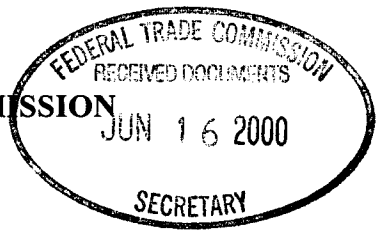
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of **Hoechst Marion Roussel, Inc., et al.,** **Respondents**	Docket No. 9293

TO: The Honorable D. Michael Chappell
Administrative Law Judge

AVENTIS PHARMACEUTICALS, INC.'S
MOTION TO COMPEL DISCOVERY

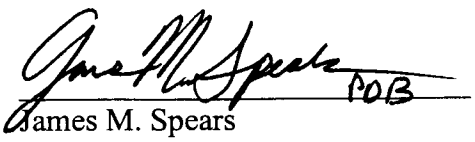
Pursuant to Rule 3.22 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.22, respondent Aventis Pharmaceuticals, Inc., formerly known as Hoechst Marion Roussel, Inc. ("HMR"), hereby moves for an Order compelling Complaint Counsel to produce certain documents requested by Respondent and to supplement Complaint Counsel's privilege log of withheld documents to comply with Commission rules and federal law.

WHEREFORE, for reasons more fully set forth in the accompanying memorandum in support of the Motion to Compel Discovery, HMR respectfully requests that

this Court enter an Order compelling Complaint Counsel to (i) produce certain documents requested by Respondent in compliance with Respondent's Second Request for the Production of Documents and (ii) supplement Complaint Counsel's privilege log of withheld documents to comply with Commission rules and federal law, and grant such other and further relief as the Court may deem just and proper.

Dated: June 16, 2000

Respectfully Submitted,



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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of **Hoechst Marion Roussel, Inc., et al.,** **Respondents**	Docket No. 9293

AVENTIS PHARMACEUTICALS, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DISCOVERY

Pursuant to Rule 3.38(a) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.38(a), Respondent Aventis Pharmaceuticals, Inc., formerly known as Hoechst Marion Roussel, Inc. ("HMR"), submits this memorandum in support of its motion for an Order compelling Complaint Counsel to produce certain documents requested by Respondent and to supplement Complaint Counsel's privilege log of withheld documents to comply with Commission rules and federal law.

The document requests at issue here were propounded by HMR in its Second Request for the Production of Documents (the "Production Request"), which HMR served upon Complaint Counsel on May 12, 2000.[1] Complaint Counsel responded to the Production Request on May 31, 2000, by serving on Respondent certain Objections and Responses to Respondent Aventis Pharmaceuticals, Inc.'s Second Request for the Production of Documents (the

1. A copy of the Production Request is attached to the Declaration of Peter D. Bernstein in Support of Aventis Pharmaceuticals, Inc.'s Motion to Compel Discovery (the "Bernstein Declaration") as Exhibit A.

"Objections")[2] and Complaint Counsel's List of Privileged Documents (the "FTC List").[3] After Respondent identified deficiencies in Complaint Counsel's objections and responses to the Production Request, Respondent HMR conferred with Complaint Counsel in a good faith attempt to resolve the parties' disagreements concerning Complaint Counsel's response. *See* 16 C.F.R. § 3.22(f).[4] These efforts failed, and by letter dated June 9, 2000, Complaint Counsel confirmed that the parties had reached an impasse as to these disagreements.[5]

ARGUMENT

1. Complaint Counsel Improperly Refuses to Produce Documents Based on Unfounded Objections.

Complaint Counsel has refused to produce or to disclose on the FTC List, any information concerning the matters at issue in this case that have been produced in any investigation other than FTC File No. 981-0368, the investigation that preceded the Commission's Complaint in this matter. Considering the Production Request in light of the liberal discovery rules applicable to these proceedings, Complaint Counsel's objections are neither legally nor factually supportable.

Commission Rule 3.31(c) makes clear that a party to a Commission adjudicative proceeding

> may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the

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2. A copy of Complaint Counsel's Objections is attached to the Bernstein Declaration as Exhibit B.

3. A copy of the FTC List is attached to the Bernstein Declaration as Exhibit C.

4. In accordance with Rule 3.22(f), annexed hereto is an originally executed copy of the Bernstein Declaration.

5. Copies of a June 8, 2000 letter from Respondent's counsel to Complaint Counsel and of Complaint Counsel's June 9, 2000 response (the "June 9 Letter"), are attached to the Bernstein Declaration as Exhibits D and E, respectively.

> complaint, to the proposed relief, or to the defenses of any respondent. Such information may include the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having any knowledge of any discoverable matter. Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . .

16 C.F.R. § 3.31(c)(1). Discovery under the Federal Rules of Civil Procedure[6] is comparably broad. Under the Federal Rules, "[d]iscovery may be had if the material sought is 'relevant to the subject matter' and if it is 'not privileged,'" and "'[r]elevant matter encompasses any matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case.'" *Fort Washington Resources, Inc. v. Tannen,* 153 F.R.D. 78, 79 (E.D. Pa. 1994). In conducting discovery under the Federal Rules, "the requirement of relevancy should be construed liberally and with common sense, rather than in terms of narrow legalisms," and "it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 8 Charles Alan Wright *et al., Federal Practice and Procedure* § 2008, at 107, 111 (2d ed. 1994).

Thus, under both the Commission's rules and the Federal Rules, discovery may be had of any material that is (1) relevant to the proceeding, interpreting that term broadly,[7] and (2) not privileged, as demonstrated by a specific articulation of facts necessary to evaluate the

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6. The Federal Rules are persuasive authority in Commission proceedings. *See generally Dura Lube Corp.*, 2000 FTC Lexis 1, at *31 (Jan. 14, 2000) (apparently considering in part law construing Fed. R. Civ. P. 12(f) in ruling on motion to strike).

7. As one commentator has observed, "'Fishing expeditions' are permissible under [the Federal Rules]. In fact, in antitrust cases and other complex litigation, discovery is expected to be somewhat of a 'fishing expedition.'" 6 James Wm. Moore *et al., Moore's Federal Practice* § 26.41[1], at 26-88 (3d ed. 2000).

applicability of a given privilege. While discovery may be further restricted to the extent it is found to be excessively burdensome (*see, e.g.*, 16 C.F.R. § 3.31(c)), such restrictions must result from a decision of the Court rather than the unilateral action of a litigant, and the party opposing discovery must first provide a concrete demonstration of any burden that it alleges from specific discovery requests. Conclusory claims of burden will not prevail.[8]

Despite this strong "public policy favoring liberal discovery,"[9] Complaint Counsel has confused its role and apparently believes that it may unilaterally cabin its obligation to search for relevant documents by employing its own restrictive gauge which relies heavily upon the staff's subjective and unreviewed interpretations of privilege. Complaint Counsel's arguments are singularly unpersuasive.

First, Complaint Counsel has apparently taken the position that information pertaining to the claims in litigation here that is found in any Commission file other than File No. 981-0368 is irrelevant to these proceedings. It makes this remarkable claim despite the fact that

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8. As one court recently noted,

> An objection to a document request must clearly set forth the specifics of the objection and how that objection relates to the documents being demanded. The burden is on the party resisting discovery to clarify and explain precisely why its objections are proper given the broad and liberal construction of the discovery rules found in the Federal Rules of Civil Procedure. A party opposing discovery request cannot make conclusory allegations that a request is irrelevant, immaterial, unduly burdensome or overly broad. Instead the party resisting discovery must show specifically how each discovery request is irrelevant, immaterial, unduly burdensome or overly broad. Moreover, a general claim of privilege, be it work product or attorney client, is an inadequate response to a discovery request.

Obiajulu v. City of Rochester, Dep't of Law, 166 F.R.D. 293, 295 (W.D.N.Y. 1996) (citations and internal quotations omitted). *See also National Beef Packing Co. v. Southern Pac. Lines,* No. 96-1419-FGT, 1997 WL 695595, at *1-2 (D. Kan. Sept. 15, 1997) (rejecting "[v]ague statements that obtaining the information would be burdensome," court notes that a "party opposing a discovery request cannot make conclusory allegations that a request is irrelevant, immaterial, unduly burdensome, or overly broad. Instead, the party requesting discovery must show specifically how each discovery request is irrelevant, immaterial, unduly burdensome, or overly broad.").

9. *Fort Washington Resources,* 153 F.R.D. at 80.

at least one prior staff investigation of which HMR is aware – concerning Watson Pharmaceuticals Inc. acquisition of the Rugby Group (FTC File No. 981-0006) – focused in part on the same products, the same markets and the same transaction – the HMR/Andrx Stipulation and Agreement – that are at the heart of the Commission's Complaint. While Complaint Counsel has agreed, after negotiation with Respondent, to produce some of the Watson/Rugby documents, it continues to argue that it need neither search for nor produce comparably relevant documents in other investigative files. As is apparent from even a cursory review of the liberal interpretations of the rules of discovery and of the Complaint in this matter – as well as from Complaint Counsel's belated determination to moderate ever so slightly its previous position on the discoverability of Commission investigative documents – information derived from any Commission or staff investigation, communication, speech, or position paper that discusses, describes, or otherwise concerns prescription antihypertension pharmaceutical products, calcium channel blockers, HMR's Cardizem® CD product, the HMR/Andrx Stipulation and Agreement, the Hatch-Waxman Amendments to the Food, Drug and Cosmetics Act, or any other matter that the Commission has placed at issue in these proceedings, is clearly relevant to these proceedings. Complaint Counsel may not shirk its responsibility to identify, collect and produce relevant, responsive, non-privileged discovery simply because the Commission has chosen to store that information under a different file number.

Second, Complaint Counsel's bald and unsupported protestations of the alleged burdensomeness of providing relevant discovery, regardless of the file or office in which Commission staff may have determined to place relevant documents and information, is both unfounded and perplexing. To the extent that the Commission possesses information concerning the Respondents in this matter, the HMR/Andrx Stipulation and Agreement, the Hatch-Waxman

Amendments, or any other product or matter raised by the Commission's Complaint – most, if not all, of which are of relatively recent vintage – such information should be easy to identify and to collect for production. Moreover, if, as the Commission has suggested, the Complaint raises novel issues under a statutory scheme with which it has little experience,[10] Complaint Counsel's suggestion that the identification, collection and production of (or specific assertions of privilege with respect to) such information would somehow become so onerous as to overwhelm such materials' demonstrable relevance to these proceedings, is baffling. The putative burden about which Complaint Counsel now laments is not the product of the Production Request, but of the Commission's Complaint when read through the lens of the rules of discovery. Having placed these matters in issue, Complaint Counsel may not evade its responsibility to produce relevant, non-privileged discovery with vague assertions of burden.

Finally, almost as an afterthought, Complaint Counsel attempts to shroud all investigatory documents collected in other investigations with sweeping, blanket claims of statutory privilege. Because "statutory privileges are to be narrowly construed,"[11] they must be asserted with specificity. This is particularly true with respect to the claims at issue here, involving three statutory provisions and one regulation that provide different standards and levels of protection for, and exceptions to, confidentiality for different classes of *information* in

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10. *See* FTC Press Release, "FTC Charges Drug Manufacturers with Stifling Competition in Two Prescription Drug Markets" (Mar. 16, 2000) (quoting Commission statement on issuance of Complaint noting that Abbott and Geneva consents announced concurrently with the Complaint in this matter constitute "the first government antitrust enforcement action in th[e] area" of "the complicated provisions of the Hatch-Waxman Act," and suggesting "that the development of a full factual record in the [HMR/Andrx] administrative proceeding . . . will help to shape further the appropriate parameters of permissible conduct in this area").

11. *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603, 648 (D.D.C. 1980) (mem.) (quoting and adopting "Special Masters' Guidelines for the Resolution of Privilege Claims").

Commission files.[12] As with Complaint Counsel's other assertions of privilege,[13] these blanket privilege claims do not provide this Court or Respondent with sufficient information to evaluate and, if appropriate, challenge the claims.

The Commission's rules authorize this Court -- ***not*** Complaint Counsel – to resolve disputed issues of discovery and to assure that such issues are considered in a "fair and impartial" manner. *See, e.g.,* 16 C.F.R. § 3.42(c). Complaint Counsel may no more arrogate to itself the authority unilaterally to decide these issues than it may impose upon them its own constricting concept of relevance. Complaint Counsel should be ordered to produce, or assert specific claims of privilege with respect to, any materials that meet the specifications of the Production Request, regardless of the Commission file, office or matter in which they may be kept or found.

2. Complaint Counsel's Objections to the Instructions to Respondent's Production Request Are Frivolous and Without Merit.

