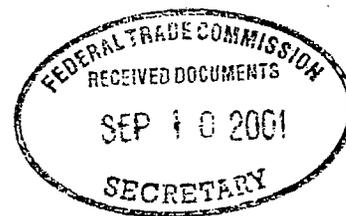


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



\_\_\_\_\_  
In the Matter of )

Schering-Plough Corporation, )  
a corporation, )

Upsher-Smith Laboratories, )  
a corporation, )

and )

American Home Products Corporation, )  
a corporation. )  
\_\_\_\_\_

Docket No. 9297

**ORDER ON AMERICAN HOME PRODUCTS CORPORATION'S AND  
SCHERING-PLOUGH CORPORATION'S MOTIONS TO COMPEL  
AND ON NON-PARTIES ANDRX PHARMACEUTICAL, INC.'S AND AVENTIS  
PHARMACEUTICAL INC.'S MOTION FOR A PROTECTIVE ORDER**

**I.**

On July 23, 2001, Respondent American Home Products Corporation ("AHP") filed a motion to compel Complaint Counsel to search the files of the Federal Trade Commission ("FTC") for documents responsive to AHP's First Request for Production of Documents. Complaint Counsel filed its opposition to AHP's motion to compel on August 2, 2001. Respondent Schering-Plough Corporation ("Schering") filed a joinder in AHP's motion to compel on August 2, 2001. Complaint Counsel filed its opposition on August 13, 2001.

On August 9, 2001, non-parties Andrx Pharmaceutical, Inc. and Aventis Pharmaceutical, Inc. filed a joint motion for a protective order to prevent Complaint Counsel from producing to AHP documents and materials that had been produced in *In re Hoechst Marion Roussel, Inc.*, FTC Docket No. 9293. Non-party Bayer Corporation ("Bayer"), on August 7, 2001, filed a letter in opposition to AHP's document request to the extent it requests information submitted to the FTC by Bayer.

On August 20, 2001, AHP filed a reply in support of its motion to compel and a response to Andrx and Aventis' motion for a protective order. AHP's request to file a reply brief is GRANTED.

For the reasons set forth below, AHP's and Schering's motions to compel are GRANTED in part and DENIED in part. Andrx and Aventis' motion and Bayer's request for protective orders are DENIED WITHOUT PREJUDICE.

## II.

AHP seeks to compel Complaint Counsel to produce responsive documents from the following sources: (1) documents located anywhere within the Commission's files; and (2) documents from the files of other closed or pending investigations. Complaint Counsel has stated that it confined its search for documents to "those persons employed by the Commission in the Bureau of Competition, Division of Health Care Products and Services, and Bureau of Economics that were assigned to, or actually worked on" FTC File 991-0256 (the investigation leading up to this adjudication) or this litigation.

AHP asserts, first, that it is entitled to discovery from the entire Commission and that Complaint Counsel is obligated to search for responsive documents from all individuals likely to have responsive documents within the Bureaus of Competition and Economics, the Offices of the Commissioners, the Secretary, Congressional Relations, Public Affairs, and General Counsel. AHP argues, second, that it is entitled to discovery of documents that are located outside the files of FTC File No. 991-0256 and not collected as part of the investigation into the Schering/Upsher/AHP agreements or subsequent litigation. AHP asserts that it has demonstrated substantial need for documents from other investigations because Complaint Counsel has relied upon or referred to documents from other investigations in the prosecution of this case. AHP also asserts that it needs to show only relevance, not substantial need, for Complaint Counsel to produce responsive documents from closed investigations.

In Schering's joinder motion, Schering asserts that its document requests to Complaint Counsel are substantially similar to those issued by AHP and that Complaint Counsel has taken the same positions with respect to both Schering's and AHP's requests. Schering adopts and joins in the arguments made in AHP's motion. Schering further asserts that statements made by Complaint Counsel during oral argument on Schering's Motion for Partial Dismissal suggest that Complaint Counsel is relying on responsive documents from investigations other than File No. 991-0256. While Complaint Counsel does not oppose Schering's joinder in AHP's motion, it does oppose Schering's request to compel Complaint Counsel to conduct a more extensive search.

Complaint Counsel states that it has conducted a comprehensive search of the files of agency personnel from the Bureaus of Competition and Economics and other offices within the FTC who are reasonably likely to possess materials responsive to Respondents' document

requests. As part of this search, Complaint Counsel has collected non-privileged, responsive documents from: (1) each individual who previously worked, in any capacity, on the pre-complaint investigation; and (2) other agency personnel who had no direct involvement in that investigation, but who may have had responsive information, including individuals in the Bureau of Competition's Office of Policy and Evaluation and its International Antitrust Division, the FTC's Office of Public Affairs, and the FTC's Office of Congressional Relations.

Complaint Counsel first states that it will not search the Offices of the Commissioners or the FTC's General Counsel. Complaint Counsel asserts that such a search would likely only uncover privileged documents bearing on the Commission's reasons to believe that the respondents violated the law. Complaint Counsel also asserts that, to the extent relevant and non-privileged documents might also be found in the files of these offices, they are likely to be duplicates of those already produced by Complaint Counsel.

