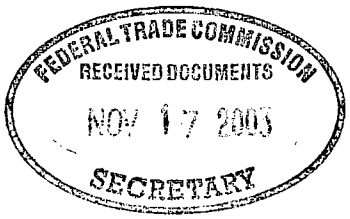
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of NORTH TEXAS SPECIALTY PHYSICIANS, a corporation.	**DOCKET NO. 9312**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO COMPEL RESPONSES TO INTERROGATORIES

Respondent North Texas Specialty Physicians ("NTSP"), even before the commencement of the fact discovery period, served on Complaint Counsel two vague but sweeping contention interrogatories, which, *inter alia*, would require Complaint Counsel to interrupt its fact discovery in order to set forth–on a partial factual record–a detailed description of the facts supporting each of its allegations of the complaint. Respondent is attempting to use these interrogatories to override this Court's own scheduling order, which provides separately certain dates for discovery and for disclosure by each party of evidence that will be used at trial to support its allegations. Complaint Counsel objected to the terms of these contention interrogatories as well as to their timing. Respondent has now belatedly moved to compel responses to these interrogatories. Complaint Counsel respectfully recommends that this Court dismiss North Texas Specialty Physicians' Motion to Compel Responses to Interrogatories (filed Nov. 4, 2003) ("Motion to Compel") as untimely, or, in the alternative, follow the customary practice in Commission and federal court litigation, and delay whatever responses to contention interrogatories may be held appropriate until the close of fact discovery, if at all, when responses

can be made on a complete factual record. Finally, Complaint Counsel submits that this Court should quash one of the contention interrogatories as an improper attempt to restructure Complaint Counsel's allegations and legal theories. For these and other reasons set forth below, NTSP's Motion to Compel should be denied in its entirety.

I. Respondent Filed Its Motion to Compel Responses to Interrogatories Nine Days After the Time Permitted by This Court's Scheduling Order.

According to this Court's Additional Provisions to the Scheduling Order, "[a]ny motion to compel responses to discovery requests shall be filed within 5 days of impasse if the parties are negotiating in good faith and are not able to resolve their dispute." Scheduling Order at ¶ 4, (filed Oct. 16, 2003) ("Scheduling Order"). On October 6, 2003, Respondent issued interrogatories to Complaint Counsel. *See* Respondents Interrogatories to Complaint Counsel (filed Oct. 6, 2003) ("Interrogatories"). Complaint Counsel filed timely objections to the Interrogatories on October 16, 2003. Respondent and Complaint Counsel held a conference on October 21, 2003 in an unsuccessful effort to resolve all disputed issues. In Respondent's Motion to Compel, counsel for Respondent certified that he conferred with Complaint Counsel "in good faith to resolve by agreement the issues raised in this motion and [Respondent] has been unable to reach such an agreement." Motion to Compel at 9. Despite the instructions of this Court requiring that a motion to compel be filed within five days of impasse (reached here on October 21), Respondent waited fourteen days before filing the present motion on November 4, 2003. Since Respondent neither filed its Motion to Compel in a timely fashion, nor requested an extension of time to respond, nor offered any justification or excuse for ignoring ¶ 4 of the Scheduling Order, Respondent's Motion to Compel should be dismissed as untimely.

II. Respondent's Contention Interrogatories Are Premature.

A. Respondent's contention interrogatories are premature under the FTC Rules of Practice.

Respondent's contention interrogatories are premature.[1] Although contention interrogatories are permitted under the FTC Rules of Practice for Adjudicative Proceedings ("Rules of Practice"), they are generally reserved until closer to or following the completion of fact discovery. Rule 3.35(b)(2) of the Rules of Practice and the identically worded Rule 33(c) of the Federal Rules of Civil Procedure both unmistakably confer on the courts considerable discretion in deciding when (if ever) a party must answer contention interrogatories. Rules of Practice, 16 C.F.R. § 3.35(b)(2) ("Rule 3.35(b)(2)"); Fed. R. Civ. P. 33(c) ("Rule 33(c)"). After declaring that an otherwise proper interrogatory is not necessarily objectionable merely because it calls for an opinion or contention, the Rule immediately continues: "but the Administrative Law Judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time." Rule 3.35(b)(2). In the Advisory Committee Notes accompanying the 1970 amendments that sanctioned the use of contention interrogatories, the Committee states that "[s]ince interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved *after*

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[1] Respondent characterizes the interrogatories as "contention interrogatories" in its Motion to Compel, *see* Motion to Compel, at 3 *et seq.* Well settled case law indicates that interrogatories that refer to mixed questions of law and fact, or questions which ask another party to indicate what it contends, or to state all the facts or evidence on which it bases its contentions, or to explain how the law applies to the facts are "contention interrogatories." Contention interrogatories generally "ask a party: to state what it contends, . . . [or] to state all the facts upon which it bases a contention." *Everett v. US Air Group*, 165 F.R.D. 1, 3 (D. Col. 1995) (*citing B. Braun Medical Inc. v. Abbott Laboratories*, 155 F.R.D. 525, 527 (E.D. Pa. 1994), aff'd in part, vacated in part, and remanded on other grounds, 124 F.3d 1419 (Fed. Cir. 1997)).

much or all of the other discovery has been completed, the court is expressly authorized to defer an answer." (emphasis added) (Rule 33(b) (currently (c)) advisory committee note to 1970 amendments).

B. This Court has previously denied a motion to compel responses to identical contention interrogatories.

This Court's decision in an earlier case suggests that Respondent's motion should be denied. In *In the Matter of Hoechst Marion Roussel, Inc., Carderm Capital, L.P. and Andrx Corporation* ("*Hoechst*"), this Court denied a motion to compel responses to interrogatories that were nearly identical in language and made at the exact same stage of litigation.[2] *Hoechst*, Order on Respondent Andrx's Motion to Compel Complaint Counsel to Respond to Interrogatories (filed Aug. 18, 2000) ("Hoechst Order"). In *Hoechst*, respondents filed a first set of interrogatories less than one month into discovery, including an interrogatory that requested precisely the same type of information sought by Respondent in the present case.[3] Complaint

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[2] Respondent makes much of the fact that Complaint Counsel has had ample opportunity, fourteen months, to prepare its case. Motion to Compel at 4, *et seq*. In *Hoechst*, complaint counsel had engaged in two-and-a-half years of investigation. Furthermore, in the present case, Respondent has had fourteen months to prepare its defense, including numerous meetings with staff, management and the Commissioners, in which the theories of the case were thoroughly explored.

[3] Respondent Hoechst asked complaint counsel to that "[d]escribe in detail each basis, if any, for the allegation made in paragraph 29 of the Complaint that '[t]he acts and practices of the respondents are herein alleged have had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and injure competition and consumers,' including, without limitation, explain the meaning of 'tendency or capacity' as used in the allegation." *Hoechst*, Complaint Counsel's Responses and Objections to Respondent Andrx Corporation's First Set of Interrogatories at 25 (filed May 15, 2000) ("Complaint Counsel's Responses and Objections").

Respondent NTSP's interrogatories ask: "[i]dentify each and every communication between NTSP and any alleged coconspirator in which the coconspirator agreed

counsel in *Hoechst* objected to the interrogatory as premature "to the extent it asks us to identify, prior to completion of discovery, each basis for the allegation" and on the grounds that it called for a legal conclusion. *Hoechst*, Complaint Counsel's Responses and Objections at 26. Complaint counsel's only response to the *Hoechst* interrogatory was a reference to an earlier response that essentially restated the complaint. In its order, this Court found that "Complaint Counsel's responses to Andrx's contention interrogatories are adequate at this stage of litigation," and allowed complaint counsel seven months from the start of discovery to supplement responses. Hoechst Order at 2. The identical circumstances in the present case suggest that this Court should deny Respondent's Motion to Compel.

C. Federal courts have routinely required responses to contention interrogatories only after the end of fact discovery, if at all.

As this Court has recognized that "[j]udicial decisions and precedents under the Federal Rules of Civil Procedure concerning discovery motions, though not controlling, provide helpful guidance for resolving discovery disputes in Commission proceedings." *Hoechst*, Order Denying Respondents' Motions for Protective Orders at 4 (filed Oct. 12, 2000) (*citing L.G. Balfour Co., et. al.*, 61 F.T.C. 1491, 1492 (1962); *In re Int'l Ass'n of Conference Interpreters*, 1995 FTC LEXIS 21, *17 (1995)). Federal courts overwhelmingly favor delaying responses to contention interrogatories until the end of fact discovery. *McCarthy v. Paine Webber Group*, 168 FRD 448, 450 (D. Conn. 1996) (the nature of contention interrogatories is such that responses are more

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that he or she would reject a payor offer, including the date, time, content, and participants of such communication" ("Interrogatory Number 1") and "[i]dentify each and every act or practice of NTSP which you contend restrains trade, hinders competition, or constitutes an unfair method of competition, including the date of each such act or practice." ("Interrogatory Number 2"), Respondents Interrogatories to Complaint Counsel at 3 (filed Oct. 6, 2003).

appropriate after substantial amount of discovery has been conducted); *Everett v. US Air Group*, 165 F.R.D. 1, 3 (D. Col. 1995) (although contention interrogatories are permitted , the "obligation to respond to them is often postponed until near end of discovery period"); *B.Braun Medical, supra*, 527 (order denying motion to compel responses to contention interrogatories, "[t]here is considerable support for deferring contention interrogatories until the end of the discovery period."); *Fischer & Porter Co. V. Tolson*, 143 F.R.D. 93, 96 (E.D. Pa. 1992) (order denying motion to compel responses to contention interrogatories as premature); *Nestle Foods Corp. v. Aetna Casualty & Sur. Co.*, 135 F.R.D. 101, (D.N.J. 1990) (the goals of the Federal Rules of Civil Procedure would best be served by use of contention interrogatories at the end of the discovery period); *In re Convergent Technologies Secs. Litig.*, 108 F.R.D. 328, 336 (N.D. Cal. 1985) (order refusing to require a response to contention interrogatories prior to substantial completion of discovery).

