

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

AMGEN INC.,
a corporation,

and

HORIZON THERAPEUTICS PLC,
a corporation

Respondents.

Docket No. 9414

**RESPONDENTS' UNOPPOSED MOTION FOR AN ORDER
TO ADDRESS UNAUTHORIZED DISCLOSURES OF RESPONDENTS'
CONFIDENTIAL INFORMATION**

Pursuant to Rules 3.22(c) and (d) of the Commission Rules of Practice, 16 C.F.R. § 3.22, Respondents Amgen Inc. (“Amgen”) and Horizon Therapeutics plc (“Horizon”) respectfully move the Court for an order to address the unauthorized disclosure by Complaint Counsel of certain highly sensitive confidential information of Respondents Amgen and Horizon (“Confidential Information”).

By letter dated June 28, 2023, Complaint Counsel has indicated that it does not oppose this motion. (See Exhibit A).

I. REASONS FOR THE REQUESTED RELIEF

During the FTC’s investigation into Amgen’s proposed acquisition of Horizon, Amgen and Horizon produced Confidential Information in filings and in response to requests made by the FTC that was subject to all protections afforded confidential information under the Federal Trade Commission Act, 15 U.S.C. §§ 46(f) & 57b-2, the Hart-Scott-Rodino Antitrust

Improvements Act of 1976, 15 U.S.C. § 18a(h), the Freedom of Information Act, 5 U.S.C. § 552(b)(3), (b)(6) and (b)(7), and all other applicable laws, regulations or rules.

When the FTC initially filed the administrative complaint in this proceeding on June 22, 2023, it applied black highlighting over the Confidential Information contained in its complaint, rather than properly redacting that text. As a result, any member of the public who accessed the administrative complaint was able to see the Confidential Information in the improperly redacted complaint simply by copying and pasting from the complaint to another file. Though the improperly redacted administrative complaint has since been removed from the public docket, any member of the public who downloaded the complaint before it was removed can still access (and share) the Confidential Information it contains. The information that was improperly redacted was competitively sensitive and analysts and reporters have viewed and publicly commented on the Confidential Information that they have accessed from the administrative complaint.¹

In addition to the disclosure of Confidential Information through the improperly redacted administrative complaint, in a letter dated June 26, 2023, Complaint Counsel represented to us that they inadvertently sent materials with Confidential Information to the state attorneys general for the State of Wisconsin and the State of California. (See Exhibit B).

Upon learning of these disclosures, on June 27, 2023, we sent to Complaint Counsel a request that the FTC identify what specific Confidential Information has been shared.

¹ For example, on a June 27, 2023 edition of CNBC's Squawk on the Street, one of the hosts noted, "When they filed [with] their ALJ, they failed to lock it. In other words, they redact things, but they failed to lock the document, Mike. And so people were able to download it, put it back in Adobe somehow and see all the redactions."

(See Exhibit C). In that correspondence, we also informed Complaint Counsel of our intent to ask this Court for the relief sought herein.²

We also note that in the pending preliminary injunction litigation brought by the FTC (and now six states) in the United States District Court for the Northern District of Illinois, the FTC failed to redact legally protected confidential information of third parties from its complaint. This necessitated a corrected filing, but it is likely that many individuals had already downloaded the improperly redacted federal court complaint (as was the case with the administrative complaint).

These repeated disclosures of confidential information erode the confidence of the parties and the public in the FTC's ability to maintain the legally required protections afforded to confidential information produced in response to FTC investigations.

II. REQUESTED RELIEF

In light of these disclosures, Respondents seek an order from this Court requiring Complaint Counsel to (i) identify every person who may have improperly accessed Confidential Information, and (ii) take all actions necessary to ensure that those persons destroy any improperly accessed Confidential Information and make no use of it in any way. As noted, Complaint Counsel has confirmed they do not oppose this request for relief.³

² On June 30, 2023, Complaint Counsel sent a further reply to our June 27 correspondence. (See Exhibit D).

³ Respondents remain extremely concerned about the repeated unauthorized disclosures by Complaint Counsel of highly confidential information, and reserve all rights to pursue additional relief as appropriate.

Dated: July 5, 2023

Respectfully submitted,

/s/ David R. Marriott

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/s/ Ethan Glass

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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In the Matter of

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Docket No. 9414

**DECLARATION OF JESSE M. WEISS IN SUPPORT OF RESPONDENTS’
UNOPPOSED MOTION FOR AN ORDER TO ADDRESS UNAUTHORIZED
DISCLOSURES OF RESPONDENTS’ CONFIDENTIAL INFORMATION**

I, Jesse M. Weiss, declare and state:

1. I am an attorney at the law firm of Cravath, Swaine & Moore LLP and counsel for Respondent Amgen Inc. (“Amgen”) in this matter.
2. I make this declaration pursuant to 28 U.S.C. § 1746 in support of Respondents’ Unopposed Motion for an Order to Address Unauthorized Disclosures of Respondents’ Confidential Information.
3. Attached hereto as **Exhibit A** is a true and correct copy of a letter from Nathan Brenner to David Marriott, dated June 28, 2023.
4. Attached hereto as **Exhibit B** is a true and correct copy of a letter from Nathan Brenner to David Marriott, dated June 26, 2023.
5. Attached hereto as **Exhibit C** is a true and correct copy of a letter from David Marriott to Nathan Brenner, dated June 27, 2023.