Next, Complaint Counsel states that it is not required to scour dozens of non-public law enforcement investigatory files for potentially responsive materials. Complaint Counsel asserts that allowing respondents unrestricted access to the files of other investigations (whether pending or closed) (1) would be inconsistent with non-parties' expectations of confidentiality; and (2) could interfere with the Commission's ability to conduct on-going and future investigations in by chilling companies' willingness to provide confidential information. Complaint Counsel further avers by affidavit that it has not relied and does not intend to rely on, or refer to, in discovery or at trial, documents from any FTC open or closed investigative file, other than FTC File No. 991-0256. And, Complaint Counsel states by affidavit that it has not provided, nor does it intend to provide, to any expert who is anticipated to testify at the trial in this matter, documents from any FTC open or closed investigative file, other than FTC File No. 991-0256.

Non-parties Aventis and Andrx assert that the documents which they produced to the FTC in *In re Hoechst Marion Roussel, Inc.*, FTC Docket No. 9293 should not be produced in this litigation because: (1) the documents are not relevant to the current proceeding; (2) substantial prejudice to Aventis and Andrx would occur if their documents are produced; and (3) Respondents have failed to show an adequate need for the documents. Non-party Bayer also argues that documents that it produced to the FTC in response to a subpoena issued in the *Hoechst Marion Roussel, Inc.*, FTC Docket No. 9293 litigation and in response to other subpoenas and civil investigative demands issued by the FTC should not be produced by Complaint Counsel to Respondents. Bayer considers the information sought by Respondents to be sensitive commercial information, the disclosure of which could injure Bayer, particularly where disclosure is to competitors.

### III.

Discovery sought in a proceeding before the Commission must be "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." 16 C.F.R. § 3.31(c)(1); *Federal Trade Commission v. Anderson*,

631 F.2d 741,745 (D.C. Cir. 1979). However, discovery may be limited if the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive, or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c)(1).

Under the FTC's discovery rules, Respondents assert that they are entitled to responsive documents regardless of where in the Commission's offices they may be located, upon a showing of relevancy. Complaint Counsel argues that Respondents are not entitled to a Commission wide search for documents, regardless of what showing of relevance or need may be met. In determining the appropriate standard to assess the scope of documents to which Respondents may be entitled, at least two issues must be addressed. First, should the Commission, as the repository of documents obtained from non-parties, be compelled to produce documents located outside the files of the staff members who have worked on this investigation or litigation. And, second, to what extent do confidentiality concerns of non-parties raise a barrier to production.

The Commission, as a government agency, has enormous powers to compile highly confidential information from non-parties. *Sperry and Hutchinson Co. v. Federal Trade Commission*, 256 F. Supp. 136, 144 (S.D.N.Y. 1966). The Commission compels production of information from businesses that "are frequently reluctant to have their affairs made public and they expect, in providing this information to the Commission, that its confidentiality will be maintained wherever possible." *Sperry and Hutchinson Co.*, 69 F.T.C. 1112, 1114 (1966). Simply because the Commission has collected documents that may be relevant does not entitle respondents to them. *See Sperry and Hutchinson Co.*, 256 F. Supp. at 144 ("It is true that the Commission has had facilities for investigation not available to a private litigant, as is customarily the case with Government agencies. But to hold, as Sperry urges, that a respondent is therefore entitled to what appears to be tantamount to a complete disclosure of the Commission's files would be to fashion a new rule in administrative proceedings of very wide implications which would not be in the public interest."). *See also In re Abbott Laboratories*, 1992 FTC LEXIS 296, \*7-8 (Dec. 15, 1992) (striking respondents' request a search of the entire Commission for responsive documents and limiting requests to only those "files in the custody or control of complaint counsel").

"The Constitution does not require that a respondent in an administrative proceeding be aware of all evidence, information and leads to which opposing counsel might have access." *Federal Trade Commission v. Anderson*, 631 at 748 (D.C. Cir. 1979). Further, respondents' "rights under the APA to present evidence and to conduct cross examination as may be required for a full and true disclosure of the facts 'certainly do not extend to an unlimited privilege to examine all the Commission's files.'" *Sperry and Hutchinson Co.*, 256 F. Supp. at 143. However, as a matter of fundamental fairness, a respondent does have the right to be aware of all evidence utilized by opposing counsel in prosecuting that respondent.

Respondents in the instant case assert that they are entitled to documents from other investigations, that they need demonstrate only relevance for documents from closed

investigations because the production of documents from closed investigations would not interfere with the Commission's investigatory powers, and that they have demonstrated substantial need for documents from open investigations. Complaint Counsel responds that the production of documents from any other investigations - regardless of whether open or closed - would interfere with its investigatory powers. *See Kroger Co.*, 1977 FTC LEXIS 55, \*5 (October 27, 1977) ("In the absence of special circumstances, the likelihood of such discovery unduly disrupting current investigations in other Commission proceedings clearly outweighs any benefit to respondent."). The relevant inquiry, however, is not limited to what effect production of documents might have on the FTC's powers to conduct other investigations, but includes whether Respondents in this litigation have been provided the relevant and non-privileged documents that they need to defend themselves.