In its Objections to the Production Request, Complaint Counsel has objected to five Instructions to the Production Request, mostly with the conclusory statement that the

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12. *See, e.g.,* 15 U.S.C. § 46(f) (providing confidentiality for information demonstrated to be trade secret or confidential commercial or financial *information*, but not providing for exclusion of otherwise non-exempt portions of documents containing such information); 15 U.S.C. § 18a(h) (materials demonstrated to qualify as "information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section" may not be made public "*except as may be relevant to any administrative or judicial action or proceeding*" (emphasis added)); 16 C.F.R. § 4.10(d) (permitting disclosure of materials demonstrated to fit within either of two categories of documents to be disclosed upon consent of the submitter, and disclosure of all other Commission records except where prohibited by law). *See also* 16 C.F.R. § 4.10(g) (information demonstrated to qualify under 15 U.S.C. §§ 46(f) or 57b-2(b) or 16 C.F.R. § 4.10(d) "may be disclosed in Commission administrative . . . proceedings subject to . . . protective or *in camera* orders as appropriate").

13. *See* Section 3, *infra.*

disputed Instructions are "unduly burdensome." (*See* Objections Nos. 11-15.)[14] 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 to have otherwise become unavailable for production, and briefly 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 (Instructions Nos. 38 and 39).

Complaint Counsel's sweeping and unsupported claims of burden with respect to these Instructions are as remarkable as they are untenable, for at least two reasons. First, as to Complaint Counsel's Objections to Instructions 35, 36 and 37, Respondent's Instructions closely mirror the FTC staff's own instructions in the subpoena *duces tecum* that it issued to Respondent

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14. Complaint Counsel has also objected to Production Request Instruction No. 30, which requests documents dating back to January 1, 1993, but has failed to indicate the scope of the documents it has produced or is willing to produce. (Complaint Counsel's Objection No. 10, at 5.) This Objection remains an open issue. Subject to clarification by Complaint Counsel as to the scope of its responses to date to the Production Request, and consistent with Instruction No. 2 to each of the Commission's investigative subpoena and Complaint Counsel's first document production request, Respondent is willing initially to accept production of "documents dated, generated, received, or in effect from January 1, 1995." However, because some products that compete with HMR's Cardizem® CD entered the market before January 1, 1995, Respondent may determine that additional discovery preceding this date is necessary. As a result, Respondent reserves the right to seek additional documents dating back to January 1, 1993 and to dispute Complaint Counsel's Objections to Instruction No. 30 at a later time.

on October 23, 1998,[15] in connection with the investigation that preceded the issuance of the Commission's Complaint in this matter. In particular, Instructions Nos. 7 through 10 to the Commission's subpoena request information identical to – and in some cases, more extensive than – Instructions 35 through 37 of the Production Request. Respondent's Instructions Nos. 37, 38 and 39 also closely resemble Instructions Nos. 5 and 7 to Complaint Counsel's First Request for Production of Documents and Things Issued to Hoechst Marion Roussel, Inc. (the "FTC Request"),[16] which Complaint Counsel served on May 1, 2000. More specifically:

- Like Production Request Instruction No. 35, the Commission's Instruction No. 7 requires production of a Document Log in hard copy and machine-readable form listing document control numbers, the identification of the person from whose files the document was obtained, and the information requests to which each document responds, while Commission Instruction No. 8 requires segregation of produced documents by request number.

- Like Production Request Instruction No. 36, Commission Instruction No. 9 requires the preparation and production of a detailed privilege log "to enable the Commission to assess the applicability of the claimed privilege." Unlike the Production Instruction, the parallel Commission Instruction requires that a privilege log provide significant additional information describing parties and claims in any anticipated litigation that might form part of the basis for a work product claim, and that Respondent sift through all documents withheld for any reason, identify any patents discussed in such documents, and list the identified patents (by patent number) in the privilege log descriptions of such documents.

- While Commission Instruction No. 10 threatens Respondent with a potential felony prosecution upon destruction of any responsive or potentially responsive documents, Production Request Instruction No. 37 would merely require Complaint Counsel to identify any responsive documents of which it is aware that are no longer available for production and the reasons for such unavailability. In a similar fashion, Instruction No. 7 to the FTC Request requires Respondent to provide information concerning HMR's previous disposal of any document that

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15. A copy of Instructions Nos. 7 through 10 to the Commission's October 23, 1998 subpoena *duces tecum* is attached to the Bernstein Declaration as Exhibit F.

16. A copy of Instructions Nos. 2 through 7 of the FTC Request is attached to the Bernstein Declaration as Exhibit G.

might be responsive to the FTC Request. In each case, the relevant Instruction is intended to identify potential instances of spoliation of relevant evidence.

- Finally, Production Request Instruction No. 38 closely resembles FTC Request Instruction No. 5, and Production Request Instruction No. 39 is similar to FTC Request Instruction No. 5. In each case, the producing party may, in lieu of providing previously produced documents, simply identify the location of the previously produced documents.

Although the Commission's investigative staff apparently did not consider the Commission's subpoena Instructions to impose any significant hardship on Respondent, Complaint Counsel now attempts to assert that nearly identical Instructions in the Production Request would saddle it with some unarticulated "undue burden." Similarly, Complaint Counsel's new-found protestations of burden with respect to Instructions Nos. 38 and 39 ring hollow in light of the fact that Complaint Counsel saw fit to include similar Instructions in the FTC Request. Complaint Counsel cannot have it both ways. Particularly after having had the benefit of a year and a half in which to review Respondent's good faith response to the Commission's discovery requests in compliance with these Instructions, Complaint Counsel may not now be heard to complain that discovery from it under comparable terms suddenly creates an undue burden.

Complaint Counsel's burden objections to Production Request Instructions Nos. 38 and 39 are all the more confusing in light of the fact that these Instructions permit Complaint Counsel to refrain from "re-producing" previously produced documents, provided Complaint Counsel demonstrates that it has in fact previously produced these responsive documents. "The fact that the information sought might already be in the possession of the requesting party or obtainable from another source is not a bar to discovery of relevant information." 6 James Wm. Moore *et al., Moore's Federal Practice* § 26.60[2], at 26-204 (3d ed. 2000); *see also Fort*

Washington Resources, 153 F.R.D. at 79 ("it is not a bar to the discovery of relevant material that the same material may be in the possession of the requesting party or obtainable from another source"). As a result, absent these Instructions, such previously produced, relevant and responsive documents are potentially discoverable. Instructions Nos. 38 and 39 attempt to minimize any potential burden that such a result might entail by providing Complaint Counsel the option of either producing documents or identifying the location of such previously produced documents. Complaint Counsel's Orwellian assertion of burden as to these Instructions cannot be taken seriously.

Complaint Counsel should not be permitted to evade its own discovery Instructions. Complaint Counsel should be ordered to fully comply with the Instructions to the Production Request in responding to the Production Request.

3. Complaint Counsel's Privilege Log is Deficient on Its Face Under FTC Rules and Applicable Legal Principles, and Cannot Support the Claims of Privilege that Complaint Counsel Purports to Invoke.

a. Complaint Counsel's Privilege Log is Inadequate as a Matter of Law.

Complaint Counsel withheld numerous documents on claims of privilege. In such instances, the Production Request requested that Complaint Counsel provide Respondent with a privilege log sufficiently detailed to permit Respondent to evaluate Complaint Counsel's claims of privilege.[17] In doing so, the Production Request asked nothing more than that Complaint

17. Paragraph 36 of the Instructions and Definitions to the Production Request instructed Complaint Counsel to list any withheld documents by request number and to identify, as to each, (i) such document's authors, (ii) its recipients, (iii) its date, (iv) its subject matter or purpose, (v) "the nature of the relationship between the authors and counsel with sufficient particularity to sustain the asserted privilege," (vi) "whether direct quotes or paraphrases of advice from counsel were identified," (vii) "whether such quotes could be redacted, leaving non-privileged information," and (viii) "any other information necessary to reveal the basis upon which the document is withheld to provide HMR with sufficient information to determine whether the stated basis for withholding the document is proper."

Counsel comply with the Commission's procedural rules and federal law. Unfortunately, disregarding both the Instructions to the Production Request and applicable Commission and federal law, Complaint Counsel produced a list of withheld documents that not only fails to measure up to the letter and spirit of the applicable rules and precedents, but also undermines the very purpose that a privilege log is intended to serve in Commission proceedings.

> Commission Rule 3.38A requires, in pertinent part, that:
>
> [a]ny person withholding material responsive to . . . a request for production or access pursuant to § 3.37, or any other request for the production of materials under this part, shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the . . . request for production, submit, together with such claim, a schedule of the items withheld which states ***individually as to each such item*** the ***type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item;*** and the ***specific grounds for claiming that the item is privileged.***

16 C.F.R. § 3.38A(a) (emphasis added). Rule 3.38A provides the baseline against which privilege logs are judged in Commission adjudicatory proceedings. Where a privilege log fails to comply with the particularized disclosure requirements of Rule 3.38A, a Commission tribunal will not hesitate to compel the proponent of the log to supplement its schedule of withheld documents to bring it in compliance with the express terms of the Rule. *See Weight Watchers Int'l, Inc.*, 1995 FTC Lexis 131, at *2-3 (May 15, 1995) (granting in part complaint counsel's motion to compel respondent to supplement privilege log to provide all information mandated by Rule 3.38A because, in accordance with the express terms of the rule, the moving party is "entitled to it").

Rule 3.38A mirrors the requirements for privilege logs under the federal rules. Federal cases demonstrate that the adequacy of the descriptions set forth on a privilege log will

be measured by the extent to which "as to each document, it sets forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed," focusing "on the specific descriptive portion of the log, and not on the conclusory invocations of the privilege or work-product rule, since the burden of the party withholding documents cannot be 'discharged by mere conclusory or ipse dixit assertions.'" *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993) (quoting *Golden Trade, S.r.L. v. Lee Apparel Co.*, No. 90 Civ. 6291 (JMC), 1992 WL 367070, at *5 (S.D.N.Y. Nov. 20, 1992)). In order to accomplish this purpose, federal cases, like Commission Rule 3.38A, typically require the proponent of a privilege log to describe, on a document-by-document basis, the names of any author and any recipient, the date and subject of each withheld document, any privilege claimed, and a sufficiently detailed explanation of the basis for any assertion of privilege to permit opposing counsel and the Court to assess the privilege claims.[18]

The FTC List is a far cry from the type of index that is mandated for Commission adjudicative proceedings. Rather than providing descriptive information individually for each withheld document, the FTC List grouped documents together by general category of document

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18. *See, e.g., United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir.), *cert. denied*, 519 U.S. 927 (1996) (privilege log should "identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure"); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992) (privilege log should "describe the document's subject matter, purpose for its production, and a specific explanation of why the document is privileged or immune from discovery" in a way that is "sufficiently detailed to allow the court to determine whether the discovery opponent has discharged its burden of establishing the requirements" for the asserted privilege); *Wei v. Bodner*, 127 F.R.D. 91, 96 (D.N.J. 1989) ("At a minimum, for each document asserted to be protected by th[e] [attorney-client and work product] privileges, the defendants must provide both plaintiff and the Court with the date of the document, the name of its author, the name of its recipient, the names of all people given copies of the document, the subject of the document and the privilege or privileges asserted."); *Kelchner v. International Playtex, Inc.*, 116 F.R.D. 469, 472 (M.D. Pa. 1987) (privilege log "should contain precise and certain reasons for preserving confidentiality or privilege").

and by groups of potential authors and recipients, so aggregating or withholding information as to render impossible the evaluation of Complaint Counsel's claims of privilege.

For example, most entries include at least one reference, as a document's author or recipient, to the "Hoechst-Andrx Team," "BC Management," or "BE Management" without any identification of the names or titles of those members of this supposed "team" who *actually* authored or received the withheld documents.[19] Even where the author information is more specific, it makes no sense. For example, entries 91 and 92 list Respondents' counsel as the author of withheld documents; although the descriptions suggest that these documents were withheld because of certain marginalia, the entries are not clear as to the author(s) of that marginalia, leaving such matters to speculation and implication.

In a particularly egregious example of the FTC List's obscuring technique, the first 25 entries on the FTC List – more than a quarter of all entries – state only that withheld documents were prepared on "various" dates, without elaboration, even though the date of any individual document may affect or shed light on the operation of one or more privileges.[20] And because Complaint Counsel failed to give any indication as to the scope of its production (*see* Objection No. 10, at 5) – and applied a flexible approach to interpreting and objecting to other

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19. Although Complaint Counsel appends a list of persons encompassed within these groups, it is quick to point out in a note on the front of the FTC List that "[w]hen a group is identified in this log . . . as Author or Recipient of a document, not every member of such group necessarily drafted or received the document."

20. For example, a document's date may indicate whether it could have been prepared "in anticipation of litigation" for purposes of the work product rule or whether it could have been "predecisional" within the meaning of the deliberative process privilege. *See, e.g., United States v. Hooker Chemicals & Plastics Corp.*, 114 F.R.D. 100, 102 (W.D.N.Y. 1987) (noting that while deliberative process privilege may attach to documents that precede an agency decision, "it does not apply to post-decisional, or so-called 'working law communications,' *i.e.*, explanations or interpretations of an existing government decision," or to "material which evaluates the implementation of a given government decision").