6. Attached hereto as **Exhibit D** is a true and correct copy of a letter from Nathan Brenner to David Marriott, dated June 30, 2023.

7. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and that I executed this declaration on July 5, 2023, in New York, New York.

Dated: July 5, 2023

Respectfully submitted,

/s/ Jesse M. Weiss
Jesse M. Weiss

Exhibit A



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

Nathan Brenner
Bureau of Competition
Phone: (202) 326-2314
Email: nbrenner@ftc.gov

June 28, 2023

By Electronic Mail

David R. Marriott
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019-775

Dave,

I write in response to Defendants' June 27 letter, which contains myriad mischaracterizations.

In a subsequent letter, I plan to address the various claims and questions raised in your letter. For now, though, I write to address your final request: the FTC does not oppose Defendants' request to Judge Chappell. The FTC has already worked to provide such information to Defendants as quickly as possible, and we have no objection to providing the same information to you pursuant to an order in the administrative proceeding.

/s/ Nathan Brenner
Nathan Brenner

Exhibit B



Nathan Brenner
Bureau of Competition
Phone: (202) 326-2314
Email: nbrenner@ftc.gov

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

June 26, 2023

By Electronic Mail

David R. Marriott
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019-775

Dear Dave,

This letter follows your June 23 letter to the States asking whether the FTC had shared with them any materials reflecting Amgen or Horizon confidential information in connection with the recently filed Amended Complaint. I write to re-affirm my previous representation that the FTC has never shared an unredacted copy of the Amended Complaint with the States—while drafting and finalizing the Amended Complaint, the FTC only shared PDFs redacting Amgen’s and Horizon’s confidential information. It has, however, since come to my attention that in two instances the FTC inadvertently disclosed to two States limited materials which referenced HSR information. First, on May 11, before the FTC’s Complaint was filed, the FTC shared with the State of California—a state with whom we share a common interest privilege on this matter—attorney work-product which referenced limited Amgen and Horizon HSR information. Second, on the morning of May 16, the FTC shared with the State of Wisconsin—another state with whom we share a common interest privilege—an unredacted copy of its federal complaint, as well as attorney work-product that referenced limited Amgen and Horizon HSR information.

Shortly after sharing this material with the State of Wisconsin—i.e., the very same day, May 16—FTC staff realized they inadvertently disclosed the limited HSR information and immediately notified the State of California and the State of Wisconsin to sequester that information and not rely on it. Both States were informed that, unless and until the parties granted waivers, they can only view redacted materials.

Since learning about this inadvertent disclosure on Saturday, June 24, I have confirmed that there have been no other disclosures of Amgen’s or Horizon’s HSR information to any States. Further, I can confirm that none of Amgen’s or Horizon’s documents produced as part of the HSR filing or the Requests for Additional Information have been shared with any State.

We regret the accidental sharing of some of the parties’ HSR material. Nonetheless, we believe that FTC staff’s prompt action upon discovery limited and contained any adverse consequences from the disclosure. Moreover, this incident highlights the need for the parties to grant the interested States waivers

so that plaintiffs can coordinate in a manner that allows for more efficiency for the parties and the Court. We thus ask, again, that you grant the interested States waivers so that we can more effectively coordinate. I understand that the States plan to respond to your letter separately.

/s/ Nathan Brenner
Nathan Brenner

Exhibit C



David R. Marriott
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T+1-212-474-1760
New York

June 27, 2023

Federal Trade Commission, et al. v. Amgen Inc., et al.

Nathan:

This responds to your email and letter of 11:05 p.m. on Monday, June 26, 2023, concerning Amgen's and Horizon's confidential information. While we appreciate your sharing with us the information contained in your letter, we are—to put it mildly—troubled by the pattern that has emerged and seek your immediate assistance in mitigating the harm caused.

In less than two months, the FTC has disclosed confidential information in violation of its own rules and regulations no less than four times. The FTC filed the original complaint without redacting third-party information. The FTC shared Amgen and Horizon confidential information with the State of California without consent. The FTC shared Amgen and Horizon confidential information with the State of Wisconsin without consent. And the FTC filed an administrative complaint in an improperly-redacted form, exposing sensitive information to the public. Most of this we learned after the FTC had represented, incorrectly, that it did not share any confidential Amgen or Horizon information with any state.