Complaint Counsel does not assert that the requested documents are not relevant, rather it asserts that it has no obligation to broaden its search for responsive documents beyond the files of the staff members of the Bureaus who worked on the investigation or the litigation. This position has previously been rejected. "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 (Feb. 8, 1980). Simply because a relevant document is located in another file does not shield it from discovery. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, \*12 (Aug. 18, 2000).

In *In re Hoechst Marion Roussel, Inc.*, FTC Docket No. 9293, where a similar dispute arose, Complaint Counsel was required to produce, regardless of where in the Commission's files they may have been located, (1) other settlement agreements relating to patent litigation involving innovator and generic pharmaceutical companies of patent litigation that were in the Commission's possession if Complaint Counsel intended to rely on or refer to any such agreements in prosecuting its case or if any such agreements had been reviewed or relied upon by a testifying expert for Complaint Counsel; and (2) 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. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, \*14-15 (Aug. 18, 2000). However, it would be unreasonable and unfair to allow the government to review and utilize documents in the prosecution of this case and then refuse to produce those documents solely on the grounds that they have not relied upon them. Accordingly, fairness dictates that relevant, responsive, non-privileged documents shall be produced to Respondents -- regardless of where in the Commission's files they are located and regardless of whether they are confidential documents that the FTC has received in other pending or closed investigations -- if: (1) Complaint Counsel has reviewed such documents in prosecuting its case or Complaint Counsel intends to rely on or refer to such documents in prosecuting its case; or (2) any testifying expert has reviewed, relied upon, consulted, or examined such documents in connection with forming an opinion on the subject on which he or she is expected to testify.

## V.

Non-parties Aventis, Andrx and Bayer assert that the documents which they produced to the FTC in response to subpoenas issued in investigations or litigations outside of this one should not be produced because Respondents have failed to demonstrate need and because the non-parties will be substantially prejudiced by the disclosure of their highly confidential materials. Although the material these non-parties seek to shield from discovery is confidential, this alone does not prevent their disclosure. "Material obtained by the Commission that is confidential or financial information protected by section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and § 4.10(a) (2) of this part, may be disclosed in Commission administrative or court proceedings subject to Commission or court protective or *in camera* orders as appropriate." 16 C.F.R. § 4.10(g)(3). While Section 6(f) of the Federal Trade Commission Act and Section 21(d)(2) of the Improvements Act (codified at 15 U.S.C. § 46(f) and 15 U.S.C. § 57b-2(b), respectively) limit the Commission's ability to disclose confidential information to the public, they do not limit a litigant's ability to obtain confidential information through discovery. *In re E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116, 116 (Jan. 21, 1981).

Even where relevance is established, the right of the requesting party to obtain documents is weighed against the prejudice that might be caused to non-parties in the event that production were ordered. This is particularly true where the document requests implicate "the rights of third parties who have complied with investigatory demands and the public interest in minimizing disclosure of confidential documents produced in investigations." *In re Hoecsht Marion Roussel*, 2000 FTC LEXIS 134, \*13-14 (Aug. 18, 2000) (*citing King v. Department of Justice*, 830 F.2d 210, 233 (D.C. Cir. 1987); *Black v. Sheraton Corp.*, 564 F.2d 531, 545 (D.C. Cir. 1977)). If Complaint Counsel has, in no way, utilized in the prosecution of this case the confidential material sought by Respondents, prejudice to the non-parties outweighs the Respondents' desire for the material.

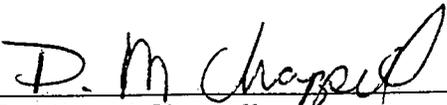
## VI.

Under both the protective orders entered in this litigation and *In re Hoecsht Marion Roussel*, FTC Docket No. 9293, Complaint Counsel is required to provide notice to non-parties which have produced confidential material to the Commission prior to disclosing the non-parties' confidential material. At present, it would be premature to determine whether the Respondents' asserted need for the documents outweighs the prejudice to the non-parties if their confidential information is produced. Accordingly, Aventis' and Andrx's motion for a protective order is DENIED WITHOUT PREJUDICE.

Complaint Counsel is HEREBY ORDERED to produce all non-privileged, responsive documents that (1) Complaint Counsel has reviewed in prosecuting its case or Complaint Counsel intends to rely on or refer to in prosecuting its case; or (2) any testifying expert has reviewed, relied upon, consulted, or examined in connection with forming an opinion on the subject on which he or she is expected to testify. However, prior to the production of any such

documents that have been provided to the FTC by non-parties, Complaint Counsel shall identify, which, if any, documents that Complaint Counsel intends to produce in accordance with this order and provide notice of its intent to produce such documents in this litigation to the producing parties. The producing parties shall then have ten days to file any motion for a protective order to prevent such disclosure.

ORDERED:

  
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D. Michael Chappell  
Administrative Law Judge

Date: September 7, 2001