UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	
LABORATORY CORPORATION OF AMERICA	**Docket No. 9345**
and	**PUBLIC**
LABORATORY CORPORATION OF AMERICA HOLDINGS, Corporations.	

RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE A REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF THEIR MOTION TO COMPEL DOCUMENT PRODUCTION

Respondents oppose Complaint Counsel's Motion for Leave to File a Reply ("Motion for Leave") because the motion improperly argues the merits of Complaint Counsel's reply[1] and improperly requests a reply on an issue that has already been argued in all four of the briefs previously filed regarding the present Motion to Compel.

ARGUMENT

I. Complaint Counsel's Motion Improperly Argues the Merits of its Proposed Reply

Complaint Counsel improperly argues the merits of the reply that it is seeking this Court's permission to file. A motion for leave to file a reply should briefly set forth the

[1] While Respondents agreed not to oppose Complaint Counsel's Motion for Leave with respect to two issues: (1) grouping of entries in Complaint Counsel's privilege log; and (2) the relevance of Complaint Counsel's litigation hold, Declaration of Corey Roush, at ¶¶ 6, 7 (attached as Exhibit A), Respondents' never intended not to oppose a motion that argued the substantive issues and that characterized Respondents' arguments as "baseless," as "misrepresent[ing]" certain issues, and as "based on flawed assumptions," Motion for Leave at 2-3. As a result, counsel for Respondents informed Complaint Counsel on March 18, 2011 that Respondents would oppose the Motion for Leave in its entirety.

circumstances that demonstrate why the court should consider further arguments. It should not present those substantive arguments in the motion for leave because the court has not yet agreed to hear those arguments. Rule 3.22(d) ("The moving party shall have no right to reply .... The reply may be *conditionally* filed with the motion seeking leave to reply.") (emphasis added). If a party does present substantive arguments, the court should not consider them. *See, e.g., United States v. Int'l Bus. Mach. Corp.*, 66 F.R.D. 383, 385 (S.D.N.Y. 1975) ("To permit the reply papers to accompany the request ... is to enable the requesting party to accomplish its goal of placing the papers before the court, thereby reducing the question of whether the papers should be accepted for filing to relative unimportance."); *see also Riggs v. Peschong*, 2008 WL 4372376 (D.N.H. 2008) (refusing to consider a party's substantive arguments that were not properly before the court because those arguments required leave of the court). Here, Complaint Counsel made numerous substantive arguments in its Motion for Leave that go to the merits of the reply. In fact, the Motion for Leave exceeds 1,100 words, just short of the 1,250 word limit for the underlying reply it seeks permission to file. *See* Rule 3.22(c). Because most of these words are used to argue the merits of Complaint Counsel's proposed reply, there is no need for Complaint Counsel to file an additional reply. In short, Complaint Counsel both sought leave to file a reply and replied in the same pleading – this is improper and for this reason alone the court should deny the motion.

II. The Merits of Complaint Counsel's Reply Have Already Been Fully Briefed

Not only should Complaint Counsel's motion be denied because it is improper, there is no need for further briefing on Respondents' Motion to Compel since Complaint Counsel has already made its substantive arguments (and even attached materials purportedly supporting those substantive arguments) in its present Motion for Leave.

For instance, Complaint Counsel claims that "this Court found" a privilege log grouping documents "satisfactory" in *In re Hoechst Marion Roussel, Inc.*, citing to 2000 FTC LEXIS 134 (Aug. 18, 2000) (attached as Exhibit B). Motion for Leave at 2. The *Hoechst Marion Roussel* decision does not, however, mention whether the parties disputed – or even discussed – the acceptability of grouping documents on a privilege log. Moreover, the decision makes clear that the motion to compel pertaining to the privilege log in that case was withdrawn. As a result, the Court never ruled on the acceptability of the privilege log that was at issue in that case. As detailed in Respondents' Supplement to its Motion to Compel ("Respondents' Supplement"), grouping of entries in a privilege log in inappropriate. The case cited by Complaint Counsel does not change that. As a result, Complaint Counsel should either produce a log that permits the Court and Respondents to evaluate whether *each individual* document was properly withheld or they must produce the documents.[2]

