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,	)	Docket No. 9293
and	)	
ANDRX CORPORATION, a corporation.	)	

TO: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S OPPOSITION TO AVENTIS' MOTION TO COMPEL

In its motion to compel, Hoechst seeks privileged documents (prepared by FTC staff) from an unrelated Commission non-public law enforcement investigatory file (FTC File No. 951-0057) that was closed almost four years ago (one year before respondents entered into the Stipulation and Agreement that is the focus of this proceeding). Hoechst's motion should be denied because: (1) the four documents sought by Hoechst are protected from disclosure by various legitimate privileges, including the law-enforcement, work-product, and informant privileges; and (2) Hoechst has failed to meet the "substantial need" test that has been long established as the cornerstone of overcoming the qualified privileges asserted by complaint counsel.

an FTC staff attorney and lays out in detail the factual and legal issues developed during the course of the MMD/Seldane investigation. Providing Hoechst access to this type of investigatory material would undermine the Commission's ongoing and future, non-public, law enforcement activities by (1) disclosing confidential investigative techniques and targets, and deterring witnesses from sharing necessary information for fear of being revealed; and (2) interfering with the Commission's ability to prepare for possible litigation by intruding into the mental processes of the FTC staff.

2. *Interview Reports* - The Commission has long held that complaint counsel's interview notes, such as those at issue here, qualify for work-product protection. *See Mesa County Physicians IPA*, FTC Dkt. No. 9284 (August 4, 1997); *Gillette Co.*, 98 F.T.C. 875 (1981); *Flowers Indus.*, 1981 FTC Lexis 117. The work product privilege provides a lawyer with a degree of privacy to assemble information, sift the facts, prepare legal theories, and plan strategy free from unnecessary intrusion by opposing counsel. *United States v. Nobles*, 422 U.S. 225, 238 (1975) (the work-product privilege "shelters the mental processes of the attorney, providing a privileged area" within which to prepare for possible litigation). The two interview reports at issue here were prepared by an FTC staff attorney with an eye towards litigation, and were organized such that their disclosure to respondents would likely reveal legal theories, impressions, and strategies of Commission staff. As the Commission has explained:

> There is little doubt that any attorney's summaries of interviews which he conducts will inevitably, by the very fact of selection, omission and emphasis, reflect the attorney's own state of knowledge at the time of the interview and also his own thoughts and subjective impressions of what he is being told influenced as well by the type and form of the questions which he posed during the interview. To this extent, his summary may more accurately reflect his own views of the case and state of knowledge of the issues at the time of the interview than it will of the witnesses' state of knowledge.

Inter-State Builders, Inc. 69 F.T.C. at 1164 (denying respondent access to complaint counsel's third-party interview notes.[3]

3. Interagency communication – The withheld letter asks the Food & Drug Administration for certain information relating to the Commission's MMD/Seldane investigation. The information sought by Commission staff would reveal deliberations of staff personnel on potential legal theories relevant to the staff's investigation in anticipation of possible Commission litigation. Accordingly, this correspondence is entitled to protection from disclosure under the work-product and law-enforcement investigatory file privileges.

II. Hoechst Fails to Show "Substantial Need" for these Privileged Documents

Under the Commission's rules, complaint counsel's privileged materials are discoverable only if Hoechst can demonstrate that it "ha[s] substantial need of the materials in the preparation of its case." *See* 16 C.F.R. § 3.31(c)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). Hoechst has made no such showing here, claiming only that it is entitled to these documents because they are "relevant to issues that are central to this litigation" (Hoechst Mem. at 7 n. 14) and "critical to HMR's defense." Hoechst Mem. at 6. Such assertions are insufficient to make a showing of "substantial need" both as a matter of fact and law.

Factually, Hoechst is simply wrong. The privileged documents sought by Hoechst are neither relevant to the facts alleged in the complaint nor to the defenses raised in Hoechst's Answer. These documents come from an unrelated non-public Commission investigation that closed nearly four years ago (a year before respondents even entered into the Stipulation and

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[3] The identity of the interviewees is also protected by the informant's privilege. *Gillette Co.*, 98 F.T.C. 875 (1981) (denying discovery of names of informants because respondent did not demonstrate "substantial need").

Agreement that is the subject of the complaint here). In the MMD/Seldane investigation, Commission staff looked into whether Hoechst's predecessor may have violated the FTC Act through the "prosecution of patent enforcement litigation." Unlike the Commission's focus in the MMD/Seldane investigation, however, the complaint in this proceeding does not allege that Hoechst engaged in unlawful or sham patent litigation. Indeed, in previous discovery responses, complaint counsel has specifically stated that this case is not about Hoechst's initiation of patent infringement litigation against Andrx. *See* Complaint Counsel's Response to Hoechst's Admission No. 11. Rather, this case is about an agreement in which Hoechst paid Andrx, its most dangerous competitor, at least $40 million a year – and as much as $100 million a year – to delay marketing a generic version of Hoechst's lucrative branded prescription drug, Cardizem CD. Unlike MMD/Seldane, the only issue is whether such an agreement not to compete violates Section 5 of the Federal Trade Commission Act.

Hoechst argues that the privileged documents from this prior investigation into Hoechst's patent litigation tactics are critical to evaluating the context in which the Stipulation and Agreement arose. But even if the fact of the Commission's previous investigation of Hoechst's litigation tactics was somehow relevant to the overall context in which the Stipulation and Agreement arose (which it clearly is not), Hoechst has not – and cannot – explained why it has a "substantial need" for the internal privileged Commission documents which analyze the factual and legal issues involved in that investigation. Indeed, complaint counsel offered to provide Hoechst stipulations that set forth basic facts relating to the existence and nature of the investigation. Agreement, however, could not be reached on the language of these stipulations.

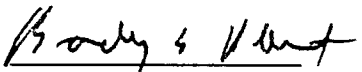
Legally, mere assertions of substantial need do not constitute the showing of need required by Rule 3.31(b)(3). "It is not enough for [Hoechst] to assert that the information is

critically important. . . relevant, and not available by practicable means." *Connelly v. Dun & Bradstreet, Inc.*, 96 F.R.D. 339, 343 (D. Mass. 1982); *see also In re Schering Corporation*, 1990 FTC Lexis 133 (denying respondents' motion to compel documents because of failure to show "substantial need"). Indeed, if this type of blanket assertion was all that was required to overcome complaint counsel's legitimate privileges, then all of the privileged information in complaint counsel's pre-complaint documents would have been subject to discovery. But, this Court already determined that respondents could not demonstrate a "substantial need" for these plainly relevant documents. Order on Motions to Compel Discovery From Complaint Counsel Filed by Andrx and by Aventis. (August 18, 2000). In light of this previous ruling, it is difficult to see how Hoechst could have "substantial need" for documents that bear no relevance to the issues in this proceeding.

III. CONCLUSION

For the reasons discussed above, Hoechst's Motion to Compel should be denied in its entirety.

Respectfully Submitted,



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Dated: October 16, 2000

CERTIFICATE OF SERVICE

I, Bradley S. Albert, hereby certify that on October 16, 2000, I caused a copy of the Complaint Counsel's Opposition to Aventis' Motion to Compel to be served upon the following persons via facsimile and/or overnight delivery.

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