Contrary to your assertions about the FTC's action to address its own missteps, it has failed to avert the adverse consequences of its conduct. Members of the public have accessed the confidential portions of the administrative complaint, and it is being discussed publicly. To the extent your letter suggests the FTC's missteps may have been avoided if defendants had simply given the states a waiver, it is misguided. The granting of a waiver would have done nothing to avoid the FTC's filing of its administrative complaint in a form that allowed it to be accessed by the public. And defendants are under no obligation to provide a waiver.

Your letter is unclear about exactly what confidential information was shared with the states of California and Wisconsin. It is also unclear about whether confidential information was shared with any state through drafts of the original complaint. Please identify what specific information has been shared, including (but not limited to) specifically what "Amgen and Horizon HSR information" was shared directly or indirectly with California and Wisconsin.

We have been told that the FTC convened a conference call with certain state attorneys general for the purpose of persuading them to join its litigation in order to lend credibility to the FTC's allegations in the face of public criticism of the current Commission. We understand

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CRAVATH, SWAINE & MOORE LLP

information about the case was shared orally and perhaps by screen share with the participating states. Please advise whether this is true and, if so, identify any Amgen or Horizon information shared orally, by screen share or in any other way with any state Attorney General.

Given the number of violations involved, and the inaccuracy of prior representations, as a first step, we intend to ask Judge Chappell to order the FTC to identify every person who accessed Amgen and Horizon confidential information, and to take steps to ensure that those persons destroy such information and make no use of it in any way. Please let us know if the FTC will oppose this request.

Respectfully,

/s/ David R. Marriott

David R. Marriott

Nathan Brenner
Federal Trade Commission, Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580

Copy to:

Ethan Glass
Cooley LLP
1229 Pennsylvania Avenue, NW, Suite 700
Washington, DC 20004

Exhibit D



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

Nathan Brenner
Bureau of Competition
Phone: (202) 326-2314
Email: nbrenner@ftc.gov

June 30, 2023

By Electronic Mail

David R. Marriott
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019-775

Dave,

As previously noted, Defendants' June 27 letter contains myriad mischaracterizations.

The FTC has worked with third parties and parties to mitigate exposure of confidential information. When notified by a third party regarding a single quote referenced in the redacted federal complaint, the FTC acted immediately to address the issue by removing the public complaint from the FTC's website and contacting the court regarding sealing the public complaint.

Regarding the information contained in materials shared with the State of California and State of Wisconsin, FTC staff asked these States to discard the materials shortly after they were sent and instead refer only to the redacted complaint until Defendants provide waivers. I am not aware of HSR information shared orally or by screen share with any State, as referenced in your letter.

Both staff from the FTC and Defendants reviewed and approved the redactions proposed for publication on the FTC's website. While it is unfortunate that, due to a technical processing error, the redactions were applied by the Commission's Office of the Secretary in a manner such that the public was able to work around any redactions, as you are aware, FTC staff took immediate action to inform Defendants and remove the improperly redacted complaint from its website upon learning that the redactions could be bypassed.

/s/ Nathan Brenner
Nathan Brenner

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Docket No. 9414

[PROPOSED] ORDER

Upon the unopposed motion of Respondents Amgen Inc. and Horizon Therapeutics plc, for an order to address unauthorized disclosures by Complaint Counsel of confidential information that Respondents produced to the Federal Trade Commission (the “FTC”) during the FTC’s investigation into Amgen’s proposed acquisition of Horizon (“Confidential Information”),

IT IS ORDERED THAT Complaint Counsel shall (i) identify every person who may have improperly accessed Respondents’ Confidential Information that was disclosed by Complaint Counsel, and (ii) take all actions necessary to ensure that those persons destroy any improperly accessed Confidential Information and make no use of it in any way.

Date: _____

D. Michael Chappell
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2023, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Acting Secretary Federal Trade Commission 600
Pennsylvania Ave., NW, Rm. H-113 Washington,
DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

Complaint Counsel

U.S. Federal Trade Commission

Nathan Brenner
Jacob Danziger
Evan R. Johnson
Matthew Joseph
Betty Jean McNeil
Dylan Naegele
R. Tyler Sanborn
Anjelica Sarmiento
Andrew Scheperle
Hilla Shimshoni
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Renata B. Hesse
Samantha F. Hynes

Counsel for Respondent Horizon Therapeutics plc
Cooley LLP

Ethan Glass
Jacqueline Grise
David Burns

July 5, 2023

/s/ Jesse M. Weiss
Jesse M. Weiss

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

July 5, 2023

/s/ Jesse M. Weiss

Jesse M. Weiss