Instructions in the Production Request (*see* Objection No. 5, at 3) – Respondent may not safely assume that withheld documents correspond to any particular time period.

In other cases, cryptic descriptions defy any attempt to determine whether documents qualify, in whole or in part, for any privilege – or, if only in part, whether withheld documents contain segregable non-privileged or purely factual information. Four of the first five entries on the FTC List, for example, attempt to claim privilege for an unspecified number of "miscellaneous e-mails" concerning "Hoechst-Andrx investigation" or "FTC comment on FDA proposed rule changes." Complaint Counsel apparently finds safety in numbers; by grouping together an unspecified number of "miscellaneous" documents among, effectively, miscellaneous authors and recipients on "various" dates, Complaint Counsel effectively negates any realistic opportunity for this Court or Respondent to second-guess Complaint Counsel's unilateral determinations of privilege or interpretations of its legal responsibilities.

As the preceding discussion suggests, the FTC List does not satisfy the particularity requirements of Rule 3.38A and federal law. When Respondent brought this deficiency to Complaint Counsel's attention, Complaint Counsel objected to the Production Request's Instruction that Complaint Counsel identify and describe each document withheld based on a claim of privilege, on the conclusory assertion that compliance with these requirements would be "unduly burdensome" because the withheld documents are purported to be "voluminous" and "clearly privileged." (June 9 Letter, at 2.) Even if Complaint Counsel could support its conclusory assertions of burden – which it has so far made no attempt to do in this matter – such assertions would not relieve it of its obligation to provide a privilege log that meets the requirements of Rule 3.38A and federal law. *See Weight Watchers Int'l, Inc.*, 1995 FTC Lexis 131, at *3 (May 15, 1995) (granting motion to compel supplementing of privilege log

to comply with Rule 3.38A requirements, even though such supplementing "may be burdensome and time consuming").

b. Complaint Counsel's Privilege Log Does Not Support the Claims of Privilege Purportedly Asserted Therein.

As federal cases make clear, the purpose of a privilege log is to permit the Court and opposing counsel to fairly evaluate – and where appropriate, to challenge – the proponent's claims of privilege. Complaint Counsel must shoulder the burden of demonstrating that the privileges it claims as the basis for prohibiting access to otherwise discoverable material are validly asserted,[21] and the privilege log is the tool for accomplishing this task. The privilege log is therefore critical to discovery and the assessment of privilege claims, and "if the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected." *Construction Prods. Research, Inc.*, 73 F.3d at 473; *see also Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, 866 (D.C. Cir. 1980) (agency claiming work product immunity must "[a]t the very least . . . establish in its affidavits or indexes the fact that a specific claim had arisen, was disputed by the company, and was being discussed in the [withheld] memorandum" and "cannot expect the district court to simply assume the fundamental prerequisites which are its burden to establish").

The vague, general and categorical descriptions of withheld documents and conclusory assertions of privilege set forth on the FTC List subvert the intended function of the privilege log in these Commission proceedings. As a brief review of the standards governing the

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21. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984) ("The party claiming privilege has the burden to establish its existence.").

major privileges asserted by Complaint Counsel demonstrates, the lack of specificity in Complaint Counsel's list is fatal to any effort by Respondent or this Court to evaluate and, if appropriate, challenge Complaint Counsel's asserted bases for withholding from discovery otherwise relevant evidence within its possession, custody or control.[22]

Attorney-Client Privilege. To sustain its claims of attorney-client privilege, Complaint Counsel must show that each document withheld on this basis constitutes (1) a communication (2) made between privileged persons (namely, client and counsel) (3) in confidence (4) for the purpose of seeking, obtaining or providing legal assistance for the client. *Construction Prods. Research, Inc.,* 73 F.3d at 473; *Haines v. Liggett Group Inc.*, 975 F.2d 81, 90 (3d Cir. 1992). A party may be deemed to waive the attorney-client privilege where it discloses otherwise privileged materials to persons outside the confidential attorney-client relationship. Moreover, "[l]ike all privileges, . . . the attorney-client privilege is narrowly construed and is limited to those situations in which its purposes will be served." *Coastal States Gas Corp.,* 617 F.2d at 862. The cryptic entries on the FTC List make it impossible to determine whether individual documents constituted confidential communications between attorney and client, whether particular documents may have been shared with persons outside the privileged attorney-client relationship, or whether any particular withheld document was prepared to seek, obtain or provide legal assistance for a client.

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22. Because the FTC List is inadequate to permit an assessment of Complaint Counsel's privilege claims with respect to particular documents that Complaint Counsel has chosen to withhold, Respondent HMR reserves the right to challenge specific assertions of privilege after Complaint Counsel shall have remedied the defects on the FTC List, or after this Court may otherwise rule on Respondent's motion to compel supplementation of the FTC List. As hereinafter briefly discussed, however, Respondent observes that even the sketchy information set forth on the FTC List raises serious questions as to whether materials withheld by Complaint Counsel meet the requirements of the asserted privileges.

Work-Product Immunity. Like the two privileges that follow, the work-product doctrine is a qualified discovery privilege. The immunity, as codified in Rule 26 of the Federal Rules of Civil Procedure, "provides that a party may not obtain discovery of documents or other tangible things prepared in anticipation of litigation or trial by or for another party or that other party's representative, unless the party seeking discovery (1) has substantial need of the materials in the preparation of his or her case, and (2) the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 6 James Wm. Moore *et al., Moore's Federal Practice* § 26.70[1], at 26-206 (3d ed. 2000). To validly assert work-product immunity with respect to any document, Complaint Counsel must demonstrate that the document was prepared in anticipation of litigation or for trial. *Coastal States Gas Corp.*, 617 F.2d at 864. In addition, "because the doctrine is intended only to guard against divulging an attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product, or facts contained within work product." 6 James Wm. Moore *et al., Moore's Federal Practice* § 26.70[2][a], at 26-207 (3d ed. 2000).

As noted above, the vague entries on the FTC List frustrate any attempt to evaluate whether documents could have been prepared "in anticipation of litigation" within the contemplation of the doctrine. They also render impossible any attempt to determine whether segregable factual or other non-privileged information might be contained in any withheld

document,[23] as well as any serious attempt to apply the balancing test for the application of this qualified privilege.

Law Enforcement Investigative Files Privilege. The investigative files, or "law enforcement," privilege generally protects certain information gathered or compiled for law enforcement purposes. To sustain a claim of investigative privilege, "three requirements must be met: (1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege." *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988) (citing *Friedman,* 738 F.2d at 1341-42, and *Black v. Sheraton Corp. of America,* 564 F.2d 531, 542-43 (D.C. Cir. 1977)). Blanket or categorical assertions of privilege are inadequate to preserve a claim of investigative files privilege against challenge. *See* 26A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5681, at 170 (1992) ("an agency ought not to be able to make anything privileged merely by slipping it into a file with legitimate investigatory materials[,] . . . includ[ing] a document that was originally intended for some other purpose but which is in fact subsequently used as evidence in some law enforcement proceeding"). Because the law enforcement investigatory files privilege is a qualified privilege, even if a litigant makes a *prima*

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23. The FTC List also raises questions as to the extent to which Complaint Counsel attempted to redact allegedly privileged matter and produce segregable non-privileged matter, rather than asserting wholesale work-product immunity for withheld documents. For example, the cryptic information in entries 33 ("Chronology of various drafts of Hoechst-Andrx Stipulation and Agreement"), 67 (a March 2000 "Summary of Hoechst-Andrx investigation"), 83 ("Chronology of events relating to Hoechst-Andrx Stipulation and Agreement"), and 92 (document apparently originating with co-Respondent but containing certain marginalia of an unidentified author) suggest that the withheld documents may contain (in some cases, substantially) segregable factual or otherwise non-privileged information.

facie showing of privilege with respect to particular documents, a court faced with a challenge to an assertion of the privilege must balance any putative public interest in nondisclosure against the needs of a particular litigant for access to the allegedly privileged information. *In re Sealed Case,* 856 F.2d at 272.

Complaint Counsel has asserted the law enforcement privilege with respect to every item listed on the FTC List. Moreover, its bald assertions of privilege neither specify the information for which the privilege is claimed nor explain in any way why the privilege might properly apply. Instead, in many instances, Complaint Counsel has purported to assert the privilege with respect to broad, undefined categories of documents. Neither does the FTC List anywhere provide any indication as to whether the appropriate agency official formally claimed the privilege following personal consideration of its applicability to specific documents.[24] As a result, outside of Complaint Counsel's conclusory and self-serving assertions of privilege, the FTC List provides no basis for evaluating whether, nor any reason to believe that, the law enforcement privilege may properly be asserted as to any withheld document.

Deliberative Process Privilege. The FTC List also makes numerous assertions of deliberative process privilege. To make out a *prima facie* showing that a document may be protected by the qualified deliberative process privilege, the governmental agency must demonstrate that the allegedly privileged document or communication is (1) "predecisional" (*i.e.*, it must have been created prior to the adoption of the agency's decision) and (2) "deliberative" in nature (*i.e.*, it sets forth evaluations, analyses, opinions, deliberations or recommendations

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24. At the June 7 "meet and confer" meeting, Complaint Counsel acknowledged that the privilege has not been officially invoked and the documents have not been officially reviewed. This fact alone casts substantial doubt on the appropriateness of Complaint Counsel's ubiquitous assertions of the law enforcement privilege, as well as its many assertions of deliberative process privilege.

bearing on the formulation or exercise of a policy-oriented judgment), rather than purely factual.[25] Like the law enforcement privilege, invocation of the deliberative process privilege requires that the privilege (1) be claimed by the head of the agency after actual personal consideration of the material, and be accompanied by (2) a specific designation and description of the documents claimed to be privileged[26] and (3) an assertion of "precise and certain" reasons for preserving the confidentiality of the governmental communications. *See, e.g., Smith v. FTC*, 403 F.Supp. 1000, 1016 (D. Del. 1975). Agencies cannot make conclusory or general assertions of privilege, but must specifically assert the privilege for each document or communication they seek to protect. *See Vaughn v. Rosen*, 523 F.2d 1136, 1146-47 (D.C. Cir. 1975). Once the government satisfies its initial burden of demonstrating that the privilege applies, the Court will balance the discovering party's need for the materials and the interest in accurate fact-finding against the government's interest in non-disclosure. *See FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). As with other privileges, the deliberative process privilege may be waived if the putatively privileged materials have been disclosed to certain third parties who fall outside the privileged relationship. *See, e.g., General Elec. Co. v. EPA*, 18 F. Supp.2d 138 (D. Mass. 1998); *Chilivis v. SEC*, 673 F.2d 1205, 1212 (11th Cir. 1982).

As will be immediately apparent, many of the defects on the FTC List that so effectively shield Complaint Counsel from any meaningful evaluation of its other privilege

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25. Where both factual and deliberative material are contained in a document, the factual material should be separated out and produced where possible. *See Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552 (1st Cir. 1992).

26. As the *Smith* court noted, "[a]ny attempts to invoke executive privilege [of which the deliberative process privilege is a part] in the absence of this specific factual showing are actually attempts to interfere with the proper functioning of the judicial branch of our government by appropriating the means of this decision to the executive branch." 403 F. Supp. at 1016.

claims have the same effect here. Moreover, the cryptic descriptions that litter Complaint Counsel's list – such as those in entries 1 through 3 ("miscellaneous e-mails" among miscellaneous persons at miscellaneous times) – provide no basis for evaluating whether any given withheld document might be either "predecisional" or "deliberative."[27]

For the reasons set forth above, Complaint Counsel should be ordered to supplement the FTC List, to bring it into compliance with Commission rules and federal law.

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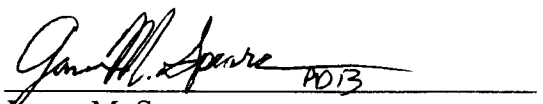
27. As noted *supra* note 24, it is not clear that the deliberative process privilege has been properly asserted with respect to any particular document. Even assuming, *arguendo*, that it has, Complaint Counsel may have waived any deliberative process privilege that might apply to some or all of these documents, in light of the widespread sharing of potentially predecisional and deliberative materials by Commission staff with third parties described in Andrx's Supplemental Submission in Further Opposition to Complaint Counsel's Motion to Strike Affirmative Defenses, dated June 5, 2000. Evaluation of these issues must await supplementation and clarification of the FTC List.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Respondent HMR respectfully requests that this Court enter an Order compelling Complaint Counsel to (i) produce certain documents requested by Respondent in compliance with Respondent's Second Request for the Production of Documents and (ii) supplement Complaint Counsel's privilege log of withheld documents to comply with Commission rules and federal law, and grant such other and further relief as the Court may deem just and proper.