Complaint Counsel also argues in its Motion for Leave that its assertion of work product over documents prepared *months before* Complaint Counsel ever issued a litigation hold was appropriate because Respondents appear to have done the same thing in their privilege log is not a proper response. First, the only issue before the Court is Complaint Counsel's privilege log. Complaint Counsel has had Respondents' privilege log for over five months, Declaration of Corey Roush, at ¶ 2, and have not raised any issues with it or filed a motion to compel. Second, if Complaint Counsel believes that the sixteen work product claims made on the five pages that were submitted to this Court (16 entries out of a total of over 16,000 and 5 pages out of a total of over 1500), Respondents will be happy to confer with Complaint Counsel to determine whether

[2] Respondents have already submitted a 16,000 entry privilege log that complies with this standard, *see* Roush Decl. Exhibit 1, and are preparing another privilege log with nearly 7,500 entries pending this Court's determination of whether the format of the FTC's current privilege log is appropriate.

Respondents should withdraw those work product claims.[3] That issue is immaterial to Respondents' Motion to Compel and concerns about Complaint Counsel's privilege log. The substantive point raised by Respondents is that if Complaint Counsel did not anticipate litigation until August then it must produce the alleged "work product" created in June and July. If, on the other hand, Complaint Counsel did anticipate litigation, then it inappropriately destroyed documents that should have been preserved and produced. *Either* a spoliation inference is necessary to prevent prejudice to Respondents from the documents destroyed in June and July *or* Complaint Counsel must produce the alleged work product from June and July.

Finally, Respondents dispute Complaint Counsel's claim that Complaint Counsel "could not have anticipated that Respondents would *continue*" to argue that the interests of the CAAG and the interests of the FTC are not aligned with respect to this matter. Motion for Leave at 3 (emphasis added). Indeed, as Complaint Counsel explicitly admits with its use of the word "continues," this issue has been addressed in the previous filings related to the instant Motion to Compel.[4] Furthermore, the report attached to Respondents' Supplemental Brief is not new evidence – it is a publicly-available document that was produced by a third party to both LabCorp and the FTC several weeks ago. Respondents attached the report to rebut Complaint Counsel's untenable claim that the *qui tam* proceeding will not affect capitated rates. Indeed, industry participants (including the author of the report) recognize that the CAAG *qui tam* action and the parallel enforcement action by DHCS likely will *increase* capitated rates whereas

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[3] The statement that "Complaint Counsel's privilege log is much more detailed than Respondents' log" is absolutely ridiculous. Motion for Leave at n 4. Respondents' over 1500-page privilege log contained over 16,000 entries with individual descriptions for each document and attachment. *See* Roush Decl. Exhibit 1. Complaint Counsel's privilege log lumped 759 documents together in a mere 69 entries with generic descriptions that do not enable the Court or Respondents to identify the basis for the alleged privilege.

[4] *See* Respondents' Motion to Compel at p. 5; Complaint Counsel's Opposition at p. 8; Complaint Counsel's Supplemental Opposition at p. 2; Respondents' Supplemental Brief at p. 5.

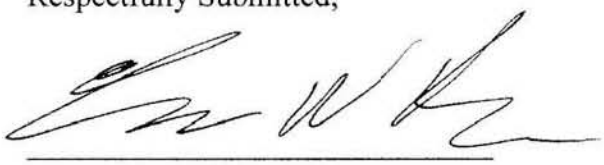
Complaint Counsel's purported objective in this matter is to *prevent* any such increase in rates. As has been argued several times in the various submissions pertaining to this Motion to Compel,the deliberative process privilege should not apply in situations where, as here, the interests of CAAG diverge sharply from those of Complaint Counsel. Complaint Counsel disagrees. No further briefing on this issue is necessary (unless of course this Court would like such briefing from both parties).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Complaint Counsel's Motion for Leave to File a Reply.