D. The cases cited by Respondent do not support its motion to compel.

Respondent fails to acknowledge any of the precedent cited above. Respondent relies instead on inapposite cases that, on examination, are counter to its argument, or at best, ambiguous. For example, Respondent cites *Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 442 (D. Kan. 2000), to support the proposition that "contention interrogatories assist in narrowing and defining the issues and enable the propounding party to determine the proof required to rebut the adverse party's position." Motion to Compel at 4. Respondent's reliance on *Steil* is misplaced. In seeking to prevent the plaintiff's Rule 30(b)(6) deposition, the defendant in *Steil* contended that the plaintiff's requests were unduly burdensome and irrelevant; the court found the requests relevant. *Id.* at 444. The *Steil* court never addressed the subject of contention

interrogatories.

For the same proposition, that contention interrogatories assist in narrowing and defining the issues, Respondent cites *Nestle Foods Corp. v. Aetna Casualty*, 135 F.R.D. 101, 110 (D. N.J. 1990). While the court in *Nestle* acknowledged that an interrogatory may properly inquire into a party's contentions in the suit and wrote that the objective is "to ferret out and narrow the issues," the court also recognized that the 1970 amendments to Rule 33(b) give courts "considerable discretion in deciding when, if ever, a party must answer contention interrogatories." *Id.* at 110. Accordingly, the court in *Nestle* used its discretion to reach the conclusion that "judicial economy as well as efficiency for the litigants dictate that contention interrogatories are more appropriate *after a substantial amount of discovery has been conducted.*" *Id.* at 111 (emphasis added).

Respondent cites *Starcher v. Correctional Med. Sys., Inc.*, 144 F.3d 418, 421 n.2 (6th Cir. 1998), in support of its statement that "the general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response ordinarily would be required." This statement is taken directly from dicta in footnote 2 of *Starcher*, where the court cites *Taylor v. FDIC*, 132 F.3d 753 (D.C.C. 1997), and *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217 (7th Cir. 1997). As in *Steil, supra*, contention interrogatories were not at issue in either *Taylor* or *Vidimos*: in both cases the interrogatories were merely mentioned as one method of discovery.[4] These cases stand for the proposition only that contention interrogatories are *one among many*

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[4] The *Taylor* court stated merely that contention interrogatories may be an alternative to a summary judgment motion in the case of a vague and conclusory complaint. *Taylor* at 762. In *Vidimos*, the defendant claimed that he was not aware that the legal theory was promissory estoppel, and Judge Posner suggested that, among other alternatives, the defendant could have served contention interrogatories. *Vidimos* at 222.

permissible forms of discovery, which Complaint Counsel does not dispute.

Respondents cite *Cable & Computer Tech.* for the proposition that contention interrogatories may, in certain cases, be the most reliable and cost effective discovery device, as compared to depositions. *Cable & Computer Tech. v. Lockheed Sanders, Inc.*, 175 F.R.D. 646, 652 (C.D. Cal. 1997).[5] The efficacy and cost of depositions as compared to contention interrogatories, however, is not at issue in the present case. Moreover, Complaint Counsel has not said that contention interrogatories are never appropriate or efficient.

The only cases that Respondent cites for the premise that contention interrogatories may be answered early in the discovery process are *Bove v. Worlco Data Systems*, 1986 U.S. Dist. LEXIS 19384 (E.D. Pa. 1986), and *Rusty Jones, Inc. v. Beatrice Co.*, 1990 WL 139145 (N.D Ill. 1990). In *Bove*, the court found that plaintiff could answer the interrogatories because the case had been already litigated in state court, and even then did so recognizing that "there is reason to question the appropriateness of 'the early knee jerk filing of sets of contention interrogatories'" *Bove* at *4 *(citing In re Convergent Technologies, supra*, at 337-38). Plaintiff in that case, unlike

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[5] *Cable & Computer Tech* relies on *McCormick-Morgan, Inc. v. Teledyne Industries, Inc.*, 134 F.R.D. 275 (N.D. Cal.), rev'd in other part, 765 F. Supp. 611 (N.D. Cal. 1991) in reaching its decision that responses to contention interrogatories were necessary. In *McCormick*, the court in making a determination between a 30(b)(6) deposition and contention interrogatories, noted, in relevant part, "we have expressed considerable skepticism about the appropriateness of the use of contention interrogatories at earlier stages of litigation" but held that contention interrogatories were more appropriate than a deposition "[i]n a case like this, however, it is more persuasively arguable that going through the hard work of answering contention interrogatories, *at the end of the discovery period*, is justified because by doing so counsel can set the case up for serious settlement negotiations or for a streamlined and rational trial." (emphasis added) *Id.* at 286. (The Court also noted that before making the decision it had to "pause, to say the least, before ruling, even in the limited circumstances of this case, that the most appropriate vehicle for disclosing the kind of information and argument at issue here is a sensibly crafted set of contention interrogatories.") *Id.* at 287.

here, however, would have been in a position to frame its allegations and evidence with some degree of definiteness and finality, since the case had already been fully litigated in state court.

Respondent points to the extensive pre-complaint discovery, through document production, in *Rusty Jones*, and asserts that it has produced 43,000 pages of documents (17 boxes) in the present case. Respondent fails to mention, however, that Complaint Counsel received many of these documents only within the last week.[6] Respondent also fails to mention that in *Rusty Jones*, the party serving contention interrogatories had already answered the opposing party's interrogatories and document requests, thus providing a reasonably full record on which the interrogatories could be answered. *Id.* at 2. Here, by contrast, Respondent still has not responded to Complaint Counsel's request for documents, and other discovery (including depositions) has not yet commenced. Furthermore, the vast majority of facts of this case are found in NTSP's own documents, to which Respondent has better access.[7]

E. Respondent makes no effort to demonstrate why it needs responses to contention interrogatories this early in discovery.

While Respondent suggests that Complaint Counsel has the burden to justify its objections to Respondent's interrogatories, the Rules of Practice are silent on this issue, and there is substantial federal case law showing the burden of demonstrating necessity lies with the party requesting early responses to contention interrogatories.

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[6] Eight of these boxes were produced within the last week, and Complaint Counsel was told on November 12, 2003 that approximately 13 additional boxes apparently newly discovered may be produced at the end of this week, while another forty or so boxes may be forthcoming. All of Respondent's documents were supposed to have been produced by or on October 8, 2003.

[7] The only documents produced by third parties total approximately two boxes, and include, in significant part, documents that NTSP itself should have produced.

In fact, Complaint Counsel was only able to find one case where the court decided to allow the burden to remain with the party opposing discovery.[8] On the other hand, numerous other federal courts have ruled that a party filing contention interrogatories must present "specific, plausible grounds for believing that securing early answers to its contention questions will materially advance the goals of the Federal Rules of Civil Procedure." *In re Convergent Technologies, supra*, at 339.[9] *See also*, *Conopco, Inc. v. Warner-Lambert Co.*, 2000 U.S. Dist. LEXIS 1601, *12 (D. N. J. 2001); *Everett, supra*, at 5 (D. Col. 1995) (the obligation to respond to contention interrogatories is often postponed until near the end of the discovery period unless the proponent carries its burden of demonstrating why they are necessary earlier on); *B.Braun Medical, supra*, 527; *Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 96 (E.D. Pa. 1992) (the party filing contention interrogatories before substantial documentary or testimonial discovery has been completed bears the burden of justification).

Respondent does not provide any substantiation for its need, only claiming baldly that "[t]he FTC is preventing NTSP from adequately defending itself." Motion to Compel at 6. Respondent, however, already possesses a trove of information about the facts and theories underlying the Commission's Complaint.[10] As required under *Flowers Industries*, Complaint

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[8] *Cable & Computer Tech., supra*, at 652.

[9] The *Convergent Technology* court explained that "this court believes that the wisest course is not to preclude entirely the *early* use of contention interrogatories, but to place a burden of justification on a party who seeks answers to these kinds of questions." *In re Convergent Technologies, supra*, at 338.

[10] The vast majority of facts of this case are found in NTSP's own documents, to which Respondent has better access. The only documents produced by third parties total approximately two boxes, and include, in significant part, documents that NTSP itself should have produced.

Counsel has unquestionably put forth its "present concept of the theory of the case" and provided a current "roadmap" of where the case is headed. *In the Matter of Flowers Industries*, FTC No. 9148, 1981 FTC LEXIS 110 at *3 (October 7, 1981). The Commission's Complaint plainly alleges a broad pattern of concerted action by NTSP with and on behalf of its members, including practices such as joint negotiations with payors, sharing of current and future price information among physicians, refusals to "messenger" payor offers to members, and interference with the ability of payors to contract directly with NTSP members. Thus, Respondent's claims that the allegations set forth in the complaint do not allow NTSP to fully and adequately defend itself are without merit. If Respondent believed, however, that further detail was necessary, Respondent could have moved for a more definite statement of the complaint, but Respondent chose not to do so. At the initial conference before this Court, Complaint Counsel provided an even more detailed summary of its legal theory and the facts that it expects to prove at trial. Complaint Counsel also provided the initial disclosures required by the Rules of Practice, and Respondent did not object to the completeness of those disclosures. Respondent has not pursued any of the appropriate venues for a more definite statement, and should not be allowed to do so at this time.

III. Interrogatory Number 1 Should Be Quashed Because It Is an Improper Attempt to Restructure the Theory of the Case.[11]

Interrogatory Number 1 represents a deliberate effort by Respondent to misuse the contention interrogatory process in order to restructure the theory of the case in a self-serving

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[11] Complaint Counsel could conceivably respond to Interrogatory Number 2 at the close of fact discovery, insofar as the interrogatory seeks any information that will not already have been provided to Respondent in Complaint Counsel's exhibit lists, witness lists, and other materials required by this Court's Scheduling Order.

manner.[12] The purpose of a legitimate contention interrogatory is to ascertain the allegations that will be put forward by the other side, and the factual basis for those allegations. Here, however, Respondent has framed its interrogatory as if Complaint Counsel was alleging that NTSP, as a single entity, is conspiring with *other* doctors, and Respondent is in effect trying to obtain an implicit admission from Complaint Counsel that NTSP is such a single entity.[13] Our allegations are different. As Complaint Counsel has made clear numerous times, including but not limited to, the administrative complaint filed on September 17, 2003,[14] Complaint Counsel's opening statement at the initial conference before this Court on October 15, 2003, and in numerous conference calls with Respondent, Complaint Counsel's position is that NTSP is an organization comprised of competing members and that, insofar as its practices seek to affect the prices obtained by those physicians, NTSP acts as a combination of those members.[15] Moreover,

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[12] "Identify each and every communication between NTSP and any alleged coconspirator in which the coconspirator agreed that he or she would reject a payor offer, including the date, time, content, and participants of such communication." Interrogatory Number 1.