Dated: June 16, 2000

Respectfully Submitted,



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Attorneys for Respondent
Aventis Pharmaceuticals, Inc.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of **Hoechst Marion Roussel, Inc., et al.,** **Respondents**	Docket No. 9293

ORDER GRANTING MOTION TO COMPEL DISCOVERY

IT IS HEREBY ORDERED that Aventis Pharmaceuticals, Inc.'s Motion to Compel Discovery is hereby GRANTED.

Dated: _____, 2000

_____
D. Michael Chappell
Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE 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 June 16, 2000, a copy of Aventis Pharmaceuticals, Inc's Motion to Compel Discovery, 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

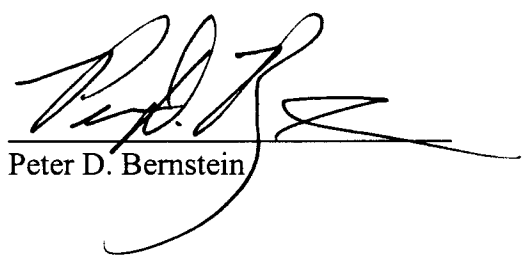
Richard Feinstein
Federal Trade Commission
Room 3114
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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, Ellerhorn,
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

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of **Hoechst Marion Roussel, Inc., et al.,** Respondents	Docket No. 9293

DECLARATION OF PETER D. BERNSTEIN IN SUPPORT OF AVENTIS PHARMACEUTICALS, INC.'S MOTION TO COMPEL DISCOVERY

Peter D. Bernstein, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am associated with the law firm of Shook, Hardy & Bacon L.L.P., counsel for Aventis Pharmaceuticals, Inc., formerly known as Hoechst Marion Roussel, Inc. ("HMR"). I submit this declaration pursuant 16 C.F.R. § 3.22(f) and in order to place documents before the Court in support of HMR's Motion to Compel Discovery.

2. On May 12, 2000, I caused to be served on Complaint Counsel and others Respondent's Second Request for the Production of Documents (the "Production Request"). Annexed hereto as Exhibit A is a true and correct copy of Respondent's Second Request for the Production of Documents.

3. On May 31, 2000, Complaint Counsel responded and objected to the Production Request. Annexed hereto as Exhibits B and C, respectively, are true and correct copies of Complaint Counsel's Objections and Responses to Respondent Aventis

Pharmaceuticals, Inc.'s Second Request for the Production of Documents and Complaint Counsels' List of Privileged Documents, each dated May 31, 2000.

4. On the morning of June 7, 2000, James Spears, Edward Wilson and I, each acting as counsel to HMR, met and conferred at the offices of the Commission with Bradley S. Albert, Daniel Kotchen, Markus Meier and Elizabeth Schneirov of the FTC, in an effort in good faith to resolve by agreement the issues raised by the Motion to Compel. At that time, we explained our concerns with respect to Complaint Counsel's objections and responses to the Production Request. Specifically, we discussed the parties' differences with respect to: (1) the search for and production of information concerning the matters at issue in this case that might have been produced in any investigation other than FTC File No. 981-0368; (2) objections to certain instructions to the Production Request; and (3) the deficiencies in Complaint Counsels' List of Privileged Documents. The parties were unable to reach agreement on these issues at this meeting.

5. On June 8, 2000, Mr. Spears wrote to Mr. Meier to memorialize and confirm the results of the June 7, 2000 discussions. The letter asked Mr. Meier to confirm that, despite the good faith discussions on June 7, 2000, Complaint Counsel was not prepared to modify either its objections and responses to the Production Request or its List of Privileged Documents in light of the concerns raised by HMR's counsel. Annexed hereto as Exhibit D is a true and correct copy of the June 8, 2000 letter from Mr. Spears to Mr. Meier.

6. By way of letter dated June 9, 2000, Mr. Meier stated that Complaint Counsel would review and produce (or assert privileges with respect to) a limited subset of documents from FTC File No. 981-0006. Mr. Meier confirmed to Mr. Spears that Complaint Counsel did not otherwise intend to modify either its objections and responses to the Production

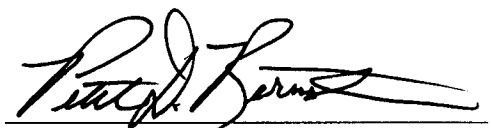
Request or its List of Privileged Documents. Annexed hereto as Exhibit E is a true and correct copy of the June 9, 2000 letter from Mr. Meier to Mr. Spears.

7. Annexed hereto as Exhibit F is a true and correct copy of Instructions Nos. 7 through 10 to the subpoena *duces tecum* issued by the Federal Trade Commission to Hoechst Marion Roussel, Inc. on October 23, 1998.

8. Annexed hereto as Exhibit G is a true and correct copy of Instructions Nos. 5 and 7 of Complaint Counsel's First Request for Production of Documents and Things Issued to Hoechst Marion Roussel, Inc., dated May 1, 2000.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 16, 2000 in Washington, D.C.



Peter D. Bernstein

Resp. due June 5

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

RESPONDENT'S SECOND REQUEST FOR THE PRODUCTION OF DOCUMENTS

Pursuant to Federal Trade Commission ("FTC") Rules of Practice for Adjudicative Proceedings ("Rule of Practice") § 3.37, Respondent Aventis Pharmaceuticals, Inc., formerly known as Hoechst Marion Roussel, Inc., by counsel, submits these requests for production of documents to the FTC. Respondent requests that the FTC begin producing documents or things responsive to these requests, within its possession, custody or control, within twenty (20) business days for inspection and copying by counsel for respondent at the offices of Shook, Hardy & Bacon LLP, 600 14th Street, N.W., Suite 800, Washington, D.C. 20005, in accordance with the Instructions set forth below.

INSTRUCTIONS AND DEFINITIONS

As used herein, "agreement" means any oral or written contract, arrangement or understanding, whether formal or informal, between two or more persons, together with modifications or amendments thereto.

1. As used herein, "ANDA" means an Abbreviated New Drug Application filed with the FDA pursuant to 21 U.S.C. § 355(j), including but not limited to the original application and any supplements thereto.

2. As used herein, "Andrx" means Andrx Pharmaceuticals, Inc., and its predecessors, successors, assigns and present and/or former affiliates and subsidiaries and any of its respective officers, directors, employees, agents, attorneys, representatives, economic consultants, lobbyists, public relations consultants or any person acting or purporting to act on its behalf.

3. As used herein, "Biovail" shall refer to Biovail Corporation with its principal place of business in Mississauga, Ontario, Canada, and its predecessors, successors, assigns and present and/or former affiliates and subsidiaries and any of its respective officers, directors, employees, agents, attorneys, representatives, economic consultants, lobbyists, public relations consultants or any person acting or purporting to act on its behalf.

4. As used herein, "cardiovascular pharmaceutical products" means the products within code 31000 of the IMS Uniform System of Classification.

5. As used herein, "Cardizem® CD" means the diltiazem product sold under that trademark.

6. As used herein, "Compliance Investigation" means FTC File No. 971-0055.

7. As used herein, "Consent Order" means Hoechst AG; Proposed Consent Agreement with Analysis to Aid Public Comment, 60 Fed.Reg. 49609 (1995).

8. As used herein, "diltiazem product" means any pharmaceutical product containing diltiazem and/or its salts including diltiazem hydrochloride as an active pharmaceutical ingredients.

9. As used herein, "document" or "documents" shall include, without limitation, originals, masters and every copy of writings and printed, typed and other graphic or photographic matter, including microfilm of any kind or nature, recordings (tape, diskette or other) of oral communications, other data compilations and every other tangible thing from which information can be obtained, including, without limitation, magnetic or electronic media, in the possession, custody or control of plaintiff or any present or former officer, employees or agents thereof, or known by plaintiff to exist. The term "document" or "documents" shall include, without limiting the generality of the foregoing, all computer files, electronic mail, letters, telegrams, teletypes, correspondence, contracts, agreements, notes to the files, notebooks, reports, memoranda, mechanical and electronic sound recordings or transcripts thereof, blueprints, flow sheets, formal or information drawings or diagrams, calendar or diary entries, memoranda of telephone or personal conversations of meetings or conferences, studies, reports, interoffice communications, price lists, bulletins, circulars, statements, manuals, summaries of compilations, minutes of meetings, maps, charts, graphs, order papers, articles, announcements, books, catalogs, records, tables, books of account, ledgers, vouchers, canceled checks, invoices or bills. A draft or nonidentical copy is a separate document within the meaning of this term.

10. As used herein, "Faulding" means Faulding Inc. and its predecessors, successors, assigns and present and/or former affiliates and subsidiaries and any of its respective officers, directors, employees, agents, attorneys, representatives, economic consultants, lobbyists, public relations consultants or any person acting or purporting to act on its behalf.

11. As used herein, "FDA" means the United States Food and Drug Administration, including without limitation its employees, scientists, technicians, agents, examiners, laboratories, consultants and special governmental employees.

12. As used herein, "FTC" means the United States Federal Trade Commission, including without limitations its employees, investigators, agents, consultants and special governmental employees.

13. As used herein, "formulary" means a list of prescription medications covered under a pharmacy benefit plan maintained by a governmental entity or third-party payor.

14. As used herein, "HMR" means Hoechst Marion Roussel, Inc., its successors, predecessors and the officers, directors, employees, partners, subsidiaries, corporate parents, affiliates and divisions of each of the foregoing.

15. As used herein, "Hoechst/Andrx Investigation" means Hoechst Marion Roussel, Inc. and Andrx Corporation, FTC File No. 981-0368; Andrx-Hoechst Generic Cardizem, FTC Docket No. 9293; and Hoechst A.G./Watson Pharmaceuticals, Inc., FTC File No. 981-0006 as it pertains to the Stipulation and Agreement between Hoechst Marion Roussel, Inc. and Andrx Corporation.

16. As used herein, "Hoechst/Biovail Rights Agreement" means the Rights Agreement between Biovail and Hoechst Roussel Pharmaceuticals, Inc. dated as of June 30, 1993.

17. As used herein, "Hoechst/Biovail Settlement Agreement" means the Settlement Agreement and Release between Biovail, Hoechst A.G., Hoechst Roussel Pharmaceuticals, Inc., Marion Merrill Dow and Carderm Capital, L.P. dated April 28, 1995.

18. As used herein, "Hoechst/MMD Merger" means the acquisition by Hoechst A.G. of Marion Merrell Dow Inc., FTC File No. 951-0090, as it relates to the Hoechst/Biovail Settlement Agreement.

19. As used herein, "NDA" means a New Drug Application filed with the FDA pursuant to 21 U.S.C. § 355(b), including but not limited to the original application and any supplements thereto.

20. As used herein, "person" includes any natural person, corporate entity, sole proprietorship, partnership, association, governmental entity, or trust.

21. As used herein, "Probucol Negotiations" means the discussions occurring after July 1997 between HMR and Biovail relating to development of new indications for Probucol and any related or contemporaneous discussions, which included, but are not limited to, settlement negotiations.

22. As used herein, "relate" means concerns, refers to, describes, forms the basis for, evidences or constitutes, and the term "relating" means concerning, referring to, describing, evidencing or constituting.

23. As used herein, "Stipulation and Agreement" means that agreement between Hoechst Marion Roussel, Inc., Carderm Capital, L.P. and Andrx Pharmaceuticals entered into on or about September 26, 1997.

24. As used herein, "Stipulation and Order" means that agreement between Hoechst Marion Roussel, Inc., Carderm Capital, L.P. and Andrx Pharmaceuticals entered into on or about June 8, 1999.

25. As used herein, "Third Parties" means any person that is not a named party in FTC File No. 981-0368 or FTC Docket No. 9293 and includes, but is not limited to Biovail,

Faulding, Quatro Scientific Inc., Teva Pharmaceuticals and their respective officers, directors, employees, agents, attorneys, representatives, economic consultants, lobbyists, public relations consultants or any person acting or purporting to act on their behalf.

26. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

27. The term "all" shall be construed as all and each, and the term "each" shall be construed as all and each.

28. The use of the singular form of any word includes the plural, and vice versa.

29. Except for privileged materials, produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. Submit any appendix, table, or other attachment by either physically attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, do not mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.

30. Unless otherwise stated, the scope of this request is from January 1, 1993 through the present and is continuing in nature. If, after producing documents, the FTC obtains or becomes aware of any further documents, or information responsive to this request for production of documents, the FTC is required to produce to HMR such additional documents and/or to provide HMR with such additional information.

31. Compliance with this document request requires a search of all documents in the possession, custody, or control of the FTC's current or former officers, directors, employees, agents, or representatives, whether or not such documents are on the premises of the FTC. If any

person is unwilling to have his or her files searched, or is unwilling to produce responsive documents, the FTC must provide counsel serving this request with the following information as to each such person: his or her name, address, telephone number, and relationship to the FTC.

This subpoena covers documents in your possession, custody or control, wherever the documents are located.

32. If any requested documents cannot be produced in full, produce the remainder and state whatever information, knowledge, or belief the FTC has concerning the unproduced portion.