Dated: March 18, 2011

Respectfully Submitted,



J. Robert Robertson
Corey W. Roush
Benjamin F. Holt
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004-1109
(202) 637-5600 (telephone)
(202) 637-5910 (facsimile)
robby.robertson@hoganlovells.com
corey.roush@hoganlovells.com
benjamin.holt@hoganlovells.com

Attorneys for Laboratory Corporation of America and Laboratory Corporation of America Holdings

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
LABORATORY CORPORATION OF AMERICA	)	**Docket No. 9345**
	)	**PUBLIC**
and	)	
LABORATORY CORPORATION OF AMERICA HOLDINGS, Corporations.	)	

[PROPOSED] ORDER

Upon consideration of Complaint Counsel's Motion for Leave to File a Reply to Respondents' Supplemental Brief in Further Support of their Motion to Compel Document Production, and Respondents' opposition thereto, and the Court being fully informed,

IT IS HEREBY ORDERED, that Complaint Counsel's Motion is DENIED.

Date:_____

_____
D. Michael Chappell
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed via hand delivery an original with signature and one paper copy and via FTC e-file a .PDF copy that is a true and correct copy of the paper original of the foregoing document with:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-113
Washington, DC 20580
secretary@ftc.gov

I also certify I delivered via electronic mail and hand delivery a copy of the foregoing to:

D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-110
Washington, DC 20580
oalj@ftc.gov

I also certify I delivered via electronic mail a copy of the foregoing to:

J. Thomas Greene
Michael R. Moiseyev
Jonathan Klarfeld
Stephanie A. Wilkinson
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Date: February 11, 2011

Justin W. Bernick
Hogan Lovells US LLP
Counsel for Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
LABORATORY CORPORATION OF AMERICA	)	**Docket No. 9345**
	)	**PUBLIC**
and	)	
LABORATORY CORPORATION OF AMERICA HOLDINGS,	)	
Corporations.	)	

DECLARATION OF COREY W. ROUSH IN SUPPORT OF RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE A REPLY

I, Corey W. Roush, declare and state as follows:

1. I am an attorney at law duly licensed to practice in the District of Columbia. I am a partner at Hogan Lovells US LLP, and an attorney of record for Respondents Laboratory Corporation of American and Laboratory Corporation of America Holdings ("Respondents" or "LabCorp"), in this action. I submit this Declaration in Support of Respondents' Opposition to Complaint Counsel's Motion for Leave to File a Reply. The following is based on my personal knowledge and if called as a witness, I could and would competently testify thereto.

2. Respondents produced a privilege log to the Federal Trade Commission ("FTC") with regard to its initial production of almost 27 million pages of material on November 4, 2010. That privilege log, which is 1,519 pages and includes 16,770 entries, is attached as Exhibit 1 to this declaration.

3. On or about March 8, 2011, I participated in a telephone call with Thomas Greene, Michael Moiseyev, Jonathan Klarfeld, and Lisa DeMarchi Sleigh, all counsel representing the FTC, as well as Benjamin Holt, counsel for Respondents. On that call we discussed various

discovery issues, including when the FTC issued its litigation hold notice; the destruction of potentially responsive documents prior to the issuance of that notice; and the appropriateness of asserting attorney work product protection, which requires that the materials have been prepared in anticipation of litigation, over materials that were not subject to a litigation hold notice. On that call, I asked when the Commission's litigation hold notice was issued. The FTC participants indicated that they did not know the exact date, but that they would provide it.

4. On or about March 9, 2011, I had another telephone call with Ms. DeMarchi Sleigh. It is my understanding that the statements in Footnote 2 of Complaint Counsel's Motion for Leave to File a Reply refer to that conversation.