[13] Indeed, this alleged "contention interrogatory" appears to be more in the nature of a request that Complaint Counsel admit the truth of certain of *Respondent's* contentions, rather than a good faith effort to learn about Complaint Counsel's own allegations and evidence.

[14] *See* Complaint, In the Matter of North Texas Specialty Physicians, September 17, 2003, ¶¶ 11, 12, 17, 18, 19, 20, 21.

[15] For at least the last half century, trade and professional organizations have been presumed to constitute a combination of their members for the purpose of determining liability under § 1. *See, e.g. Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963); *AP v. US*, 326 U.S. 1 (1944). Based on these and other cases, the Commission has determined that there is "ample precedent for finding that individual professionals, acting through their organizations, can conspire or combine to violate the antitrust laws." *Michigan State Med. Soc'y*, 101 F.T.C. 191, 286 (1983). More recently, the Supreme Court upheld the Commission's finding of a § 1 violation against a

insofar as these physicians participate in NTSP acts to that end, they do so in combination with (and through) one another. So, for example, each action taken by NTSP, directly or by implication, that regulates the conduct of the members rather than NTSP, is deemed to be that of the members. For example, as Complaint Counsel has explained to Respondent, each and every communication or correspondence between NTSP and a member regarding price is responsive to Respondent's interrogatory, as are all contracts conferring exclusive powers of attorney to NTSP.

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professional organization of dentists in *Indiana Federation of Dentists*, 476 U.S. 447 (1986), including their factual finding that "members of the Federation conspired among themselves." *Id.* at 454. In all of those cases, the organizations were a conduit for a conspiracy by its members.

Courts have held specifically that a conspiracy is possible among doctors on medical staff committees, because doctors are independent economic actors with separate and competing economic interests. *See, e.g. Weiss v. York Hospital*, 745 F.2d 786 at 817 (3rd Cir. 1983), *cert. denied*, 470 U.S. 1060 (1985); *see also Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 704 (4th Cir. 1991) (holding that members of a medical staff are capable of conspiring because the staff is comprised of physicians with separate and sometimes competing interests); *Nurse Midwifery Ass'n v. Hibbett,* 918 F.2d 605, 613 (6th Cir. 1990); *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810, 819 (11th Cir. 1990) (holding that it is legally possible for members of a medical staff to conspire with each other, because each is a separate economic entity); *Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 118 (3rd Cir. 1988). The Second Circuit extended the reasoning of *Bolt* and *Oksanen* to apply to an independent association of private physicians operating as part of an IPA, arguing that the member doctors of the IPA are capable of competing for the purposes of establishing a § 1 violation. *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 544 (1993).

Conclusion

Respondent has ignored considerable legal precedent in making its motion to compel responses to its interrogatories. The Rules of Practice and well settled case law support a finding that Respondent's contention interrogatories are premature. Even if legal precedent could be relied on to support Respondent's motion, however, Interrogatory Number 1 should be quashed because it is an attempt by Respondent to refashion the theories of this case. For these reasons, Complaint Counsel respectfully requests this Court, therefore, deny Respondent's Motion to Compel Responses to Interrogatories in its entirety.

Dated: November 17, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christine Rose, hereby certify that on November 17, 2003, I caused a copy of the foregoing document to be served upon the following persons:

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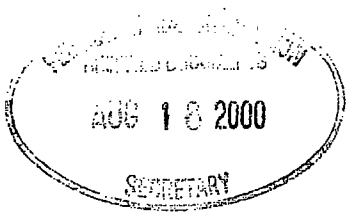
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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.	)	

ORDER ON RESPONDENT ANDRX'S MOTION TO COMPEL COMPLAINT COUNSEL TO RESPOND TO INTERROGATORIES

I.

On June 5, 2000, pursuant to Commission Rule 3.36, Respondent Andrx Corporation ("Andrx") filed a motion for an order compelling Complaint Counsel to respond to interrogatories. Complaint Counsel filed its opposition on June 19, 2000. Oral arguments of counsel were heard on August 3, 2000. For the reasons set forth below, Respondent's motion is DENIED except as stated herein.

Andrx seeks an order requiring Complaint Counsel to: (1) provide more complete responses to sixteen contention interrogatories (numbers 1, 3, 7 - 20), or in the alternative, be precluded from proceeding at trial on any bases beyond those set forth in the answers; (2) respond to interrogatories relating to agreements in other patent litigations (numbers 5 and 6); and (3) explain the Commission's reason to believe that this proceeding is in the interest of the public (number 4).

II.

Andrx asserts that Complaint Counsel's responses to Interrogatory Numbers 1, 3, 7 - 20 are incomplete and couched with language reserving the right to modify its contentions at some later point. Complaint Counsel's responses to Andrx's contention interrogatories are adequate at this stage of the litigation. Andrx's request for an order precluding Complaint Counsel from proceeding at trial on bases either inconsistent with or in addition to those set forth in its interrogatory answers is denied. However, Complaint Counsel is ordered to supplement its responses to these interrogatories as soon as it has any information inconsistent with, or in addition to, its previous responses, and no later than October 2, 2000. All parties are reminded of their duty to seasonably amend prior responses to interrogatories, requests for production or requests for admission, pursuant to Rule 3.31(e). 16 C.F.R. § 3.31(e). Parties shall not wait until the close of discovery to make supplemental responses.

III.

Interrogatory No. 5 asks Complaint Counsel to identify other settlements or partial settlements of patent litigation, of which the FTC is aware, involving an innovator or brand-name pharmaceutical company and a generic company that involved any form of: payment from a brand-name company to the generic company; or licensing and/or royalty arrangement between the brand-name company and the generic company.

The existence of other nonpublic FTC investigations into any such settlement agreements is shielded from discovery under the work product privilege, the investigatory files privilege, and the deliberative process privilege. *See* Order on Motions to Compel Discovery from Complaint Counsel Filed by Andrx and by Aventis, Docket 9293, issued August 18, 2000. These qualified privileges may be overcome by a demonstration of substantial need. *Id.* Andrx has not made the requisite showing at this stage of the litigation since Andrx may discover such agreements or information from sources other than from the FTC's confidential files. *Seeburg Corp.*, 70 F.T.C. 1809, 1812-13 (Oct. 25, 1966).

Complaint Counsel will not be compelled to answer Interrogatory No. 5. However, if Complaint Counsel intends to use any such agreement in the prosecution of this case or if any such agreement has been relied upon or reviewed by a testifying expert for Complaint Counsel, Complaint Counsel must disclose the existence of any such agreement by providing the names of all parties thereto. *See Dura Lube Corp.*, 2000 FTC LEXIS 1, *18-19 (Dec. 15, 1999).

Interrogatory No. 6 asks Complaint Counsel to describe each basis for concluding whether or not any settlement identified in Interrogatory No. 5 is or was an unfair method of competition or unfair or deceptive act or practice in or affecting commerce. This interrogatory

inquires into the mental processes of attorneys and thus seeks privileged information. *Kroger Co.*, 1977 FTC LEXIS 55, *3-4 (October 27, 1977) (The Commission's or its staff's views, policy considerations, analyses, interpretations or evaluations are privileged work products not generally subject to pretrial discovery except in cases where good cause or special need therefor is established.). *See also* Order on Motions to Compel Discovery from Complaint Counsel filed by Andrx and by Aventis, Docket No. 9293, issued August 18, 2000. Accordingly, Complaint Counsel will not be compelled to answer Interrogatory No. 6.

IV.

Interrogatory No. 4, relating to the Commission's reason to believe that this proceeding is in the public interest, is outside the scope of discovery. *Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974). Andrx has not shown the compelling circumstances required to gain access to the Commission's deliberations. *Chock Full O' Nuts Corp., Inc.*, 82 F.T.C. 747, 748 (1973). Accordingly, Complaint Counsel will not be compelled to respond to this interrogatory.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: August 18, 2000

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 RESPONSES AND OBJECTIONS TO RESPONDENT ANDRX CORPORATION'S FIRST SET OF INTERROGATORIES

In accordance with section 3.35 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.35, complaint counsel hereby respond to respondent Andrx Corporation's First Set of Interrogatories. The full text of each interrogatory is set out below, *in italics*, followed by our respective objections and responses. Our provision of a response to any interrogatory shall not constitute a waiver of any applicable objection, privilege, or other right.

General Objection

Complaint counsel has attempted to answer Andrx's First Set of Interrogatories as completely and accurately as is reasonably possible. Complaint counsel's answers, however, are subject to the following general objection to this entire set of interrogatories (and hence complaint counsel will not repeat this objection in each response):

Complaint counsel object to Andrx's First Set of Interrogatories to the extent that they are excessively broad and therefore are unreasonably burdensome. For example, the majority of the interrogatories request complaint counsel to describe in detail or identify "each basis" for our responses. To the extent an interrogatory asks for "each basis" in a response, our response to such an interrogatory is not intended to be exhaustive or to be admissions that other facts or bases are not supportive or relevant. Complaint counsel has, however, expended reasonable efforts to answer these interrogatories to the best of our abilities.

Responses and Specific Objections to Interrogatories

Complaint counsel object to each and every interrogatory on the basis of the general objection stated above. Without waiving this general objection (but without restating it in each and every response), complaint counsel provide the following answers:

Interrogatory No. 1

Describe in detail each anticompetitive effect, if any, the FTC contends was the result of or caused by, directly or indirectly, the alleged anticompetitive conduct of respondents, as set forth in the Complaint, including, without limitation, any actual increase in price, restriction on output, foreclosure of entry into the market, or any other consequence.

Response to Interrogatory No. 1

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 1 as premature to the extent it asks us to identify, prior to the completion of discovery, each anticompetitive effect that we will contend was the result of, or caused by, directly or indirectly, the alleged anticompetitive conduct of respondents. Complaint counsel further object to Interrogatory No. 1 as premature to the extent it seeks information prepared by an expert who may testify in this matter.