33. In addition to hard-copy documents, the search will include all the FTC's electronically stored data. Sources of such data include, but are not limited to, the following:

(a) Desktop personal computers ("PCs") and workstations; PCs, workstations, minicomputers and mainframes used as file servers, application servers, or mail servers; laptops, notebooks, hand-held devices and other portable computers available for shared use; and home computers used for work related purposes;

(b) Backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether stored onsite with the computer used to generate them, stored offsite in another facility or stored offsite by a third-party, such as in a disaster recovery center; and

(c) Computers and related offline storage used by agents, consultants, and other persons as defined herein, which may include persons who are not employees of the FTC or who do not work on FTC premises.

34. The FTC will submit all documents, including electronically-stored documents, in hard copy. In addition to the hard copies, the FTC will submit the electronically-stored documents in machine readable form.

35. The source and location of each responsive document shall be designated, including the person from which it was obtained. Responsive documents from each person's files shall be produced together, in file folders or with other enclosures that segregate the files by

request number. If a document is responsive to more than one request, it shall be produced in response to the request to which it is primarily responsive. An index of responsive documents is requested in hard copy and machine-readable form identifying for each document produced: (1) the identification and consecutive control number; (2) the numbered request(s) to which it is responsive; (3) the person from whom the document was obtained; and (4) for documents generated by the recipient, the person and/or file name or number from which it was obtained.

36. In the event that the FTC withholds any document on the basis that it is privileged, subject to work-product immunity, or is otherwise excludable from discovery, the FTC is requested to list such documents by request number and to provide the following information:

(a) the identity of the authors;

(b) the identity of all recipients;

(c) the date of the document;

(d) the subject matter or purpose of the document or report;

(e) the nature of the relationship between the authors and counsel with sufficient particularity to sustain the asserted privilege;

(f) whether direct quotes or paraphrases of advice from counsel were identified;

(g) whether such quotes could be redacted, leaving non-privileged information; and,

(h) any other information necessary to reveal the basis upon which the document is withheld to provide HMR with sufficient information to determine whether the stated basis for withholding the document is proper.

37. If any document responsive to these requests once existed but has been destroyed, lost, discarded or is otherwise not available for production, the recipient shall identify in writing each such document, including the date of the document's creation, a description of the

document's subject matter, the name and address of each person who prepared, received, viewed, or had possession, custody or control of the document or otherwise had knowledge of its subject matter, and a statement of the circumstances under which the document was destroyed, lost, discarded or why such document is otherwise not available for production.

38. If the FTC has produced documents to HMR responsive to this request as part of the Third Party materials collected during the course of the pre-complaint investigation of this matter, FTC File No. 981-0368, those documents need not be produced again, provided that the FTC clearly indicates in its answers to the document request the location within the Third Party materials where responsive information resides.

39. If the FTC believes documents responsive to this request originated from HMR, the FTC need not produce those documents, provided that the FTC provides the location within the HMR materials where responsive information resides.

DOCUMENT REQUESTS

Request No. 1: All documents submitted to the FTC voluntarily or through compulsory process by any Third Party in connection with or relating in any manner to the Hoechst/Andrx Investigation.

Request No. 2: All transcripts of all depositions, investigational hearings, or formal, informal or sworn statements, including all exhibits thereto, taken by the FTC of or from Third Parties in connection with or relating in any manner to the Hoechst/Andrx Investigation.

Request No. 3: All statements, including but not limited to responses to interrogatories, responses to civil investigative demands and subpoenas, statements, memoranda and white papers, and affidavits and declarations provided to the FTC by Third Parties in connection with or relating in any manner to the Hoechst/Andrx Investigation.

Request No. 4: All communications, including but not limited to letters, notes, documents relating to telephonic communications or meetings, electronic mail messages or voice mail messages, between the FTC and any Third Party in connection with or relating in any manner to the Hoechst/Andrx Investigation.

Request No. 5: All documents sufficient to identify each person with whom the FTC communicated in connection with or relating in any manner to the Hoechst/Andrx Investigation.

Request No. 6: All documents reflecting statements made by third parties in meetings, interviews, or other communications with the FTC in connection with or relating in any manner to the Hoechst/Andrx Investigation.

Request No. 7: All civil investigative demands, subpoenas or other formal or informal requests for materials and information issued by the FTC to Third Parties in connection with or relating in any manner to the Hoechst/Andrx Investigation.

Request No. 8: All documents submitted to the FTC, voluntarily or through compulsory process, by any Third Party relating in any manner to the negotiation, operation or termination of the Hoechst/Biovail Rights Agreement or the Hoechst/Biovail Settlement Agreement, including but not limited to documents submitted during the course of the Compliance Investigation or the Hoechst/MMD Merger.

Request No. 9: All transcripts of all depositions, investigational hearings, or formal, informal or sworn statements, including all exhibits thereto, taken by the FTC of or from Third Parties in connection with or relating in any manner to the negotiation, operation, interpretation or termination of the Hoechst/Biovail Rights Agreement or the Hoechst/Biovail Settlement Agreement, including but not limited to documents submitted during the course of the Compliance Investigation or the Hoechst/MMD Merger.

Request No. 10: All statements, including but not limited to responses to interrogatories, responses to civil investigative demands and subpoenas, statements, memoranda and white papers, and affidavits and declarations, provided to the FTC by Third Parties in connection with or relating in any manner to the negotiation, operation, interpretation or termination of the Hoechst/Biovail Rights Agreement or the Hoechst/Biovail Settlement Agreement, including but not limited to documents submitted during the course of the Compliance Investigation or the Hoechst/MMD Merger.

Request No. 11: All communications, including but not limited to letters, notes, documents relating to telephonic communications or meetings, electronic mail messages or voice mail messages, between the FTC and any Third Party in connection with or relating in any manner to the negotiation, operation, interpretation or termination of the Hoechst/Biovail Rights Agreement or the Hoechst/Biovail Settlement Agreement, including but not limited to documents submitted during the course of the Compliance Investigation or the Hoechst/MMD Merger.

Request No. 12: All documents sufficient to identify each person with whom the FTC communicated in connection with or relating in any manner to the negotiation, operation, interpretation or termination of the Hoechst/Biovail Rights Agreement or the Hoechst/Biovail Settlement Agreement, including but not limited to documents submitted during the course of the Compliance Investigation or the Hoechst/MMD Merger.

Request No. 13: All documents reflecting statements made by Third Parties in meetings, interviews, or other communications with the FTC in connection with or relating in any manner to the negotiation, operation, interpretation or termination of the Hoechst/Biovail Rights Agreement or the Hoechst/Biovail Settlement Agreement, including but not limited to

documents submitted during the course of the Compliance Investigation or the Hoechst/MMD Merger.

Request No. 14: All documents submitted to the FTC, voluntarily or through compulsory process, by any Third Party in connection with or relating in any manner to the Probucol Negotiations.

Request No. 15: All transcripts of all depositions, investigational hearings, or formal, informal or sworn statements, including all exhibits thereto, taken by the FTC of or from Third Parties in connection with or relating in any manner to the Probucol Negotiations.

Request No. 16: All statements, including but not limited to responses to interrogatories, responses to civil investigative demands and subpoenas, statements, memoranda and white papers, and affidavits and declarations, provided to the FTC by Third Parties in connection with or relating in any manner to the Probucol Negotiations

Request No. 17: All communications, including but not limited to letters, notes, documents relating to telephonic communications or meetings, electronic mail messages or voice mail messages, between the FTC and any Third Party in connection with or relating in any manner to the Probucol Negotiations.

Request No. 18: All documents sufficient to identify each person with whom the FTC communicated in connection with or relating in any manner to the Probucol Negotiations.

Request No. 19: All documents reflecting statements made by Third Parties in meetings, interviews, or other communications with the FTC in connection with or relating in any manner to the Probucol Negotiations.

Request No. 20: All documents, transcripts of all depositions, investigational hearings, statements, submissions or other communications between the FTC and Andrx Pharmaceuticals, Inc. in connection with or relating in any manner to the Hoechst/Andrx Investigation.

Request No. 21: All documents, transcripts, statements, submissions or other communications between the FTC and Biovail in connection with or relating in any manner to the Hoechst/Andrx Investigation, the Hoechst/Biovail Rights Agreement, the Hoechst/Biovail Settlement Agreement, the Probucol Negotiations, or the Hoechst/MMD Merger.

Request No. 22: All documents reflecting statements made by Biovail in connection with or relating in any manner to the Hoechst/Andrx Investigation, the Hoechst/Biovail Rights Agreement, the Hoechst/Biovail Settlement Agreement, the Probucol Negotiations, or the Hoechst/MMD Merger.

Request No. 23: All documents including but not limited to the marketing documents, sales plans and budgets, sales forecasts, marketing and pricing strategies of any pharmaceutical manufacturer that relate to the sales, marketing or promotion of any cardiovascular pharmaceutical product which may have been provided to or received by the FTC in connection with the Hoechst/Andrx Investigation or any other Commission proceeding, investigation or enforcement action.

Request No. 24: All documents reflecting the sales of any cardiovascular pharmaceutical product and all documents reflecting any measure of the sale, price, revenues and profits of each cardiovascular pharmaceutical product, including but not limited to:

(a) gross and net sales to all customers in units and dollars;

(b) gross number and dollar value of promotional sample units distributed;

(c) sales returns in units and dollars;

(d) cost of goods sold in dollars;

(e) gross and net profit in dollars;

(f) sales, promotion, or marketing expenses;

(g) the list price and wholesale acquisition cost;

(h) product returns in units and dollars; and

(i) rebates, credits, allowances, chargebacks, and any other adjustment to price.

Request No. 25: All data and reports, including but not limited to data and reports provided by third-party vendors such as IMS, that reflect the sales of any cardiovascular pharmaceutical product and any analysis that might consider: (1) the extent to which these products compete against each other and compete against Cardizem® CD and other sustained release diltiazem products; (2) the extent to which sales of the products respond to/or are affected by variations in price or manufacturer discounts, rebates, credits or other price adjustments; and (3) the extent to which sales of the products respond to changes in the manner in which they are listed in formularies maintained by third-party payors, insurers and other health care providers.

Request No. 26: All documents which reflect in any way standards of care for the treatment of hypertension and/or angina through the use of cardiovascular pharmaceutical products.

Request No. 27: All documents which reflect, in any way, the substitutability of any cardiovascular pharmaceutical product for any other cardiovascular pharmaceutical product.

Request No. 28: All documents sufficient to identify the government entities or third-party payors who maintain prescription pharmaceutical formularies and with whom the FTC communicated in connection with or relating in any manner to the Hoechst/Andrx Investigation.

Request No. 29: All documents which relate in any manner to the categories into which prescription pharmaceutical products are grouped in formularies, including categories of drug types and categories used for determining co-payments or reimbursement amounts for individual participants and/or payments to pharmacies.

Request No. 30: All documents which describe any process or criteria used to determine the pharmaceutical products to be included in any formulary.

Request No. 31: All documents which reflect in any manner the policies or criteria for making any initial classification in formularies as well as any reclassification of any previously classified pharmaceutical product in subsequent formulary listings.

Request No. 32: All documents which describe the formularies in which Cardizem® CD has been listed, including but not limited formularies identifying all categories in which Cardizem® CD has been listed, as well as the other pharmaceutical products included in each categories so described.

Request No. 33: All documents which relate in any way to programs, campaigns or activities undertaken by governmental entities and/or third-party payors which are designed to encourage the use or substitution of any cardiovascular pharmaceutical product for any other cardiovascular pharmaceutical product.

Request No. 34: All documents which relate in any way to the reimbursements paid by any governmental entity or third-party payor for cardiovascular pharmaceutical products.

Request No. 35: All documents that relate in any way to the negotiation of contracts or other agreements regarding discounts, rebates, credits, allowances, chargebacks and other price adjustments between government entities or third party payors and any manufacturer or distributor of cardiovascular pharmaceutical products.

Request No. 36: All specimen pharmacy or prescription benefit policies or riders maintained by any government entities or third-party payors that apply to cardiovascular pharmaceutical products.

Request No. 37.: All documents relating in any manner to the Hoechst/Andrx Investigation given or transmitted to any FTC Commissioner by the Bureau of Competition or the Bureau of Economics.

Request No. 38: All documents, transcripts, statements, submissions or other communications between the FTC and any Third Party that relate to formularies or other prescription pharmaceutical benefit plans.

Request No. 39: All documents, transcripts, statements, submissions or other communications between the FTC and any other agency or instrumentality of the federal government, including but not limited to the FDA and the Congress, that relates in any manner to the Hoechst/Andrx Investigation; the negotiation, operation, interpretation or termination of the Hoechst/Biovail Rights Agreement or the Hoechst/Biovail Settlement Agreement; the Consent Order or the Probucol Negotiations.

Request No. 40: All documents, transcripts, statements, submissions or other communications between the FTC and any Third Party that may relate or pertain to the settlement or partial settlement of patent litigation involving an innovator or brand name pharmaceutical company, and a generic company, that involve any form of payment from the brand name company to the generic company, or any form of licensing and/or royalty arrangement between the brand name company and the generic company.

Request No. 41: All documents which relate in any manner to any allegations in the complaint issued in Andrx-Hoechst Generic Cardizem, FTC Docket No. 9293.

Request No. 42: All documents which relate to communications between the FTC and the FDA from January 1, 1995 to the present (including without limitation documents provided by the FTC to the FDA and transcripts of testimony before the FDA, and vice versa), concerning generic exclusivity, including, but not limited to, comments on Docket No. 98D-0481, Guidance on 180-Day Generic Drug Exclusivity.

Request No. 43: All documents which relate to communications between the FTC and any Third Party from January 1, 1995 to the present (including without limitation comments or documents provided by the FTC to the FDA and transcripts of testimony before the FDA, and vice versa), concerning generic exclusivity, including, but not limited to, comments on Docket No. 98D-0481, Guidance on 180-Day Generic Drug Exclusivity.

Request No. 44: All document or articles relating to descriptions, policy considerations, and discussions of legal and economic implications relating to the Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman").

Request No. 45: All documents relating to communications between the FTC and the FDA on the status of, and the likely date of final FDA approval for, the application for the bioequivalent or generic version of Cardizem® CD filed by Andrx.

Request No. 46: All documents relating to communications between the FTC and any Third Party on the status of, and the likely date of final FDA approval for, the application for the bioequivalent or generic version of Cardizem® CD filed by Andrx.

Request No. 47: All documents relating to the product encompassed by Andrx's ANDA 74-752, including but not limited to documents obtained from the FDA, Andrx and/or any Third Party.

Request No. 48: All documents relating to communications between the FTC and the FDA on the status of, and the likely date of final FDA approval for, the application for the bioequivalent or generic version of Cardizem® CD filed by Faulding.

Request No. 49: All documents relating to communications between the FTC and any Third Party on the status of, and the likely date of final FDA approval for, the application for the bioequivalent or generic version of Cardizem® CD filed by Faulding.

Request No. 50: All documents relating to the product encompassed by Faulding's ANDA 79-984, including but not limited to documents obtained from the FDA, Faulding and/or any Third Party.

Request No. 51: All documents relating to communications between the FTC and the FDA on the status of, and the likely date of final FDA approval for, the applications for bioequivalent or generic versions of Cardizem® CD filed by Biovail.

Request No. 52: All documents relating to communications between the FTC and any Third Party on the status of, and the likely date of final FDA approval for, the applications for bioequivalent or generic versions of Cardizem® CD filed by Biovail.

Request No. 53: All documents relating to the product encompassed by Biovail's ANDA 75-116, including but not limited to documents obtained from the FDA, Biovail and/or any Third Party.

Request No. 54: All documents relating to the product encompassed by Biovail's NDA 20-939, including but not limited to documents obtained from the FDA, Biovail and/or any Third Party.

Request No. 55: All documents relating to communications between the FTC and the FDA concerning *Mova Pharmaceuticals Corp. v. Shalala*, 955 F.Supp. 128 (D.D.C. 1997), *Mova*

Pharmaceuticals Corp. v. Shalala, 140 F.3d 1060 (D.C. Cir. 1998), *Granutec, Inc. v. Shalala*, No. CA 97-485-5-BO (E.D.N.C. 1997), and/or *Granutec, Inc. v. Shalala*, 139 F.3d. 889, 1998 WL 153410 (4th Cir. 1998).

Request No. 56: All documents relating to communications between the FTC and any Third Party concerning *Mova Pharmaceuticals Corp. v. Shalala*, 955 F.Supp. 128 (D.D.C. 1997), *Mova Pharmaceuticals Corp. v. Shalala*, 140 F.3d 1060 (D.C. Cir. 1998), *Granutec, Inc. v. Shalala*, No. CA 97-485-5-BO (E.D.N.C. 1997), and/or *Granutec, Inc. v. Shalala*, 139 F.3d. 889, 1998 WL 153410 (4th Cir. 1998).

UNITED STATES OF AMERICA
BEFORE THE 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 May 12, 2000, a copy of the Second Request for the Production of Documents of Respondent Aventis Pharmaceuticals, Inc., formerly known as Hoechst Marion Roussel, Inc., 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, Ellerhorn,
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

37009.1

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S OBJECTIONS AND RESPONSES TO RESPONDENT AVENTIS PHARMACEUTICALS, INC'S SECOND REQUEST FOR THE PRODUCTION OF DOCUMENTS

Pursuant to Federal Trade Commission Rules of Practice Section 3.37(b), 16 C.F.R. § 3.37(b), complaint counsel submit these Objections and Responses to Respondent Aventis Pharmaceuticals, Inc.'s, formerly known as Hoechst Marion Roussel, Inc., Second Request for the Production of Documents. Our provision of a response and production of any document shall not constitute a waiver of any applicable objection, privilege or other right.

GENERAL OBJECTIONS

The following general objections apply to each of Aventis's document requests:

1. Complaint counsel object to each request to the extent it seeks information protected from disclosure by privilege, including, where applicable: (a) attorney-client privilege; (b) work-product privilege; (c) government deliberative-process privilege; (d) government informant privilege; and (e) any other applicable privilege. These objections include, but are not limited to the following:

a. On the basis of both the work-product and attorney-client privileges, complaint counsel object to each request which requires the production of: (a) notes, data compilations or summaries, internal communications, internal forms, or memoranda of FTC attorneys and staff; or (b) correspondence and documents exchanged between the FTC and its agents or non-testifying experts.

b. On the basis of the work-product, attorney-client, and government deliberative-process privileges, complaint counsel object to each request which requires the production of any communications, memoranda, or documents (a) between FTC attorneys or staff; or (b) between FTC attorneys or staff and FTC Commissioners or their staff.

c. On the basis of the work-product, attorney-client, and government-informant privileges, complaint counsel object to each request which requires the production of unexecuted declarations of witnesses.

d. On the basis of the government-informant privilege, complaint counsel object to each request which requires the production of (a) complaints or documents received from confidential government informants without first redacting information that would identify these informants; or (b) documents received from confidential government informants which by their nature would identify these informants.

e. On the basis of the law enforcement investigatory-file privilege, complaint counsel object to each request which requires the production of (a) correspondence or documents exchanged between the FTC and other law enforcement agencies; or (b) confidential documents received from other government agencies.

2. Complaint counsel object to each request, instruction, or definition to the extent it

seeks to impose obligations broader than those required or authorized by the Federal Trade Commission Rules of Practice for Adjudicatory Proceedings or any applicable order or rule of this Court.

3. Complaint counsel object to each request to the extent that it seeks information not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.

4. Complaint counsel object to each request as unduly burdensome to the extent that it purports to have complaint counsel conduct a search for responsive documents beyond those persons employed by the Commission that were assigned to, or actually worked on, the Hoechst Marion Roussel, Inc. and Andrx Corporation matter, FTC File No. 981-0368.

5. Complaint counsel object to each request as unduly burdensome to the extent that it purports to have complaint counsel conduct a search for responsive documents beyond those collected in the Hoechst Marion Roussel, Inc. and Andrx Corporation matter, FTC File No. 981-0368. Complaint counsel intends to rely solely on documents that were or should have been produced in FTC File Number 981-0368. The only exception concerns a document that HMR withheld – on claim of privilege – in the Andrx/HMR investigation, FTC File No. 981-0368, but which was produced in an earlier investigation conducted by one of the FTC's merger divisions and which we believe should have been produced in this matter. Moreover, all documents produced in any investigation besides FTC File Number 981-0368 are privileged or confidential under 15 U.S.C. §§ 46(f), 57b-2(b), and 18a(h), as well as 16 C.F.R. § 4.10(d).

6. Complaint counsel object to each request on the ground that it is unreasonably cumulative and duplicative to the extent that it seeks documents already produced as part of complaint counsel's initial disclosures or in response to Respondents' previous document requests, including Respondent Andrx's First Request for the Production of Documents and Things and Respondent Aventis's First Request for the Production of Documents.

7. Complaint counsel object to each request as premature to the extent it seeks information prepared by an expert who may testify in this matter.

8. The failure of complaint counsel to object to any specific request on a particular ground shall not be construed as a waiver of its rights to object on any additional ground(s). Complaint counsel reserves its rights to amend or supplement its objections and responses to these requests consistent with further investigation and discovery.

9. Complaint counsels' decision to produce documents in response to Aventis's Second Request for the Production of Documents, notwithstanding any objections to any of the definitions, requests, or instructions, should not be construed as: (a) an admission that the produced documents are relevant; (b) a waiver of the general or specific objections asserted herein; or (c) an agreement that requests for similar information will be treated in a similar manner. Complaint counsel specifically reserve all objections as to the competency, relevancy, and admissibility of the information provided; all objections as to burden, vagueness, unintelligibility, over-breadth and ambiguity; and all rights to object to the use of any documents or information in any other proceeding.

OBJECTIONS TO INSTRUCTIONS

10. Complaint counsel object to Instruction 30 to the extent it requires complaint counsel to search for documents extending back to January 1, 1993 on the grounds that it is unduly burdensome and not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.

11. Complaint counsel object to Instruction 35 to the extent it requires complaint counsel to sort or otherwise segregate documents. Complaint counsel will produce documents as they are kept in the ordinary course of business.

12. Complaint counsel object to Instruction 36 to the extent that it purports to require complaint counsel to identify, as to each document withheld based upon a claim of privilege, all of the information set forth in the instruction as to each and every individual document. Appropriate categories of documents may be submitted where, as here, a full and complete log as to each withheld document would be unduly burdensome. This approach is particularly appropriate where the privileged nature of the materials that are combined in general categories is facially apparent.

13. Complaint counsel object to Instruction 37 on the ground that it is unduly burdensome.

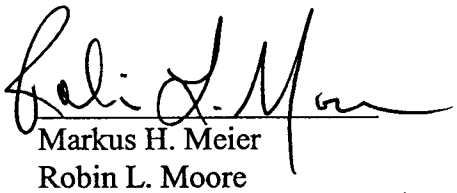
14. Complaint counsel object to Instruction 38 on the ground that it is unduly burdensome.

15. Complaint counsel object to Instruction 39 on the ground that it is unduly burdensome.

OBJECTIONS AND RESPONSES TO DOCUMENT REQUESTS

Subject to the foregoing general objections, and without waiving any of them, complaint counsel respond that we already have produced all non-privileged documents, if any, responsive to Requests 1 through 19 and 21 through 56. Complaint counsel refer respondent to the documents already produced as part of complaint counsel's initial disclosures and in response to respondents' previous document requests, including Respondent Andrx's First Request for the Production of Documents and Things and Respondent Aventis's First Request for the Production of Documents. Complaint counsel further respond that it will produce documents responsive to Request 20.

Respectfully Submitted,



Markus H. Meier
Robin L. Moore

Counsel Supporting the Complaint

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

Dated: May 31, 2000

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

COMPLAINT COUNSELS' LIST OF PRIVILEGED DOCUMENTS

May 31, 2000

Privilege Abbreviations:
AC - Attorney Client Privilege
DP - Deliberative Process Privilege (factual material non-existent or inexorably intertwined with deliberative materials)
IP - Informants Privilege
LE - Law Enforcement/Investigatory Files Privilege
WP - Work Product

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
1	Various	Internal e-mail	Hoechst-Andrx Team, BC Management, BE Management[1]	Hoechst-Andrx Team, BC Management, BE Management	Miscellaneous e-mails concerning Hoechst-Andrx investigation and litigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
2	Various	Internal e-mail	Hoechst-Andrx Team, BC Management, BE Management	Hoechst-Andrx Team, BC Management, BE Management	Miscellaneous e-mails concerning FTC comment on FDA proposed rule changes	AC DP LE	Reflects agency deliberation and/or legal analysis prepared in anticipation of Commission decision.
3	Various	Internal e-mail	Hoechst-Andrx Team, BC Management, BE Management	Commission attorney advisors	Miscellaneous e-mails concerning Hoechst-Andrx investigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

[1] When a group is identified in this log (e.g., Hoechst-Andrx Team, BC Management, BE Management) as Author or Recipient of a document, not every member of such group necessarily drafted or received the document.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
4	Various	e-mail	State Attorney General's office	Bradley Albert	Request for information relating to Hoechst - Andrx investigation for law enforcement purposes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
5	Various	e-mail	BC Management	Department of Justice	Miscellaneous e-mails concerning Hoechst-Andrx investigation for law enforcement purposes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
6	Various	Notes	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management	Interview notes and reports	IP LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation, and identifies informants.
7	Various	Notes	Hoechst-Andrx Team	File	Investigational Hearing notes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
8	Various	Notes	Hoechst-Andrx Team	File	Miscellaneous team meeting notes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
9	Various	Notes	Hoechst-Andrx Team, BC Management, BE Management	Hoechst-Andrx Team, BC Management, BE Management	Miscellaneous notes on various legal and factual issues concerning Hoechst-Andrx investigation and litigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
10	Various	Memoranda	Hoechst-Andrx Team, BC Management	Hoechst-Andrx Team, BC Management, BE Management	Drafts of FTC comment on FDA proposed rule changes	DP LE	Reflects agency deliberation prepared in anticipation of Commission decision.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
11	Various	Memoranda	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management	Discussion concerning retention of experts for Hoechst - Andrx investigation and litigation.	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
12	Various	Memoranda	Hoechst-Andrx Team, BC Management, BE Management	Commission, Hoechst-Andrx Team, BC Management, BE Management	Memoranda to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
13	Various	Memoranda	Hoechst-Andrx Team	Commission, BC Management	Briefing materials	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
14	Various	Memoranda	Hoechst-Andrx Team	File	Analysis of various legal issues related to investigation of and litigation against Hoechst and Andrx	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
15	Various	Outlines	Hoechst-Andrx Team	File	Draft outlines of legal and factual issues concerning Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
16	Various	Charts	Hoechst-Andrx Team	File	Draft charts concerning Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
17	Various	Status Reports	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management	Status reports of Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
18	Various	Memoranda	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management, BE Management	Draft recommendations regarding Hoechst-Andrx investigation and litigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
19	Various	Correspondence	Hoechst-Andrx Team	Hoechst-Andrx Team BC Management	Drafts of letters to Hoechst and Andrx	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
20	Various	Correspondence	John D. Graubert	State Attorneys General	Access letters	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
21	Various	Memoranda	Robin Moore	Hoechst-Andrx Team, BC Management, BE Management, Commission attorney advisors	Legal analysis of Hatch-Waxman cases and regulations	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
22	Various	Draft memoranda	Jon Miller Steiger, Elizabeth Hilder	Hoechst-Andrx Team	Draft legal analysis of attorney-client privilege waiver issues	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
23	Various	Draft complaints	Hoechst-Andrx Team, BC Management	Hoechst-Andrx Team, BC Management, BE Management	Draft complaints	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
24	Various	Draft consent orders	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management, BE Management	Draft consent orders	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
25	Various	Draft motions and orders	Hoechst-Andrx Team	File	Draft motions and orders	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
26	Undated	Memoranda	Robert Kneuper	File	Drafts of summary data on patent issues	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
27	Undated	Memorandum to BE Management	Robert Kneuper	Hoechst-Andrx Team, BE Management	Analysis of Hoechst-Andrx Stipulation and Agreement	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
28	Undated	Memorandum	Daniel Kotchen	Hoechst-Andrx Team	Hoechst-Andrx discovery plan	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
29	Undated	Memorandum	Roy Levy	BE Management David Balto; Michael Wroblewski	Comments on draft discussion of Hatch-Waxman issues	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
30	Undated	Memorandum	Robert Kneuper	Hoechst-Andrx Team BE Management	Financial and economic analysis of Hoechst - Andrx Stipulation and Agreement	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
31	Undated	Memorandum	Robert Kneuper	Hoechst-Andrx Team BE Management	Draft financial and economic analysis of Hoechst - Andrx Stipulation and Agreement	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
32	Undated	Memorandum	Jon Miller Steiger	Hoechst-Andrx Team	Legal analysis of Hoechst's privilege log from investigation	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
33	Undated	Chronology	Bradley Albert	Hoechst-Andrx Team	Chronology of various drafts of Hoechst-Andrx Stipulation and Agreement	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
34	Undated	Presentation	Hoechst-Andrx Team	Commission attorney advisors, BC Management, BE Management	Legal and factual analysis of Hoechst-Andrx investigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
35	4/14/99	Memorandum	Geoffrey Oliver	Hoechst-Andrx Team, BC Management	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
36	9/99 11/99	Draft Opposition to HMR's Petition to Quash Subpoena of James M. Spears	Geoffrey Oliver	Hoechst-Andrx Team	Multiple drafts of Opposition to HMR's Petition to Quash Subpoena of James M. Spears	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
37	10/21/99	Memorandum	David Balto Robin Moore	Commission attorney advisors	Summary of FTC's proposed comment on FDA proposed rule changes on Hatch-Waxman	AC DP LE	Reflects agency deliberation and legal analysis prepared in anticipation of Commission decision.
38	10/28/99	Memorandum	Michael Wroblewski	Commission	Request for authority to submit FTC comment on FDA proposed rule changes	AC DP LE	Reflects agency deliberation and legal analysis prepared in anticipation of Commission decision.
39	9/27/99	Opposition to HMR's Petition to Quash	Geoffrey Oliver Bradley Albert	Commissioner Sheila Anthony, Hoechst-Andrx Team	Memorandum in Opposition to HMR's Petition to Quash Subpoena of James M. Spears	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
40	11/18/99	Opposition to HMR's Petition for Full Commission Review	Geoffrey Oliver Bradley Albert	Commission Hoechst-Andrx Team	Memorandum in Opposition to HMR's Petition for Full Commission Review	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
41	12/20/99	Cover Memorandum to Commission	Richard Feinstein, David Pender, Bradley Albert, Daniel Kotchen, Robin Moore	Commission, Hoechst-Andrx Team, BC Management, BE Management	Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
42	12/20/99	Memorandum to Commission	Bradley Albert, Daniel Kotchen, Robin Moore, Geoffrey Oliver	Commission, Hoechst-Andrx Team, BC Management, BE Management	Bureau of Competition Staff Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
43	12/20/99	Memorandum to Commission	Robert Kneuper	Commission, Hoechst-Andrx Team, BC Management, BE Management	Bureau of Economics Staff Recommendation to Commission	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
44	1/24/00	Memorandum to Commission	Richard G. Parker, Molly S. Boast, Michael Antalics	Commission, Hoechst-Andrx Team, BC Management, BE Management	Bureau of Competition Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
45	Undated	Memorandum to Commission	Will Tom	Commission, Hoechst-Andrx Team, BC Management, BE Management	Bureau of Competition Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
46	12/20/99	Memorandum to Commission	Jeremy Bulow Gregory Vistnes	Commission Hoechst-Andrx Team, BC Management, BE Management	Bureau of Economics Management Recommendation to Commission	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
47	2/26/99	Memorandum	Gregory Vistnes	Robert Kneuper, BE Management	Analysis of relief options by Bureau of Economics	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
48	10/27/99	Memorandum	Will Tom	Hoechst-Andrx Team, BC Management, BE Management	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
49	12/99 - 1/00	Memoranda	BC Management	BC Management	Drafts of Bureau of Competition Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
50	11/99	Memorandum	Hoechst-Andrx Team	Hoechst - Andrx Team BC Management	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
51	7/19/99	Memorandum	Will Tom	Hoechst-Andrx Team, BC Management, BE Management	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
52	6/4/99	Memorandum	Michael Kades	Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
53	5/7/99	Memorandum	Geoffrey Oliver	Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
54	2/26/99	Memorandum	Joanne Levine	David Balto, Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
55	8/27/99	Memorandum	Geoffrey Oliver	Will Tom, David Balto, Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
56	8/99	Memorandum	Kirsten Nussbaumer	Geoffrey Oliver Hoechst-Andrx Team	Legal analysis of FTC Act	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
57	8/6/99	Memorandum	Stephan Meisner	Bradley Albert	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
58	7/29/99	Memorandum	David Tomar	Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
59	8/11/99	Memorandum	David Tomar	Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
60	9/27/99	Memorandum	Geoffrey Oliver	File	Draft discussion of investigational issues	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
61	10/1/99	Memorandum	Geoffrey Oliver	File	Draft discussion of investigational issues	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
62	1/19/00	Memorandum	Bradley Albert	Hoechst-Andrx Team	Analysis of 180-day exclusivity regulations	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
63	8/10/99	Memorandum	Robin Moore	Hoechst-Andrx Team, BC Management	Analysis of FDA proposed regulations	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
64	1/29/99	Memorandum	Bradley Albert	Hoechst-Andrx Team,	Legal analysis of product market	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
65	3/99	Memorandum	Robin Moore	Hoechst-Andrx Team	Summary analysis of documents relating to product market	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
66	2/8/99	Memorandum	Bradley Albert	Richard Feinstein, David Pender	Legal analysis of licensing provisions in Hoechst-Andrx Stipulation and Agreement	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
67	3/00	Memorandum	Hoechst-Andrx Team	State Attorney General's office	Summary of Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
68	5/21/99	Memorandum	Gregory Vistnes	BE Management, Robert Kneuper	Economic analysis of issues relating to settlement of litigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
69	3/00	Memorandum	Richard G. Parker	Commission, Hoechst-Andrx Team	Draft memorandum on issues raised by investigation and litigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
70	3/9/98	Memorandum	Christian White, Debra Valentine, Marc Winerman	Richard Feinstein, David Pender, Bradley Albert, Geoffrey Oliver	Legal discussion of attorney-client waiver issues	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
71	4/9/99	Memorandum	Roy Levy	Robert Kneuper BE Management	Analysis of Hatch-Waxman issues	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
72	2/23/99	Memorandum	Bradley Albert, Daniel Kotchen	BC Management	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
73	4/00	Discovery	Hoechst-Andrx Team	File	Draft initial disclosures	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
74	9/9/98	Correspondence	Bradley Albert	Gordon Johnston	Request for nonpublic information relating to Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
75	3/4/99	Correspondence	Daniel Kotchen	David K. Haggard	Request for nonpublic information	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
76	3/8/99	Correspondence	David K. Haggard	Daniel Kotchen	Responding to request for nonpublic information	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
77	10/28/99	Draft Discussion	Commissioner Sheila Anthony	Geoffrey Oliver	Response to HMR's petition to quash	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
78	12/16/99	Draft Discussion	Commission	Geoffrey Oliver	Response to HMR's petition to quash	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
79	2/10/00	Memorandum	Commissioner Sheila Anthony	Commission BC Management, BE Management	Analysis of Hoechst - Andrx investigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
80	9/15/98	Memorandum	Hoechst-Andrx Team	BC Management, BE Management	Request for compulsory process	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
81	9/29/98	Memorandum	Fred Martin	Commission	Request for compulsory process	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
82	10/8/98	Memorandum	Hoechst-Andrx Team	Commission	Request for compulsory process	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
83	1/26/99	Chronology	Bradley Albert	Hoechst-Andrx Team	Chronology of events relating to Hoechst-Andrx Stipulation and Agreement	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
84	10/22/98	Memorandum	Hoechst-Andrx Team	Commission	Request for issuance of Hoechst and Andrx subpoenas and CIDs	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
85	10/22/98	Memorandum	BC Management	Commission	Request for issuance of Hoechst and Andrx subpoenas and CIDs	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
86	11/2/98	Memorandum	Hoechst-Andrx Team	Commission	Request for issuance of third-party subpoenas and CIDs	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
87	11/2/98	Memorandum	BC Management	Commission	Request for issuance of third-party subpoenas and CIDs	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
88	9/3/99	Memorandum	BC Management	Commission	Request for issuance of Subpoena Ad Testificandum for James M. Spears	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
89	3/2/00	Memorandum	Karen Bokat Bradley Albert	Commission	Request for authority to provide requested confidential briefing to Congressional sub-committee	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
90	1/14/99	Correspondence	Kenneth P. Ewing	Daniel Kotchen, Jon Miller Steiger	Compulsory process (marginalia on already-produced document)	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
91	11/10/99	HMR's Request for Full Commission Review	Michael Koon	Commission	HMR's Request for Full Commission Review (marginalia on already-produced document)	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
92	11/12/98	Correspondence	Louis M. Solomon	Bradley Albert	Compulsory process (marginalia on already-produced document)	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.