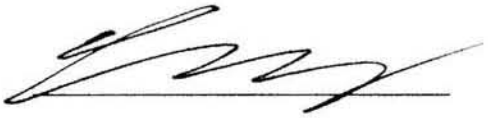
5. During that conversation with Ms. DeMarchi-Sleigh, she inquired about whether Respondents had provided a privilege log regarding the additional production of materials that had occurred since Respondents provided their November 4, 2010 privilege log. I responded that Respondents had not yet done so because we wanted to wait for this Court's ruling on Respondents' pending motion to compel regarding Complaint Counsel's privilege log. I explained that if this Court found that grouping of privilege log entries was permissible, Respondents wanted to take advantage of that since our supplemental log was going to include several thousand entries. I also made clear that Respondents were in the process of preparing and fully intended to submit a supplemental privilege log and that the timing was just a matter of whether Respondents would be able to use the same methodology that Complaint Counsel utilized in its privilege log. In response, Ms. DeMarchi-Sleigh said that Respondents had violated Rule 3.38(a) and had arguably waived privilege by not providing a supplemental privilege log on March 4, 2011 (the day of Respondents' final production). She indicated, however, that Complaint Counsel did not intend to argue that Respondents had waived privilege. I thanked her, said that I understood her general position, and asked her to let me know if a motion to compel would be forthcoming.

6. On the morning of March 17, 2011, I participated in a call with Ms. DeMarchi Sleigh and Stephanie Bovee, both counsel for the Federal Trade Commission. Ms. DeMarchi Sleigh indicated that Complaint Counsel was planning to file the present motion for leave to file a reply and asked whether Respondents would oppose. We discussed Complaint Counsel's two proposed bases for the motion – to address Respondents' arguments about (1) grouping of privilege log entries and (2) the relevance of the date on which the Commission issued its litigation hold. Since Ms. DeMarchi Sleigh indicated that she felt Respondents' arguments on these two fronts were improper, I asked whether Complaint Counsel planned to characterize them as such as I could not agree not to oppose a motion that made such characterizations. She indicated that Complaint Counsel was not filing a motion to strike and that this was just a motion to file a reply. I also asked if Complaint Counsel planned to attach a draft reply. Ms. DeMarchi Sleigh stated that Complaint Counsel did not so intend. I indicated that I would consider Complaint Counsel's bases for filing the motion for leave to file a reply and provide an answer that afternoon.

7. On the afternoon of March 17, 2011, I contacted Ms. DeMarchi Sleigh by phone to inform her that Respondents would not oppose Complaint Counsel's motion for leave to file a reply under the circumstances she had described that morning. Ms. DeMarchi Sleigh then informed me that Complaint Counsel also planned to request leave to file a reply on a third point – responding to Respondent's citation of the Dark Report article that was attached as Exhibit A to Respondents' supplemental brief. I informed Ms. DeMarchi Sleigh that the Dark Report article was not "new evidence" – as she had argued – because it was a public document that had already been produced in this case. I further indicated that Respondents would oppose a motion for leave to file a reply that continued to further debate the impact that the California Department of Justice Office of the Attorney General ("CAAG") lawsuit and related California Department of Health Care Services ("DHCS") investigation/audit on the pricing of clinical lab services to independent physician associations and whether those actions were inconsistent with the FTC's

lawsuit because those issues has been addressed in all four of the filings pertaining to the present motion to compel. We concluded the call with my agreement that Complaint Counsel could represent to the Court that Respondents would not oppose leave to file a reply on the first two issues that Ms. DeMarchi Sleigh had raised, but that Respondents did oppose Complaint Counsel's motion to file a reply on the third issue.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 18th day of March, 2011, in Washington, DC.



Corey W. Roush

EXHIBIT 1

[Exhibit 1 has been designated as confidential pursuant to the protective order entered in this matter.]

EXHIBIT B

LEXSEE 2000 FTC LEXIS 134

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

Federal Trade Commission

2000 FTC LEXIS 134

August 18, 2000

ACTION:
[*1]

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

ALJ:

D. Michael Chappell, Administrative Law Judge

ORDER:

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

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

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

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

(1) Andrx seeks a determination that Complaint Counsel's delay in providing its privilege log constitutes [*2] a wavier of any privilege objections.

(2) Aventis seeks to compel Complaint Counsel to comply with instructions set forth in Aventis' document request.