Subject to these objections, as far as complaint counsel is presently aware, the anticompetitive conduct of respondents had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and to injure competition and consumers by preventing or discouraging the entry of competition in the form of generic versions of Cardizem CD into the relevant market, decreasing the output of generic Cardizem CD products, raising or stabilizing the prices of Cardizem CD, and eliminating or reducing consumer choice.

On September 24, 1997, respondents entered into the September 1997 Stipulation. Under this agreement, HMR, Carderm, and Andrx agreed among themselves that Andrx would not enter the market with the generic version of Cardizem CD covered by its Abbreviated New Drug Application (ANDA) until the earlier of (1) the entry of final judgment in the patent lawsuit, (2) Andrx obtaining a license from HMR under the terms and conditions specified in the September 1997 Stipulation, or (3) HMR providing notice that it intended to license a third party or sell its own bioequivalent or generic version of Cardizem CD. In the September 1997 Stipulation, Andrx also agreed – at HMR's insistence – to refrain from selling any other bioequivalent or generic version of Cardizem CD, regardless of whether such product would infringe HMR's or Carderm's patents. In addition, Andrx agreed not to withdraw its pending ANDA or to relinquish or otherwise compromise any right accruing under its ANDA, including its 180-day exclusivity right, until the entry of final judgment in the Florida Patent Action.

By prohibiting Andrx from commencing the commercial sale of not only the product subject to the patent infringement suit, but also of any bioequivalent or generic version of Cardizem CD during the term of the agreement, the September 1997 Stipulation had the purpose, as well as the intended or likely effect, of deterring Andrx from developing and selling any non-

infringing or potentially non-infringing version of its generic Cardizem CD product. By prohibiting Andrx from withdrawing its pending ANDA or relinquishing or otherwise compromising any right accruing under its ANDA, including its right to 180 days of generic market exclusivity, until the entry of final judgment in the patent lawsuit, the September 1997 Stipulation had the purpose, as well as the intended or likely effect, of deterring Andrx from relinquishing its eligibility to the 180-day period of exclusivity under the Hatch-Waxman Act.

Had the September 1997 Stipulation not been terminated in June 1999, it likely would have delayed entry by Andrx for a minimum of seven months, from June 1999 until January 2000, if not later. Even if Andrx had entered in January 2000 pursuant to paragraph 6 of the stipulation, the competitive significance of its entry would have been diminished by the requirements of paying licensing royalties to HMR. In addition, had the September 1997 Stipulation not been terminated in June 1999, it likely would have delayed entry by Faulding or Biovail for a minimum of seven months, from December 1999 until July 2000, if not later.

Interrogatory No. 2
Identify each person, by name and address, with whom the FTC communicated in connection with any investigation concerning Andrx or the 1997 Stipulation; and, for each such person, describe in detail the substance of any information the FTC ascertained from the person.

Response to Interrogatory No. 2

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 2 on the grounds that it calls for information protected by the work product doctrine. Complaint counsel further object to Interrogatory No. 2 on the grounds that it calls for information the disclosure of which would reveal the identity of confidential informants. Complaint counsel further object to Interrogatory No. 2 on the grounds that it calls for

information the disclosure of which would invade the deliberative process of the Commission. Complaint counsel further object to Interrogatory No. 2 on the basis that it calls for information acquired through compulsory process, or produced voluntarily in lieu of compulsory process, in investigations other than the Commission's investigation of the September 1997 Stipulation, FTC File Number 981-0368. All information learned in any investigation besides FTC File Number 981-0368 is privileged and confidential under 15 U.S.C. §§ 46(f), 57b-2(b), and 18a(h) as well as 16 C.F.R. § 4.10(d).

Subject to these objections, complaint counsel state that we communicated with insurance companies, managed care organizations, physicians, pharmaceutical manufacturers and sellers, state and federal government agencies, and group purchasing organizations. We discussed, among other things, issues relating to generic substitution of brand name pharmaceutical products, substitution among once-a-day diltiazem products, substitution between once-a-day diltiazem products and other calcium channel blocker ("CCB") products, substitution between once-a-day diltiazem products and other drug products that treat hypertension or angina, and the likely effects of the September 1997 Stipulation on the entry of generic Cardizem CD. From these discussions, we learned the following general information which supports our allegation that once-a-day diltiazem is a relevant product market in which to assess the likely or actual anticompetitive effects stemming from the September 1997 Stipulation:

- Cardizem CD and generic versions of Cardizem CD have been determined by the Food and Drug Administration to be bioequivalent, contain the same active pharmaceutical ingredient, and act similarly in the body, so that they are virtually identical in safety, efficacy, and side effects.

- Sales of generic versions of Cardizem CD come almost exclusively at Cardizem CD's expense, with little or no effect on other drugs approved for the treatment of hypertension or angina.

- Generic products tend to be significantly less expensive than their brand-name counterparts.

- Pharmacists may, and in some cases are required to, substitute generic versions of Cardizem CD for Cardizem CD without obtaining authorization from a physician. In contrast, pharmacists cannot substitute other drugs for Cardizem CD without obtaining authorization from a physician.

- Once-a-day diltiazem products cannot be reasonably substituted with products from other CCB product categories. Although all CCBs are indicated for the treatment of hypertension, the CCB class is a diverse group of drugs with different chemical structures and effects. CCBs typically are classified into three distinct categories: benzothiazepines (diltiazem), phenylalkylamines (verapamil), and dihydropyridines. Each of these categories of drugs contain different active pharmaceutical ingredients, may react differently in the body, or are associated with different side effects.

- Although immediate release and twice-daily formulations of diltiazem deliver the same active ingredient to the patient as once-a-day versions, they are not reasonable substitutes for several reasons. Primarily, the once-a-day formulation is superior to other formulations because it increases patient compliance. For a disease such as hypertension, compliance is critical to successful treatment. Non-compliance has an adverse effect on a patient's health, resulting in the inability to control blood pressure, which in turn increases stress on the arteries. The once-a-day formulation provides not only convenience and greater compliance, but also is believed to have greater therapeutic efficacy because of the more consistent level of the drug maintained in the patient's blood stream throughout a 24-hour period.

In support of this general information, complaint counsel refer Andrx to the documents submitted by Andrx in the pre-complaint investigation of this matter, as well as the documents we produced as part of our initial disclosures, including, but not limited to: Andrx 000922-000968; Andrx 004661-004671; Andrx 005164-005182; Andrx 008487-8523; HMRI Spec 10 001790; HMRI S17 001023; HMRI S18 000217-220; HMRI Spec 19 001790; HMRI S19 002732-002737; HMRI Spec 20 Stratemeier 00181-00190; and Astra Response to CID No. 3.

Interrogatory No. 3

Describe in detail each basis, if any, for concluding that respondents have used or have been using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, as such terms are issued in Section 5(b) of the FTC Act, 15 U.S.C. § 45.

Response to Interrogatory No. 3

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 3 as premature to the extent its asks us to describe in detail, prior to the completion of discovery, each basis for concluding that respondents have used or have been using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, as such terms are used in Section 5(b) of the FTC Act, 15 U.S.C. § 45. Complaint counsel further object to Interrogatory No. 3 on the grounds that it calls for a legal conclusion. Complaint counsel further object to Interrogatory No. 3 as premature to the extent it seeks information prepared by an expert who may testify in this matter.

Subject to these objections, as far as complaint counsel is presently aware, the following are bases for concluding that respondents have used or have been using such unfair method or unfair or deceptive act or practice.

First, respondents entered into an agreement – the September 1997 Stipulation – that had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and to injure competition and consumers by preventing or discouraging the entry of competition in the form of generic versions of Cardizem CD into the relevant market by preventing or decreasing the output of generic Cardizem CD products, raising or stabilizing the prices of Cardizem CD, and eliminating or reducing consumer choice.

Beginning in late July 1997, representatives of HMR and Andrx engaged in discussions of a possible agreement, pursuant to which Andrx would agree to refrain from bringing a generic version of Cardizem CD to market for a specific period of time. On September 24, 1997, HMR, Carderm, and Andrx entered into their September 1997 Stipulation. Under the stipulation, HMR, Carderm, and Andrx agreed among themselves that Andrx would not enter the market with the generic version of Cardizem CD covered by its ANDA until the earlier of (1) the entry of final judgment in the Florida Patent Action, (2) Andrx obtaining a license from HMR under the terms and conditions specified in the September 1997 Stipulation, or (3) HMR providing notice that it intended to license a third party or sell its own bioequivalent or generic version of Cardizem CD. In the September 1997 Stipulation, Andrx also agreed – at HMR's insistence – to refrain from selling any other bioequivalent or generic version of Cardizem CD, regardless of whether such product would infringe HMR's or Carderm's patents. In addition, Andrx agreed not to withdraw its pending ANDA or to relinquish or otherwise compromise any right accruing under its ANDA, including its 180-day exclusivity right, until the entry of final judgment in the Florida Patent Action.

In exchange for Andrx's various agreements, HMR agreed to pay Andrx $10 million per quarter beginning upon final FDA approval of Andrx's ANDA (*i.e.*, once Andrx could otherwise market) and continuing until the occurrence of either (1), (2) or (3) described above in the preceding paragraph. The September 1997 Stipulation also provided that, should HMR lose the patent infringement suit, HMR would pay Andrx an additional $60 million per year for that same time period.

In the event Andrx breached any of its obligations under the September 1997 Stipulation, it was required to repay all amounts received. For example, if Andrx breached one of its obligations one year after receiving final FDA approval, it would be required to repay $40 million to HMR. In addition, by its terms, the September 1997 Stipulation would terminate in the event of a breach by Andrx, thus extinguishing any right of Andrx to receive an additional payment should it prevail in the patent lawsuit, or to exercise a license should it lose the lawsuit.

On July 9, 1998, the FDA granted final approval for Andrx's ANDA for a generic version of Cardizem CD. This approval permitted Andrx to begin the marketing and sale of its generic version of Cardizem CD immediately. In accordance with the terms of the September 1997 Stipulation, Andrx did not begin commercial sale of its generic product. As a result, pursuant to the terms of the stipulation, HMR began making quarterly payments of $10 million to Andrx.

In short, the September 1997 Stipulation was an agreement between competitors or potential competitors, whereby one party to the agreement was paid by the other not to compete. In light of Andrx's right to 180 days of marketing exclusivity and Andrx's agreement not to relinquish this right, the September 1997 Stipulation also acted to block entry from all potential forms of generic competition.