ATTACHMENT A

Identification of Individuals Listed in Privilege Log

Hoechst-Andrx Team
Bradley Albert, attorney
Daniel Kotchen, attorney
Markus Meier, attorney
Suzanne Michel, attorney
Robin Moore, attorney
Jon Miller Steiger, attorney
Meleah Geertsma, paralegal
Jennifer Johnson, paralegal
Robert Kneuper, economist
Fred Martin, economist
Elizabeth Schneirov, economist

BC Management
Michael E. Antalics, Senior Litigation Counsel
William Baer, Former Director
David A. Balto, Assistant Director for Policy and Evaluation
Molly S. Boast, Senior Deputy Director
Richard B. Dagen, Assistant to the Director
Richard Feinstein, Assistant Director for Health Care Services and Products
Geoffrey Oliver, Assistant to the Director
Richard G. Parker, Director
David R. Pender, Deputy Assistant Director for Health Care Services and Products
Willard K. Tom, Former Deputy Director

BC Staff
Karen Bokat, attorney
Elizabeth Hilder, attorney
Michael Kades, attorney
Kirsten Nussbaumer, attorney
Michael Wroblewski, attorney
Stephan Meisner, intern
David Tomar, intern

BE Management
Jeremy I. Bulow, Director
Roy Levy, Acting Deputy Assistant Director for Antitrust II
Gregory S. Vistnes, Deputy Director for Antitrust

General Counsel's Office
Debra Valentine, General Counsel
John D. Graubert, Deputy General Counsel
Christian S. White, Assistant General Counsel for Legal Counsel
Joanne Levine, attorney
Jon Miller Steiger, attorney
Marc Winerman, attorney

Commission
Robert Pitofsky, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary

Commission Attorney Advisors
Alicia Batts
Sean D. Hughto
Thomas J. Klotz
Michael McFalls
John H. Seesel
Holly Vedova
Gregg Vicinanza

Non-Party Outside Entities
Kenneth P. Ewing, attorney at Steptoe & Johnson, representing PhRMA
David K. Haggard, Director, Division of Compliance Policy, Food and Drug Administration
Gordon Johnston, Former Deputy Director of the Office of Generic Drugs, FDA

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June 8, 2000

BY FACSIMILE

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

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

Dear Markus:

The purpose of this letter is to memorialize our discussions regarding the adequacy of Complaint Counsel's Objections and Responses to Respondent Aventis Pharmaceuticals, Inc.'s Second Request For the Production of Documents and Complaint Counsel's List of Privileged Documents dated May 31, 2000. As we discussed at our meet and confer conference yesterday morning we have both general and specific concerns regarding these two documents.

Complaint Counsel's Objections and Responses to the Second Request for the Production of Documents raise several concerns. Complaint counsel objects to the production of materials produced in any investigation besides FTC File No. 981-00368. As we discussed, our position continues to be that the present investigation is a continuation of FTC File No. 981-0006 as it pertains to the Stipulation and Agreement and that complaint counsel is obligated to produce the requested materials and make appropriate entries on Counsel's List of Privileged Documents. Complaint counsel offered to produce five boxes of materials previously produced by HMR and agreed to review one more box with miscellaneous materials with a view toward production. As such, we will consider this an open item.

Complaint counsel also objected to the date limitation of January 1, 1993, in our Second Request. We believe this limitation is reasonable in light of certain allegations contained in the Complaint in this action. With respect to the objections contained in paragraphs 11 through 13 of complaint counsel's response, our instructions are almost identical to those used by the FTC. It strikes us as odd that these instructions could be reasonable as issued by the FTC, yet burdensome when issued to complaint counsel. Similarly, the objections contained in paragraphs 14 and 15 are

confusing, when similar instructions are in Complaint Counsel's First Request for the Production of Documents and Things Issued to Hoechst Marion Roussel, Inc.

You indicated that your search was limited to certain individuals files (not specified other than your own) and that you did not search any other offices. This raises questions as to the adequacy of your search. Our instructions require production from all offices within the FTC and from former officers, directors, employees, agents or representatives, whether or not such documents are on the premises of the FTC. We will also consider this an open issue.

We also discussed our concerns with Complaint Counsel's List of Privileged Documents. Generally, complaint counsel objected to the instruction to identify each document withheld based upon a claim of privilege. Rather, you categorized documents by date and groups of potential authors and recipients. By responding in this manner, it is not possible to determine whether claimed privileges actually apply. This form of categorization does not meet the minimal standard of a privilege log and does not comply with the FTC's own instructions.

We also objected to the use of some, and the breadth of other, claims of privilege. Specifically, we objected to the use of the informants and law enforcement privileges based upon the justification provided. For example, the law enforcement privilege is found in every entry. We also took issue with complaint counsels wholesale use of the deliberative process privilege. We question whether this privilege is properly utilized and specifically confirm our position that the sustained contacts between an FTC employee and a non-party with a significant interest in the outcome of the proceeding acts as waiver of the privilege.

You have indicated the you are not inclined to modify either the Objections and Responses to Respondent Aventis Pharmaceuticals, Inc.'s Second Request For the Production of Documents and Complaint Counsel's List of Privileged Documents dated May 31, 2000. We ask that you please confirm our understanding in order to end our meet and confer obligation. Your confirmation will allow us to prepare and submit a motion to compel should it be necessary.

Sincerely,

James M. Spears

cc: Louis M. Solomon, Esq.
Peter O. Safir, Esq.

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

Bureau of Competition

June 9, 2000

Via Facsimile

James M. Spears, Esq.
Shook, Hardy & Bacon, L.L.P.
600 14th Street, N.W.
Suite 800
Washington, DC 20005-2004

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

Dear Mit:

This letter responds to the issues raised in your letter of June 8, 2000, regarding Complaint Counsel's Objections and Responses to Aventis' Second Request for the Production of Documents and complaint counsel's privilege log. We address each of your concerns in turn.

First, you believe that FTC File No. 981-0368 is a continuation of the prior investigation of Watson Pharmaceuticals' acquisition of The Rugby Group, FTC File No. 981-0006, and accordingly continue to seek documents produced in that merger. While we disagree with this position and do not believe that documents from the Watson/Rugby investigation are relevant to this proceeding, we have agreed to review the documents from FTC File No. 981-0006 and to produce whatever non-privileged documents we have pertaining to the stipulation and agreement. (As we previously explained, consistent with ordinary practice, the vast majority of documents from File No. 981-0006 have either been destroyed or returned to the producing party.) To the extent that any of these documents were produced by third parties, we will produce them after giving the third party proper notice, a copy of the protective order entered in this matter, and an opportunity to seek additional protections from Administrative Law Judge Chappell. Additionally, we intend to supplement our privilege log in the event any documents from the Watson/Rugby investigation are withheld on the basis of privilege.

Second, you object to some of the objections we asserted regarding the instructions in your request for production. We believe that our objections are appropriate. Respondents together have served over 160 separately numbered document requests on us even though we already have produced all non-privileged documents from the pre-complaint investigation. In light of the duplicative nature of respondents' various document requests, we believe that responding, according to your instructions, would be unduly burdensome. Additionally, we note that although you did not object to similar instructions in our request for production, you have chosen not to follow them in your production to date to us.

Third, you expressed concern that our search for documents might be inadequate. We have conducted a diligent search of those offices within the FTC where responsive documents reasonably may be located. With respect to the specific request you made during our meeting on June 7, 2000, for documents related to the FDA's proposed rulemaking on the 180-day exclusivity right, we are searching to see if additional responsive documents exist. If such documents exist, we will produce all non-privileged documents and supplement our privilege log if any documents are withheld on the basis of privilege.

Fourth, you object to our categorization of privileged documents by date and groups of authors and recipients. We believe that our privilege log complies with our obligation to provide respondents sufficient information to determine whether a particular privilege exists. In light of the voluminous number of documents that are clearly privileged as internal FTC materials, your request that we specifically identify each and every one is unduly burdensome. Moreover, you have failed to articulate how identifying the particular FTC staff member or members who authored or received specific e-mails or memoranda, which have remained at all times internal to the FTC, will assist you in evaluating whether a particular privilege applies.

Fifth, you object to the breadth of the privilege claims we have asserted on our privilege log. We continue to believe that we have properly asserted all privilege claims. We also do not agree, as a matter of fact or law, that contacts between an FTC employee and another party created any waiver of the FTC's deliberative process privilege.

Finally, we confirm that, except to the extent discussed above, we do not intend to modify either our Objections and Responses to Respondent Aventis Pharmaceuticals, Inc.'s Second Request for the Production of Documents or our privilege log.

Sincerely,

Markus

Markus H. Meier
Complaint Counsel

cc: Louis M. Solomon, Esq.
Peter O. Safir, Esq.

(c) Computers and related offline storage used by agents, consultants, and other persons as defined herein, which may include persons who are not employees of the company or who do not work on company premises.

5. The company will submit all documents, including electronically-stored documents, in hard copy.

6. In lieu of original hard-copy documents or electronically-stored documents, the company may submit legible copies. However, if the coloring of any document communicates any substantive information, the company must submit the original document or a like-colored photocopy.

7. Each submitted page or sheet will include an identification acronym for the company and a consecutive control number (in a color other than black or with a distinctive raised label). Only the first page of a bound pamphlet or book must include this unique identification and consecutive control number. The company will provide the Commission with a Document Log, in both a hard copy and on disk, listing all submitted documents as follows:

(a) the control numbers on the document's first and last pages;

(b) the name of the person from whose files the document was obtained; and

(c) all the subpoena specifications to which the document responds.

If the Document Log exists as a computer file(s), the company will provide the Document Log both as a printed hard copy and in a computer-readable form, unless the Commission representatives determine prior to submission that the file(s) would not be in a format that would allow the Commission to use them, in which case the Document Log will be provided in hard copy form only.

8. The company will sort or organize responsive documents for submission to the Commission according to the specification number to which they respond. The box(es) or file folder(s) in which the company submits the sorted documents should identify the relevant specification number(s). If a document is responsive to more than one specification, sort it according to the specification to which it is primarily responsive and list all its specification numbers in the Document Log with the document's consecutive control numbers.

9. If the company withholds any responsive document or masks or redacts any portion of any responsive document based on a claim of privilege, the company must provide the Commission with a log describing the privilege claim and all facts supporting the claim. For each withheld, masked, or redacted document, the log will list at least the following information:

(a) document author(s); (b) the date created; (c) all addressees; (d) all recipients of the original and any copies; (e) the document title; (f) a description of the subject matter; (g) the page length of the document; (h) the relevant subpoena specification(s); (I) the specific claim asserted; and (j) for redacted documents, the document control number (*see* Instruction 7).

Attachments to a document shall be identified as such and described separately in the log; the description shall identify the document to which the attachment is attached. An attachment must be entitled to privilege in its own right — if an attachment is responsive and not entitled to privilege in its own right, it must be provided. The company must provide all nonprivileged portions of any responsive document for which a claim of privilege is asserted, noting where redactions in the document have been made. With respect to documents withheld on grounds of privilege that discuss or describe any U.S. or foreign patent, each individual patent identified in the withheld document must be specified by its patent number.

Additionally, for each document withheld under a claim that it is protected by the work-product privilege, the log will list whether the document was prepared in anticipation of litigation or for trial and identify with particularity the litigation involved. Where litigation has not commenced, the log will list the names of the anticipated adverse parties and the nature of the anticipated claims. For any claim of privilege for a document relating to any U.S. or foreign patent, the log will also identify the patent number of each patent identified in the withheld document or redacted portion thereof.

For each person listed in the log, provide the person's full name, title, employer or firm, and denote all attorneys with an asterisk (*). Short of waiving the privilege, the description of the subject matter will describe the document's subject matter in a sufficiently detailed manner to enable the Commission to assess the applicability of the claimed privilege.

10. Do not destroy or dispose of documents responsive to this subpoena, or any other documents relating to the subject matter of this subpoena. The destruction or disposal of such documents during the pendency of this investigation might constitute a felony in violation of 18 U.S.C. § 1505 and/or 18 U.S.C. § 1512.

11. The company will provide the Commission with the following:

(a) a verified statement identifying the person(s) involved and the procedures followed in conducting the document search and preparing the response to this subpoena, and

(b) a copy of all instructions used to conduct the document search and to prepare the responsive documents for submission to the Commission.

it to indicate the responsive document to which it corresponds. Except for privileged material, the company will not mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.

2. Unless otherwise indicated, each specification in this subpoena covers documents dated, generated, received, or in effect from **January 1, 1995**. Respondent HMRI should supplement, amend or correct the disclosure and responses to these requests, on a continuing basis, to the extent it ascertains any additional responsive information.

3. In lieu of original hard-copy documents or electronically-stored documents, the company may submit legible copies. However, if the coloring of any document communicates any substantive information, the company must submit the original document or a like-colored photocopy.

4. If it is claimed that any document responsive to any request is privileged, work product or otherwise protected from disclosure, identify such information by its subject matter and state the nature and basis for any such claim of privilege, work product or other ground for nondisclosure. As to any such document, state: (a) the reason for withholding it or other information relating to it; (b) the author of the documents; (c) each individual to whom the original or a copy of the document was sent; (d) the date of the documents or oral communication; (e) the general subject matter of the document; and (f) any additional information on which you base your claims of privilege. Any part of an answer to which you do not claim privilege or work product should be given in full.

5. If the company has produced documents responsive to this request in the course of the pre-complaint investigation of this matter, FTC File No. 981-0368, those documents need not be produced again, provided that the company clearly indicates in its answer to the document request the portion of the document request for which it has already supplied the information called for.

6. Unless otherwise stated, each paragraph or subparagraph herein shall be construed independently and without reference to any other paragraph or subparagraph for purpose of limitation.

7. In the event that any document required to be identified or produced has been destroyed, lost, discarded, or otherwise disposed of, any such document is to be identified as completely as possible, including, but not limited to, the following information: date of disposal, manner of disposal, reason for disposal, person authorizing the disposal and person disposing of the document.