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

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

I. PRIVILEGE LOG

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

At the time Andrx prepared its motion to compel, Complaint Counsel had not provided Andrx with a privilege log. Apparently Complaint Counsel served its privilege log on or about [*3] the day Andrx filed its motion. Andrx's motion argues that Complaint Counsel's delay in providing a privilege log constitutes a waiver of Complaint Counsel's privilege objections, and that Complaint Counsel's invocations of privileges are overbroad.

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

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

II. INSTRUCTIONS

In its Objections [*4] to Production Request served by Aventis, Complaint Counsel has objected to five instructions. The instructions at issue request that Complaint Counsel identify the source and location of responsive documents, organize documents by request number, and provide a document index of requested documents (Instruction No. 35); provide a sufficiently detailed privilege log to permit Respondent and this Court to evaluate Complaint Counsel's privilege claims concerning withheld documents (Instruction No. 36); identify any responsive documents believed to have been destroyed or otherwise unavailable and to explain the circumstances that caused their unavailability (Instruction No. 37); and permit Complaint Counsel to withhold production of otherwise responsive documents that were previously produced to Respondent, upon Complaint Counsel's identification of the location of such documents in any such previous production (Instruction Nos. 38 and 39).

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

Rule 3.37(a) governs production of documents. It states, in [*5] pertinent part, "[a] party shall make documents available as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." 16 C.F.R. § 3.37(a). Since Complaint Counsel objected to these instructions, Complaint Counsel will not be ordered to comply with instructions which call for more than is required by the Rules. Aventis' motion to compel compliance with these instructions is DENIED.

III. DOCUMENTS WITHHELD FROM PRODUCTION

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

Complaint Counsel has asserted that it has produced to Respondents all nonprivileged documents from FTC File No. 981-0368 (the investigatory file which gave rise to this proceeding). Respondents challenge the privileges asserted by Complaint Counsel. Complaint Counsel has withheld various documents, asserting that one or more of the following privileges provide a basis for withholding documents: (1) the law enforcement/investigatory files privilege; (2) the informer privilege; (3) the deliberative process privilege; (4) the work product privilege; and [*6] (5) the attorney client privilege.

1. Law Enforcement Investigatory Files Privilege

The law enforcement investigatory files privilege protects from disclosure investigatory files compiled for law enforcement purposes that would tend to reveal law enforcement techniques or sources. Black v. Sheraton Corp., 564 F.2d 531, 545 (D.C. Cir. 1977). Respondents' first challenge to Complaint Counsel's assertion of the law enforcement investigatory files privilege is that Complaint Counsel has failed to assert the privilege with sufficient specificity. Governmental privileges must be formally asserted and delineated in order to be raised properly. Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1342 (D.C. Cir. 1984)(citations omitted). The claiming official must have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced and state with specificity the rationale of the claimed privilege. Id. These procedural requirements have been met with the Declaration of Richard G. Parker Claiming Privilege for Certain Documents, Exhibit 1 to Complaint Counsel's Opposition [*7] to Motions to Compel. ("Parker Declaration").

The law enforcement investigatory files privilege is not absolute. The public interest in nondisclosure must be balanced against the need of the particular litigant for access to the privileged information. In re Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988); Friedman, 738 F.2d at 1341 (citing United States v. Reynolds, 345 U.S. 1, 11 (1953)). A demonstrated, specific need for material may prevail over a generalized assertion of privilege, but the claimant must make a showing of necessity sufficient to outweigh the adverse effects the production would engender. Black, 564 F.2d at 545 (citations omitted). Whether the materials are available from other sources is a factor in determining the degree of the litigant's need to obtain it from the governmental agency claiming the privilege. Freidman, 738 F.2d at 1341.

2. Government Informer Privilege

The government informer privilege protects from disclosure the identity of confidential government informants. McCray v. Illinois, 386 U.S. 300 (1967). The purpose of the privilege is the furtherance and protection [*8] of the public interest in effective law enforcement. Roviaro v. United States, 353 U.S. 53, 59 (1957); Gillette Co., 98 F.T.C. 875, 1981 FTC LEXIS 2, * 4-5 (Dec. 1, 1981). The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. Id. Although the issue of protecting the identity of an informer usually arises in the context of criminal cases, the privilege is also applicable in civil cases. Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 769 (D.C. Cir. 1965).