Second, HMR, Andrx, and Cardem acted with the specific intent that HMR monopolize the relevant market. The respondents implemented a plan calculated to exclude competitors or potential competitors from the market. They designed an agreement that was structured specifically to forestall the entry of generic competition to Cardizem CD. Both HMR and Andrx acted consistent with their obligations under the September 1997 Stipulation. For instance, consistent with the agreement, Andrx did not market its generic version of Cardizem CD upon

final FDA approval, in return for which HMR paid to Andrx $10 million per quarter. Moreover, HMR introduced to the agreement certain additional restrictive provisions. For instance, HMR insisted that the agreement include restraints on Andrx's ability (i) to market any generic version of Cardizem CD or (ii) to relinquish its right to 180 days of market exclusivity. Andrx knew – or should have known – that the September 1997 Stipulation would perpetuate HMR's monopoly power in the relevant market.

At the same time it was negotiating the September 1997 Stipulation, HMR also attempted to negotiate an agreement with Biovail. Shortly after Biovail filed an ANDA to market a generic version of Cardizem CD, HMR offered to pay Biovail to refrain from marketing a generic version of Cardizem CD until at least July 1999.

Complaint counsel refer Andrx to the documents submitted by Andrx in the pre-complaint investigation of this matter, as well as the documents we produced as part of our initial disclosures, including, but not limited to: August 10, 1997 correspondence from James M. Spears to Lou Solomon (the correspondence does not have Bates numbers); Andrx 01385-01675; Andrx 004291-004300; Andrx 004307-004308; Andrx 004344-004346; Andrx 004351-004352; Andrx 004358-004360; Andrx 004362-004365; Andrx 004369-004376; Andrx 004382-004384; Andrx 004403-004407; Andrx 04389-04392; Andrx 04397-04399; Andrx 004411-004414; Andrx 004418-004419; HMRI S8 000014-000023; GADS030661-030665; GADS030666-030680; and BVL0000001-0008080.

Interrogatory No. 4

Describe in detail each basis, if any, for concluding that it appears that the Action is in the interest of the public, as such terms are used in Section 5(b) of the FTC Act, 15 U.S.C. § 45.

Response to Interrogatory No. 4

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 4 on the grounds that it calls for information the disclosure of which would invade the deliberative process of the Commission. Complaint counsel further object to Interrogatory No. 4 on the grounds that it calls for information beyond the scope of discovery.

> It has long been settled that the adequacy of the Commission's "reason to believe" a violation of law has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. *Exxon Corp.*, 83 F.T.C. 1759, 1760 (Order Denying Reconsideration, June 4, 1974)

Interrogatory No. 5
Identify each other settlement or partial settlement of patent litigation, concerning which the FTC is aware, involving an innovator or brand name pharmaceutical company, and a generic company, that involved any form of: payment from a brand name company to the generic company; or licensing and/or royalty arrangement between the brand name company and the generic company.

Response to Interrogatory No. 5

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 5 on the grounds that it calls for information beyond the scope of discovery. Complaint counsel further object to Interrogatory No. 5 on the grounds that it calls for information which is protected by the work product doctrine. Complaint counsel further object to Interrogatory No. 5 on the grounds that it calls for information the disclosure of which would invade the deliberative process of the Commission. Complaint counsel further object to Interrogatory No. 5 on the grounds that the information is protected under the law enforcement investigatory file privilege. Complaint counsel further object to Interrogatory No. 5 on the basis

that is calls for information acquired through compulsory process, or produced voluntarily in lieu of compulsory process, in investigations other than the Commission's investigation of the September 1997 Stipulation, File Number 981-0368. All information learned in any investigation besides FTC File Number 981-0368 is privileged and confidential under 15 U.S.C. §§ 46(f), 57b-2(b), and 18a(h) as well as 16 C.F.R. § 4.10(d).

Subject to these objections, complaint counsel states that we are aware of the September 1997 Stipulation.

Interrogatory No. 6
For each settlement or partial settlement of a patent litigation identified in Interrogatory No. 5 above, describe in detail each basis for concluding whether or not the settlement is or was an unfair method of competition or unfair or deceptive act or practice in or affecting commerce, as such terms are used in Section 5(b) of the FTC Act.

Response to Interrogatory No. 6

Complaint counsel refer Andrx to our response to Interrogatory No. 3.

Interrogatory No. 7
Describe in detail each basis, if any, for your allegation in paragraph 12 of the Complaint that "[a] relevant product market for assessing respondents' anticompetitive conduct is once-a-day diltiazim", and identify, for that alleged market, the number of wholesalers; amount of annual sales by wholesalers to retailers; number of retailers; and amount of annual sales by retailers to individual consumers.

Response to Interrogatory No. 7

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 7 as premature to the extent it asks us to identify, prior to the completion of discovery, each basis for concluding that "[a] relevant product market for assessing respondents' anticompetitive conduct is once-a-day diltiazem." Complaint counsel further object to Interrogatory No. 7 as premature to the extent it seeks information prepared by an expert who

may testify in this matter. Complaint counsel further object to Interrogatry No. 7 on the grounds that it calls for information of which neither complaint counsel nor the Commission is aware. Complaint counsel further object to Interrogatory No. 7 on the grounds that it places an unreasonable burden on us. We do not have the information to identify, for the alleged market, the number of wholesalers, amount of annual sales by wholesalers to retailers, number of retailers, and amount of annual sales by retailers to individual consumers. This information is more readily available to Andrx than to complaint counsel, as Andrx has greater access to data (such as IMS data) and other resources which would identify the relevant information sought.

Subject to these objections, complaint counsel states the following in support of our allegation that "[a] relevant product market for assessing respondents' anticompetitive conduct is once-a-day diltiazem."

- Cardizem CD and generic versions of Cardizem CD have been determined by the Food and Drug Administration to be bioequivalent, contain the same active pharmaceutical ingredient, and act similarly in the body, so that they are virtually identical in safety, efficacy, and side effects.

- Sales of generic versions of Cardizem CD come almost exclusively at Cardizem CD's expense, with little or no effect on other drugs approved for the treatment of hypertension or angina. For instance, both HMR and Andrx – prior to the entry of generic competition – expected that the introduction of generic Cardizem CD would have a significant and profound effect on the sales of Cardizem CD. HMR forecasted that a generic version of Cardizem CD would capture roughly 40% of Cardizem CD sales within the first year, and nearly 70% after two years. (See e.g., HMRI S18 000217-220 and HMRI S19 002733, 004661). Andrx forecasted generic penetration at 43.75% of Cardizem CD sales after one year, reaching 66.10% after two years. (See e.g., Andrx 000922-000968, 000953).

- Generic products tend to be significantly less expensive than their brand-name counterparts. For instance, Andrx forecasted that upon its launch of a generic version of Cardizem CD, it would price the product at a 28-40% discount off Cardizem CD. (See Andrx 000922-000968)

- Pharmacists may, and in some cases are required to, substitute generic versions of Cardizem CD for Cardizem CD without obtaining authorization from a physician. In contrast, pharmacists cannot substitute other drugs for Cardizem CD without obtaining authorization from a physician.

- Once-a-day diltiazem products cannot be reasonably substituted with products from other CCB product categories. Although all CCBs are indicated for the treatment of hypertension, the CCB class is a diverse group of drugs with different chemical structures and effects. CCBs typically are classified into three distinct categories: benzothiazepines (diltiazem), phenylalkylamines (verapamil), and dihydropyridines. Each of these categories of drugs contain different active pharmaceutical ingredients, may react differently in the body, or are associated with different side effects.

- Although immediate release and twice-daily formulations of diltiazem deliver the same active ingredient to the patient as once-a-day versions, they are not reasonable substitutes for several reasons. Primarily, the once-a-day formulation is superior to other formulations because it increases patient compliance. For a disease such as hypertension, compliance is critical to successful treatment. Non-compliance has an adverse effect on a patient's health, resulting in the inability to control blood pressure, which in turn increases stress on the arteries. The once-a-day formulation provides not only convenience and greater compliance, but also is believed to have greater therapeutic efficacy because of the more consistent level of the drug maintained in the patient's blood stream throughout a 24-hour period.

- Andrx alleged a relevant product market of diltiazem in its counterclaim to HMR's patent infringement suit. (See Andrx's answer in the Florida Patent Action)

Interrogatory No. 8

Describe in detail the definition and scope of the market (or markets) for calcium channel blockers, ace inhibitors and beta blockers, including, without limitation, the identity of any pharmaceutical products that allegedly or actually competes with, may be substituted for, or otherwise provide an alternative for Cardizem CD and/or Cartia XT.

Response to Interrogatory No. 8

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 8 as premature to the extent it asks us to describe, prior to the completion of discovery, the definition and scope of the market (or markets) for calcium channel blockers, ace inhibitors, and beta blockers. Complaint counsel further object to Interrogatory No. 8 on the

grounds that it asks for a legal conclusion. Complaint counsel further object to Interrogatory No. 8 as premature to the extent it seeks information prepared by an expert who may testify in this matter.

Subject to these objections, as far as complaint counsel is presently aware, the relevant product market, as alleged in the complaint, is no broader than once-a-day diltiazem products. In addition, narrower relevant product markets may be contained within the market for once-a-day diltiazem, including a market of Cardizem CD and generic or bioequivalent versions of Cardizem CD.

Once-a-day diltiazem products include the following brand-name products and all generic versions thereof: Cardizem CD, Dilacor XR, and Tiazac.

Other CCB products, which are not part of the once-a-day diltiazem market, include the following brand-name products and all generic versions thereof: Adalat CC, Cardene SR, Cardene, Dynacirc CR, Dynacirc, Norvasc, Plendil, Procardia XL, Procardia, Sular, Calan SR, Calan, Covera HS, Isoptin SR, Isoptin, Verelan PM, Verelan, Cardizem SR, and Cardizem.

Ace inhibitors, which are not part of the once-a-day diltiazem market, include the following brand-name products and all generic versions thereof: Accupril, Aceon, Altace, Capoten, Lotensin, Mavik, Monopril, Prinivil, Univasc, Vasotec, and Zestril.

Beta blockers, which are not part of the once-a-day diltiazem market, include the following brand-name products and all generic versions thereof: Betachron E-R, Blocadren, Corgard, Inderal, Kerlone, Lopressor, Tenormin, Toprol XL, and Zebeta.

Interrogatory No. 9

For entities or individuals who purchased Cardizem CD, including wholesalers, retailers and individual consumers, identify the extent, if any, that prices paid were artificially inflated or

otherwise exceeded what the prices otherwise would have been by reason of defendants' alleged anticompetitive conduct, and describe in detail the basis for your contention; how this amount was calculated; any formula used in making the calculation; the sources of any data; and state all facts and assumptions on which you base such answer.

Response to Interrogatory No. 9

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 9 on the grounds that it calls for information beyond the scope of discovery. Complaint counsel further object to Interrogatory No. 9 as premature to the extent it seeks information by an expert who may testify in this matter. Complaint counsel further object to Interrogatory No. 9 as premature to the extent its asks us to identify, prior to the completion of discovery, the extent, if any, that prices paid were artificially inflated or otherwise exceeded what the prices otherwise would have been by reason of respondents' alleged anticompetitive conduct.

Subject to these objections, the evidence indicates that Andrx would have priced its generic version of Cardizem CD, upon launching the product, at a 28-40% discount off the brand name product. (See Andrx 000922-000968).

The September 1997 Stipulation, at the time of its inception and execution, was likely to foreclose entry of – or raise barriers to – lower-cost generic versions of Cardizem CD, by reducing or eliminating Andrx's incentives to launch its original product, to develop and sell any non-infringing or potentially non-infringing version of its generic Cardizem CD product, and to relinquish or otherwise compromise its right to 180 days of market exclusivity. Indeed, had the parties not terminated the September 1997 Stipulation in June 1999, the agreement likely would have delayed Andrx's entry by at least seven months, if not substantially longer. As a result, this agreement, had it not been terminated under pressure from the Commission, was likely to

artificially inflate prices in the once-a-day diltiazem market by at least 28-40% (see Andrx 000922-000968), decrease the output of generic Cardizem CD products, and eliminate or reduce consumer choice.

Interrogatory No. 10

Describe in detail the relationship, if any, which you contend exists between (a) the degree to which, if any, the prices paid for Cardizem CD by wholesalers or retailers were higher than they would have been in the absence of defendants' alleged anticompetitive conduct, and (b) the degree to which, if any, the prices paid by individual consumers for Cardizem CD exceeded what they otherwise would have been.

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 10 on the grounds that it calls for information beyond the scope of discovery. Complaint counsel further object to Interrogatory No. 10 as premature to the extent it seeks information by an expert who may testify in this matter. Complaint counsel further object to Interrogatory No. 10 as premature to the extent it asks us to identify, prior to completion of discovery, each basis for detailing the relationship which we may contend between (a) the degree to which, if any, the prices paid for Cardizem CD by wholesalers or retailers were higher than they would have been in the absence of respondents' alleged anticompetitive conduct, and (b) the degree to which, if any, the prices paid by individual consumers for Cardizem CD exceeded what they otherwise would have been.

Subject to these objections, complaint counsel state that the September 1997 Stipulation, at the time of its inception and execution, was likely to foreclose entry of – or raise barriers to – lower-cost generic versions of Cardizem CD. Indeed, had the parties not terminated the September 1997 Stipulation in June 1999, the agreement likely would have delayed Andrx's entry by at least seven months, if not substantially longer. As a result, this agreement, had it not

been terminated, was likely to artificially inflate prices in the once-a-day diltiazem market by at least 28-40% (See Andrx 000922-000968), decrease the output of generic Cardizem CD products, and eliminate or reduce consumer choice.

Complaint counsel refer Andrx to the documents submitted by Andrx in the pre-complaint investigation of this matter, as well as the documents we produced as part of our initial disclosures, including, but not limited to: Andrx 004661-004671; Andrx 005164-005182; Andrx 000922-000968; HMRI S19 002732-002737; and HMRI Spec 20 Strateneier 00181-00190.

Interrogatory No. 11
Describe in detail the relationship, if any, which the FTC contends exists, between the price(s) of a brand name pharmaceutical product and the price of one or more generic versions of such a product.

Response to Interrogatory No. 11

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 11 on the grounds that it calls for information beyond the scope of discovery. Complaint counsel further object to Interrogatory No. 11 on the grounds that it is premature to the extent it seeks information prepared by an expert who may testify in this matter. Complaint counsel further object to Interrogatory No. 11 on the grounds that it is premature to the extent it seeks information concerning the relationship, prior to completion of discovery, between the price(s) of a brand name pharmaceutical product and the price of one or more generic versions of such a product.

Subject to these objections, as far as complaint counsel is presently aware, the prices of generic products are significantly lower than their brand-name counterparts. Andrx's own documents indicate that it projected that it would price its generic version of Cardizem CD, upon

launching the product, at a 28-40% discount off the brand name product. (See Andrx 000922-000968). See e.g., Roy Levy, "The Pharmaceutical Industry: A Discussion of Competitive and Antitrust Issues in an Environment of Change," (March 1999) available on the Commission's web site (www.ftc.gov).

Interrogatory No. 12
Does the FTC contend that the alleged anticompetitive conduct, as set forth in the Complaint, constitutes, either in whole or in part, a "per se" violation of any laws; if so, describe in detail each basis, if any, for such a contention.

Response to Interrogatory No. 12

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 12 as premature to the extent it seeks, prior to completion of discovery, "each basis" that the alleged anticompetitive conduct, either in whole or in part, is illegal *per se*. Complaint counsel further object to Interrogatory No. 12 on the grounds that it calls for a legal conclusion.

Subject to these objections, as far as complaint counsel is presently aware, the September 1997 Stipulation is a market division or allocation and is *per se* illegal under Section 1 of the Sherman Act. It is a written agreement between competitors or potential competitors in which one party is paid by the other not to compete in the United States. The agreement is not justified by any countervailing efficiencies.

Interrogatory No. 13
Does the FTC contend that the alleged anticompetitive conduct, as set forth in the Complaint, constitutes, either in whole or in part, a violation of any laws based on a "rule of reason" analysis; if so, describe in detail each basis, if any, for such a contention.

Response to Interrogatory No. 13

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 13 as premature to the extent it seeks, prior to completion of discovery, "each basis" that the alleged anticompetitive conduct, either in whole or in part, is illegal based on a "rule of reason analysis." Complaint counsel further object to Interrogatory No. 13 on the grounds that it calls for a legal conclusion.

Subject to these objections, as far as complaint counsel is presently aware, the September 1997 Stipulation is illegal under a rule of reason analysis. The respondents entered into an agreement – the September 1997 Stipulation – that had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and to injure competition and consumers by preventing or discouraging the entry of competition in the form of generic versions of Cardizem CD into the relevant market, decreasing the output of generic Cardizem CD products, raising or stabilizing the prices of Cardizem CD, and eliminating or reducing consumer choice. The September 1997 Stipulation has no countervailing pro-competitive justification. It does not contain any substantial efficiency enhancing integrations, nor does it enhance consumer welfare. The only benefits stemming from the stipulation were realized by HMR and Andrx: HMR was guaranteed that no generic competitors would challenge its Cardizem CD, and Andrx was paid $89 million in return for not entering, or facilitating entry into, the market.

Interrogatory No. 14
Describe in detail each basis, if any, for concluding that Andrx would have entered the market with a generic version of Cardizem CD in the absence of the 1997 Stipulation.

Response to Interrogatory No. 14

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 14 on the grounds that it calls for information beyond the scope of discovery. Complaint counsel further object to Interrogatory No. 14 as premature to the extent it seeks information by an expert who may testify in this matter. Complaint counsel further object to Interrogatory No. 14 on the grounds that it is premature to the extent it asks, prior to completion of discovery, for each basis for concluding that Andrx would have entered the market with a generic version of Cardizem CD in the absence of the September 1997 Stipulation.

Subject to these objections, complaint counsel refer Andrx to its own signed memorandum of law submitted to a court in the Florida Patent Action, in which Andrx states that it "intends to manufacture and sell its once-a-day diltiazem composition as soon as it receives FDA approval." (See HMRI S7 002984-003000, 002993) In the course of its patent litigation with HMR, Andrx consistently maintained that the generic version of Cardizem CD for which it filed an ANDA would not infringe any valid patent listed in the Orange Book claiming Cardizem CD. Complaint counsel refer Andrx to the documents submitted by Andrx in the pre-complaint investigation of this matter, as well as the documents we produced as part of our initial disclosures, including, but not limited to:

- Andrx's Notice of Certification of Non-Infringement of a Patent Under 21 C.F.R. § 314.95, HMRI S7 003129-3133;
- Andrx's Patent Certification and Exclusivity Statement, 2199-2200;
- January 17, 1996 Letter from David Gardner to the Office of Generic Drugs, 2068-2077;
- Protocol # AX-102596-1 To: Andrx Pharmaceuticals Inc. For: Manufacture of Diltiazem Capsules Once-Per-Day According to Patent No. 5,364,620, 007608-7613; 2068-2077;

- Andrx's Answer HMRI Spec 20 Hoskins 00230-00266;
- Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction, HMRI S7 001044-001062;
- Defendant's Motion for Summary Judgment on the Issue of Non-Infringement with Supporting Memorandum of Law, HMRI S7 001656-001678;
- Affidavit of Chih-Ming Chen in Support of Defendant's Motion for Summary Judgment on the Issue of Non-Infringement, HMRI S7 001599-001607; and
- Defendant's Reply Memorandum of Law in Support of its Motion for Summary Judgment on the Issue of Invalidity, HMRI S7 002803-002815).

Interrogatory No. 15
Describe in detail each basis, if any, for concluding that some person other than respondents herein, whether Biovail, Faulding, or another person, would have entered the market with a generic version of Cardizem CD in the absence of the 1997 Stipulation.

Response to Interrogatory No. 15

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 15 on the grounds that it calls for information beyond the scope of discovery. Complaint counsel further object to Interrogatory No. 15 on the grounds that it is premature to the extent its asks, prior to completion of discovery, for "each basis" concluding that some person other than respondents herein, whether Biovail, Faulding, or another person, would have entered the market with a generic version of Cardizem CD in the absence of the 1997 Stipulation.

Subject to these objections, as far as complaint counsel is presently aware, the September 1997 Stipulation had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and to injure competition and consumers by preventing or discouraging the entry of competition in the form of generic versions of Cardizem CD into the relevant market, decreasing the output of generic Cardizem CD products, raising or stabilizing the prices of Cardizem CD,

and eliminating or reducing consumer choice. Under the September 1997 Stipulation, Andrx agreed not to market any generic version of Cardizem CD, regardless of whether the product infringed any of HMR's patents. In addition, Andrx agreed not to relinquish or otherwise compromise its right to 180 days of market exclusivity. By prohibiting Andrx from commencing the commercial sale of not only the product subject to the patent infringement suit, but also of any bioequivalent or generic version of Cardizem CD during the term of the agreement, the September 1997 Stipulation had the purpose, as well as the intended or likely effect, of deterring Andrx from developing and selling any non-infringing or potentially non-infringing version of its generic Cardizem CD product. Had the respondents not abandoned their agreement under pressure from the Commission, Andrx likely would not have marketed its product until January 2000 at the earliest, when it was eligible (but not required) to exercise a license. Even if Andrx had come to market in January 2000, neither Biovail nor Faulding would have been able to market their products until July 2000, after Andrx's exclusivity expired (which is six months after these parties actually came to market).

By prohibiting Andrx from withdrawing its pending ANDA or relinquishing or otherwise compromising any right accruing under its ANDA, including its right to 180 days of generic market exclusivity, until the entry of final judgment in the Florida Patent Action, the September 1997 Stipulation had the purpose, as well as the intended or likely effect, of deterring Andrx from relinquishing its eligibility for a 180-day period of exclusivity under the Hatch-Waxman Act. Had the respondents not abandoned their agreement under pressure from the Commission, Andrx likely would not have relinquished its 180-day exclusivity right. Accordingly, neither

Biovail nor Faulding would have been able to market their products until July 2000, after Andrx's exclusivity expired (which is six months after these parties actually came to market).

Interrogatory No. 16

Describe in detail each basis, if any, for the allegation made in paragraph 38 of the Complaint that "Hoechst MRI, Cardizem and Andrx acted with the specific intent that Hoechst MRI monopolize the relevant market."

Response to Interrogatory No. 16

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 16 as premature to the extent it asks us to identify, prior to the completion of discovery, each basis for concluding that HMR, Carderm, and Andrx acted with the specific intent that HMR monopolize the relevant market. Complaint counsel further object to Interrogatory No. 16 on the grounds that it calls for a legal conclusion. Complaint counsel further object that Interrogatory No. 16 does not accurately recite paragraph 38 of the complaint.

Subject to these objections, as far as complaint counsel is presently aware, HMR, Andrx, and Carderm acted with the specific intent that HMR monopolize the relevant market. The respondents implemented a plan calculated to exclude competitors or potential competitors from the market. They designed an agreement that was structured specifically to forestall the entry of generic competition to Cardizem CD.

Both HMR and Andrx acted consistent with their obligations under the September 1997 Stipulation. For instance, consistent with the agreement, Andrx did not market its generic version of Cardizem CD upon final FDA approval, in return for which HMR paid to Andrx $10

million per quarter. Moreover, HMR introduced to the agreement certain additional restrictive provisions. For instance, HMR insisted that the agreement include restraints on Andrx's ability (i) to market any generic version of Cardizem CD or (ii) to relinquish its right to 180 days of market exclusivity. Andrx knew – or should have known – that the September 1997 Stipulation would perpetuate HMR's monopoly power in the relevant market.

At the same time it was negotiating the September 1997 Stipulation, HMR also attempted to negotiate an agreement with Biovail. Shortly after Biovail filed an ANDA to market a generic version of Cardizem CD, HMR offered to pay Biovail to refrain from marketing a generic version of Cardizem CD until at least July 1999.

Complaint counsel refer Andrx to the documents submitted by Andrx in the pre-complaint investigation of this matter, as well as the documents we produced as part of our initial disclosures, including, but not limited to: August 10, 1997 correspondence from James M. Spears to Lou Solomon (the correspondence does not have bates numbers); Andrx 01385-01675; Andrx 004291-004300; Andrx 004307-004308; Andrx 004344-004346; Andrx 004351-004352; Andrx 004358-004360; Andrx 004362-004365; Andrx 004369-004376; Andrx 004382-004384; Andrx 004403-004407; Andrx 04389-04392; Andrx 04397-04399; Andrx 004411-004414; Andrx 004418-004419; HMRI S8 000014-000023; GADS030661-030665; GADS030666-030680; and BVL0000001-0008080.

Interrogatory No. 17

Describe in detail each basis, if any, for the allegation made in paragraph 29 of the Complaint that "[t]he acts and practices of the respondents as herein alleged have had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and injure competition and consumers," including, without limitation, explain the meaning of "tendency or capacity" as used in the allegation.

Response to Interrogatory No. 17

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 17 as premature to the extent its asks us to identify, prior to the completion of discovery, each basis for the allegation that "[t]he acts and practices of the respondents as herein alleged have had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and injure competition and consumers." Complaint counsel further object on the grounds that Interrogatory No. 17 calls for a legal conclusion, as the phrase "tendency or capacity" is defined in case law.

Subject to these objections, Complaint counsel refer Andrx to our response to Interrogatory No. 1.

Interrogatory No. 18
Describe in detail each basis, if any, for the allegation in paragraph 31 of the Complaint that "[t]he purpose and intended effect of the $10 million quarterly payments from Hoechst MRI to Andrx during the term of the Stipulation and Agreement was to provide an incentive for Andrx to refrain both from entering the relevant market, and from taking any steps . . . to permit or facilitate the entry of any other generic manufacturer."

Response to Interrogatory No. 18

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 18 as premature to the extent it seeks information by an expert who may testify in this matter. Complaint counsel further object to Interrogatory No. 18 as premature to the extent it asks us to identify, prior to the completion of discovery, each basis for the allegation that "[t]he purpose and intended effect of the $10 million quarterly payments from Hoechst MRI to Andrx during the term of the Stipulation and Agreement was to provide an incentive for Andrx to

refrain both from entering the relevant market, and from taking any steps . . . to permit or facilitate the entry of any other generic manufacturer."

Subject to these objections, as far as complaint counsel is presently aware, pursuant to the September 1997 Stipulation, Andrx agreed that it would not market the generic version of Cardizem at issue in the Florida Patent Action or any other generic version of Cardizem CD (even a non-infringing product). In addition, Andrx agreed that it would not relinquish or otherwise compromise its right to 180 days of market exclusivity. In return for these agreements, Andrx received non-refundable payments in the amount os $10 million a quarter. If Andrx failed to abide by any of these obligations, it would be required to repay all of the $10 million payments, forfeit any right to future $10 million payments, and forfeit any right to additional payments of up to $60 million per year (in the event Andrx prevailed in the Florida Patent Action). These penalty provisions created an incentive for Andrx to abide by its obligations under the September 1997 Stipulation and refrain from marketing a generic version of Cardizem CD or from relinquishing its right to exclusivity.

Interrogatory No. 19
Describe in detail each basis, if any, for the allegations in paragraph 35 of the Complaint that "[a]lthough the Stipulation and Agreement provided Andrx with the option of selling a generic version of Cardizem CD pursuant to a license from Hoechst MRI at a future date, this did not offset the anticompetitive efforts."

Response to Interrogatory No. 19

In addition to the general objection stated above, complaint counsel object to Interrogatory No. 19 as premature to the extent it asks us to describe, prior to the completion of discovery, each basis for the allegations in paragraph 35 of the Complaint that "[a]lthough the Stipulation and Agreement provided Andrx with the option of selling a generic version of

Cardizem CD pursuant to a license from Hoechst MRI at a future date, this did not offset the anticompetitive" effects. Complaint counsel further object to Interrogatory No. 19 as premature to the extent it seeks information by an expert who may testify in this matter.

Subject to these objections, as far as complaint counsel is presently aware, the licensing option within the September 1997 Stipulation did not offset the agreement's anticompetitive effects for several reasons. First, it is unclear whether Andrx would have exercised the licensing option. The September 1997 Stipulation did not require Andrx to exercise the license, and exercising the license would terminate future $10 million quarterly payments and would require the payment of substantial licensing fees.

Second, even if Andrx would have marketed a generic version of Cardizem CD pursuant to a license from HMR, it is likely that Andrx's marketing would have been delayed because of the September 1997 Stipulation. Under the agreement, barring a final resolution to the Florida Patent Action, the earliest HMR would have granted Andrx a license was January 2000 – approximately seven months after Andrx received final FDA approval to market a non-infringing generic version of Cardizem CD. Therefore, had HMR and Andrx not terminated the September 1997 Stipulation under pressure from the Commission, the licensing provision of the agreement would have delayed Andrx's launch by at least seven months.

Interrogatory No. 20
Describe in detail each basis, if any, for concluding that any of the parties to the Florida Patent Action undertook to delay the resolution of that action.

Response to Interrogatory No. 20

In addition to the general objections stated above, complaint counsel object to Interrogatory No. 20 on the grounds that it calls for information beyond the scope of discovery.

Complaint counsel further object to Interrogatory No. 20 as premature to extent it asks us to describe, prior to the completion of discovery, each basis for concluding that any of the parties to the Florida Patent Action undertook to delay the resolution of that action.

Subject to these objections, as far as complaint counsel is presently aware, neither HMR nor Andrx sought to delay the Florida Patent Action.

Interrogatory No. 21

With respect to each person whose testimony as an expert witness the FTC intends to or may adduce or rely on in this action (in person or by affidavit, report or declaration), identify such expert and describe in detail his or her expert testimony, including, without limitation: The subject matter of the testimony of such expert witness, and the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The area of the witness' expertise, and the qualifications of such witness establishing him or her as an expert, including without limitation his/her knowledge, skill, experience, training or education relating to the subject of the testimony.

Response to Interrogatory No. 21

Complaint counsel object to Interrogatory No. 21 on the grounds that it calls for premature disclosure of information.

Consistent with the scheduling order in this matter, complaint counsel will provide respondents with an expert witness list by July 17, 2000. Complaint counsel will provide respondents with an expert report (or reports) by September 11, 2000, putting forth the opinion(s) to which the expert is expected to testify and summarizing the grounds for the opinion(s). At the time an expert is first listed as a witness by complaint counsel, we will provide to the respondents:

(a) materials fully describing or identifying the background and qualifications of the expert, lists of publications, and all prior cases in which the expert has testified or has been deposed; and

(b) transcripts of such testimony in the possession, custody, or control [illegible] party or the expert.

Interrogatory No. 22

With respect to each person whose testimony as a non-expert witness the FTC intends to or may adduce or rely on in this action (in person or by affidavit, report or declaration), identify such person and describe in detail his or her expected testimony, including, without limitation, the subject matter of the testimony.

Response to Interrogatory No. 22

Complaint counsel object to Interrogatory No. 22 on the grounds that it calls for premature disclosure of information.

Consistent with the scheduling order in this matter, complaint counsel will provide respondents with a witness list (not including experts) by June 14, 2000. This witness list will include a description of the proposed testimony.

Markus H. Meier

Daniel A. Kotchen

[illegible]

Dated: May 15, 2000

UNITED STATES OF AMERICA
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

ORDER DENYING RESPONDENTS' MOTIONS FOR PROTECTIVE ORDERS

I.

Respondent Andrx Corporation ("Andrx"), on September 15, 2000, filed its motion for a protective order seeking to preclude Complaint Counsel from taking depositions of five Andrx employees or agents who had been examined by the FTC staff during the investigation which preceded this matter. Also on September 15, 2000, Respondent Aventis Pharmaceuticals, Inc. ("Aventis"), formerly known as Hoechst Marion Roussel, Inc. filed its motion for a protective order to preclude or limit further deposition of two of Aventis' attorneys ("Aventis Motion"). Complaint Counsel filed a consolidated opposition on September 27, 2000. Oral arguments of counsel were heard on October 5, 2000.

For the reasons set forth below, Respondents' motions are DENIED.

II.

Andrx and Aventis both assert that Complaint Counsel should be precluded from taking the depositions of these seven individuals because Complaint Counsel previously took their depositions during the investigatory phase of the Commission's case. In the alternative, Respondents assert, Complaint Counsel should be limited to questioning these individuals to "new" areas of testimony not previously known about during the previous questioning. In addition, Aventis asserts that Complaint Counsel should be precluded from taking the

depositions of Spears and Stratemeier because Spears is Aventis' lead outside counsel and Stratemeier is Aventis' General Counsel.

Complaint Counsel asserts that it needs to take the depositions of these individuals in order to develop and refine its case and to prepare a response to Respondents' defenses, regardless of the fact that these individuals were examined during the pre-complaint investigation. Complaint Counsel further asserts that limiting the subject matter of the proposed depositions to "new" topics is unwarranted and unworkable. In response to Aventis' argument that Spears and Stratemeier should not be deposed because they are counsel for Aventis, Complaint Counsel asserts that Spears and Stratemeier played a material role in the facts underlying the litigation and, thus, it is appropriate to take their depositions.

III.

Respondents rely on federal cases that hold that repeat depositions are disfavored, and where allowed, are limited to new areas. E.g., *Lobb v. United Air Lines, Inc.*, 1993 U.S. App. LEXIS 17495, *2-4 (9th Cir. 1993) (stating "[r]epeat depositions are disfavored" and precluding second round of questioning where party sought second deposition for alleged different purpose, for trial, after completion of earlier deposition, for settlement purposes); *Tri-Star Pictures, Inc. v. Unger*, 171 F.R.D. 94, 102-03 (S.D.N.Y. 1997) ("strictly confin[ing]" second deposition to new areas not covered in the first deposition and forbidding re-questioning on topics covered in previous testimony). Complaint Counsel counters that these cases are not analogous because they arise in context of repeat depositions in the same litigation and that here there is a significant difference between an examination during the investigatory phase of a matter and a deposition taken in the adjudicative phase of the matter.

The Supreme Court, in *Hannah et al. v. Larche et al.*, 363 U.S. 420, 446 (1960), noted that the rules of the Federal Trade Commission "draw a clear distinction between adjudicative proceedings and investigative proceedings." "The reason for these rules [regarding notice of investigation] is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial." *Id.* Also, in *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950), the Supreme Court distinguished the Commission's investigatory "power to get information from those who best can give it" and the judicial power to summon evidence in the course of litigation. The Commission "has a power of inquisition if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not." *Id.* See also *Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) ("Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it.").

The Commission, in explaining differences between the scope of discovery under Part III of the Commission's Rules of Practice and an investigation under Part II, has stated:

> . . . [I]t should be manifest that the Commission's rules of practice are intended to and do provide for comprehensive *pre*-complaint *investigation*. The rules for adjudicatory proceedings are intended to embody the Commission's conviction that, to the fullest extent practicable, the strategy of surprise and the art of concealment will have no place in a Commission proceeding. Hence, we have also provided for thorough *post* complaint *discovery* procedures. . . .
>
> A subpoena, deposition, or order requiring access aimed at obtaining information not ordinarily obtainable before issuance of the complaint, additional details, or an extension of information as to disclosed transactions or events for which evidence is to be adduced in support of the complaint is manifestly within the bounds of proper pretrial discovery. . . . There is no provision in the Commission's rules, nor is there any precedent which would, in effect, require complaint counsel to have *all* evidence that he will need prior to the issuance of the complaint. . .
>
> The general rule still remains that an onerous burden would be placed not only on the investigator but upon the party or parties investigated if the preliminary investigation must encompass the gathering of *all* of the details for each and every transaction which may eventually become an evidentiary item in a subsequent complaint. Many Federal Trade Commission proceedings present factual and conceptual complexities. In such cases, complaint counsel may properly find, particularly after the issues are refined in a prehearing conference, that some additional documentation may be required to *round out, extend, or supply further details* for the particular transactions to be pursued.

All-State Indus., et al., 72 F.T.C. 1020, 1023-24, 1967 FTC LEXIS 159, *6-10 (Nov. 13, 1967) (emphasis in original).

In re Chain Pharmacy Ass'n, Inc., et al., 1990 FTC LEXIS 193 (June 20, 1990) presents a situation similar to the instant conflict. There, an agent of respondent refused to answer questions in a deposition in Part III adjudication on the grounds that complaint counsel had asked him the same questions during an investigational hearing. Noting that the Rules of Practice adopt a liberal approach to discovery and that the discovery sought need only be relevant and holding that "the Rules do not prohibit repetitive questioning[,]" the Administrative Law Judge ordered respondents to submit to depositions and to answer the questions. *Id.* at *2-4.

Simply because the agents of Respondents were examined during the pre-complaint investigation does not preclude Complaint Counsel from taking the depositions of these individuals in accordance with Part III of the Commission's Rules of Practice. Although the Administrative Law Judge retains the discretion to limit discovery if it is unreasonably

cumulative or duplicative, and may enter a protective order to deny discovery to protect a party from annoyance, oppression or undue burden, or to prevent undue delay in the proceeding, 16 C.F.R. § § 3.31(c), 3.31(d), those circumstances are not present here.

IV.

Aventis' motion for a protective order seeks to preclude Complaint Counsel from taking the depositions of Spears and Stratemeier on the additional grounds that depositions of opposing counsel are disfavored and may be allowed only under limited circumstances. Complaint Counsel asserts that the Commission and federal courts have found it appropriate to allow depositions of opposing counsel where counsel played a material role in the facts underlying the litigation.

Judicial decisions and precedents under the Federal Rules of Civil Procedure concerning discovery motions, though not controlling, provide helpful guidance for resolving discovery disputes in Commission proceedings. *L.G. Balfour Co., et al.*, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS 367, *4 (Oct. 5, 1962); *In re Int'l Ass'n of Conference Interpreters*, 1995 FTC LEXIS 21, *17 (Jan. 24, 1995). Federal courts determining whether to permit the deposition of opposing counsel apply conflicting standards. *See generally Sparton Corp. v. United States*, 44 Fed. Cl. 557, 560 (Ct. Cl. 1999) (discussing conflicting cases). *Compare Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (allowing the deposition of opposing counsel only "where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case") *with Johnston Dev. Group, Inc., et al. v. Carpenters Local Union No. 1578, et al.*, 130 F.R.D. 348, 353 (D.N.J. 1990) (blocking the deposition of opposing counsel only where the party opposing the deposition "establishes undue burden or oppression measured by (1) the relative quality of information in the attorney's knowledge, that is whether the deposition would be disproportional to the discovering party's needs; (2) the availability of the information from other sources that are less intrusive into the adversarial process; and (3) the harm to the party's representational rights of its attorney if called upon to give deposition testimony).

Regardless of which standard is used, nearly all courts recognize that the deposition of a party's attorney may be both necessary and appropriate when the attorney is a fact witness, such as an actor or a viewer. *American Casualty Co. v. Krieger, et al.*, 160 F.R.D. 582, 588 (S.D. Cal. 1995); *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85-86 n.2 (M.D.N.C. 1987). "In cases where the attorney's conduct itself is the basis of a claim or defense, there is little doubt that the attorney may be examined as any other witness[.]" *Johnston Dev. Group*, 130 F.R.D. at 352 (*citing Jamison v. Miracle Mile Rambler, Inc.*, 536 F.2d 560 (3d Cir. 1976); *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 610 F. Supp. 1319 (D. Del. 1985), *aff'd*, 769 F.2d 152 (3d Cir. 1985); *Scovill Manufacturing Co. v. Sunbeam*, 61 F.R.D. 598 (D. Del. 1973)). *See also In re Tutu Water Wells Contamination Litig.*, 184 F.R.D. 266, 267 (D.V.I. 1999) ("A protective order will not issue where the attorney's conduct is the basis for the claim or defense

or where the attorney observed or participated in the underlying transaction or occurrence giving rise to the cause of action."); *Rainbow Investors Group, Inc. v. Fuji Trucolor*, 168 F.R.D. 34, 38 (W.D. La. 1996) (denying motion for protective order where attorney played "key role" in negotiating the transaction at the heart of the underlying dispute).

In the present case, Aventis admits that "Stratemeier and Spears were involved, on behalf of Aventis, in the negotiation and drafting of the Stipulation and Agreement alleged in the Complaint as anticompetitive." Aventis Motion at 3. As actors or participants in the negotiation and drafting of the Stipulation and Agreement at issue, Spears and Stratemeier may be deposed. Inquiry shall be limited to relevant, non-privileged information.

It is hereby ORDERED that Respondents' motions for protective orders are denied.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: October 12, 2000