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

3. Deliberative Process Privilege

The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-152 (1975). [*9] This privilege permits the

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

Assertion of the deliberative process privileges requires: (1) a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation [*10] why it properly falls within the scope of the privilege. Landry v. FDIC, 204 F.3d 1125, 1135 (D.C. Cir. 2000). These procedural requirements have been met with the Parker Declaration and the Declaration of Jeremy Bulow Claiming Privilege for Certain Documents, Exhibit 2 to Complaint Counsel's Opposition to Motions to Compel.

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

4. Work Product Immunity [*11] and Attorney Client Privilege

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

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

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

Complaint Counsel has asserted that it has limited its search for responsive documents to those documents contained in FTC File No. 981-0368 (the investigatory file giving rise to this litigation) and to those documents [*12] contained in FTC File No. 981-0006 (Watson's acquisition of the Rugby Group) which "touched upon the Hoechst - Andrx agreement." Complaint Counsel maintains, first, that it is not obligated to search for documents in files other than FTC File No. 981-0368 and that do so would impose an undue burden on Complaint Counsel; and second, that documents located in other files are not relevant, or are privileged, or both.

Complaint Counsel's general objection that to search other files would impose an undue burden is overruled. Moreover, there is no principled basis for Complaint Counsel to restrict its search for documents to the material in the file of a single investigation. Exxon Corp., 1980 FTC LEXIS 121, * 5-6 (February 8, 1980). Simply because a relevant document is located in another file does not shield it from discovery, although applicable privileges may provide that shield. With respect to the Commission's pending investigations, Respondents are entitled to relevant, nonprivileged information from such files only if they demonstrate substantial need. Kroger Co., 1977 FTC LEXIS 55, * 5 (October

27, 1977) ("In the absence of special circumstances, the [*13] likelihood of such discovery unduly disrupting current investigations in other Commission proceedings clearly outweighs any benefit to respondent.").

C. DOCUMENTS SUBJECT TO PRODUCTION

The Respondents' motions do not inform the Court of specific document request numbers for which they seek production. Instead, the motions seek a determination of whether Complaint Counsel's assertions of privileges are valid and whether Complaint Counsel can withhold documents located in investigatory files other than the file preceding this litigation. Without the benefit of specific requests and responses, it is difficult to determine whether the document requests seek relevant information or privileged information. However, from a review of the pleadings, attachments, Complaint Counsel's privilege log, and the parties' letters to the Court, it is apparent that Respondents seek to compel Complaint Counsel to produce the following: (1) documents from FTC No. 981-0368 that were withheld as privileged; (2) other settlement agreements relating to patent litigation involving innovator and generic pharmaceutical companies that have come into the Commission's possession; and (3) documents from Commission [*14] files other than FTC No. 981-0368 that relate to cardiovascular products or selection of pharmaceutical products for managed care formularies.

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

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

> other settlement agreements relating to patent litigation involving innovator [*15] and generic pharmaceutical companies of patent litigation that have come into the Commission's possession only if Complaint Counsel intends to rely on or refer to any such agreements in prosecuting its case or if any such agreements have been reviewed or relied upon by a testifying expert for Complaint Counsel; and
>
> any document relied upon, reviewed, consulted, or examined by a testifying expert in connection with forming an opinion on the subject on which he or she is expected to testify, regardless of the source of the document or whether a document was originally generated in another investigation or litigation. Dura Lube Corp., 2000 FTC LEXIS 1, * 18-19 (Dec. 15, 1999).

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

> any documents or portions thereof which consist of the Commission's or its staff's views, policy considerations, analyses, interpretations or evaluations;
>
> any internal agency memoranda that reflect the government's decision and policy making processes;
>
> pre-complaint notes or reports of communications with third parties, other than Jencks [*16] statements, as appropriate;
>
> identification of all parties the FTC communicated with during its pre-complaint investigation; and/or

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

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

ORDERED: