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

TO: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S CONSOLIDATED RESPONSE TO RESPONDENTS' MOTIONS FOR PROTECTIVE ORDER

In their motions for protective order, Hoechst and Andrx ask this Court to preclude us from deposing seven individuals, thus, seeking to limit our legitimate right to develop and refine our case and to prepare a response to respondents' defenses. Their motions are based on the faulty premise that individuals who were examined during the pre-complaint investigation cannot be deposed in this adjudicative proceeding. Hoechst also argues that the deposition of its counsel is inappropriate – an argument that was rejected by the Commission during the investigation.

Respondents' motions should be denied. The proposed depositions are "reasonably expected to yield information relevant" to this proceeding and, therefore, are entirely appropriate under the Commission's discovery rules. Moreover, each of the proposed deponents appear on respondents' witness lists except Mr. Spears and Mr. Solomon, who as outside counsel

for Hoechst and Andrx respectively, were the chief negotiators of the agreement underlying the complaint. Thus, we should have the opportunity to examine these witnesses concerning new information produced and positions revealed during post-complaint discovery, and to probe their anticipated testimony via deposition.

Alternatively, Hoechst and Andrx urge this Court to limit the subject matter of the proposed depositions to "new" topics. This position is unwarranted under the Commission rules and is unworkable. Therefore, we request that this Court deny respondents' motions in full.

Background

In July and August 2000, we served deposition notices on Hoechst and Andrx.[1] After we made numerous requests over the past two months that respondents provide specific dates for those depositions, a majority of those depositions recently have been scheduled to take place during the first three weeks of October.

The depositions of the seven individuals that are the subject of respondents' present motions have not been scheduled for the reasons stated in those motions.[2] Those seven individuals are:

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[1] Our July 21, 2000 deposition notice included *inter alia* notice for the depositions of Mr. Solomon and Mr. Spears. Our August 22, 2000 deposition notice included *inter alia* notice for the depositions of Mr. Glover, Ms. Rice, Mr. Lodin, and Mr. Malahias. Both of these notices are attached as exhibits to *Andrx's Motion for Protective Order*. We noticed the deposition of Mr. Stratemeier via correspondence on August 14, 2000.

[2] Contrary to Andrx's assertions that we have "refused" to discuss the basis for the proposed depositions (*Andrx's Motion for Protective Order*, at 4), we have engaged respondents in discussions on the need for these depositions in light of information produced and developed since issuance of the complaint.

Andrx:

- *Randy Glover* – Mr. Glover formerly served as Andrx's vice president of manufacturing operations, and is expected to testify at trial for Andrx relating to the development of generic versions of Cardizem CD. (*See* Andrx witness list, at 4) (at Attachment A)).

- *Scott Lodin* – Mr. Lodin is Andrx's general counsel. His testimony at trial (he is listed as a witness for both Andrx and Hoechst) is expected to cover the Hoechst/Andrx patent litigation, negotiation of the Stipulation and Agreement, and the settlement of the patent litigation. In addition, he is expected to testify concerning Andrx's research and development, manufacturing, marketing, and sales efforts with respect to its generic Cardizem CD product. (*See* Andrx witness list, at 5; Hoechst witness list, at 4 (at Attachment B)).

- *Angelo Malahias* – Mr. Malahias is vice president and chief financial officer of Andrx, and is expected to testify for Andrx at trial concerning its financial performance. (*See* Andrx witness list, at 5).

- *Karen Rice* – Ms. Rice is a product manager for Andrx, and is expected to testify for Andrx at trial concerning market planning and forecasting for prescription drug products. (*See* Andrx witness list, at 9).

- *Louis Solomon* – Mr. Solomon is a partner at the law firm of Solomon, Zauderer. He served as Andrx's primary negotiator of the Stipulation and Agreement.

Hoechst:[3]

- *James M. Spears* – Mr. Spears is a partner with the law firm of Shook, Hardy. As outside counsel to Hoechst, Mr. Spears was the primary negotiator for Hoechst regarding the Stipulation and Agreement, and was involved in negotiations leading to the settlement of the patent litigation.

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[3] We are also filing today a *Motion Regarding Hoechst's Waiver of Attorney-Client Privilege and Motion to Compel Answers to Deposition Questions*. That motion concerns the status of a letter from Hoechst outside counsel Mr. Spears to Hoechst general counsel Mr. Stratemeier that was disclosed to the Commission by Hoechst in 1997. This Court's ruling on that motion will affect the scope of the proposed depositions of Mr. Spears and Mr. Stratemeier (*i.e.*, whether we can pursue questioning concerning the letter). We request, however, that this Court move forward in ruling on the present motions for protective order – without waiting for respondents' response to our motion regarding the letter – in order to expedite the completion of discovery.

- *Edward Stratemeier* – Mr. Stratemeier is Hoechst's general counsel, and is listed as a witness for Andrx concerning the prosecution of the patent litigation, the negotiations leading to the Stipulation and Agreement, settlement of the patent litigation, and issues relating to the generic drug applications filed by Faulding and Biovail. (*See* Andrx witness list, at 10).

Each of the investigational hearings for the proposed deponents was held over one year ago – with the exception of Mr. Spears, whose investigational hearing was delayed by his efforts to quash his subpoena – and each investigational hearing was limited in duration.[4] During those investigational hearings, the witnesses were questioned based on the information received and analysis completed by the Commission staff at that time. Thus, the proposed deponents were not examined concerning information produced or positions revealed by respondents' since mid-1999.

I. The Proposed Depositions Are Appropriate under the Commission's Discovery Rules.

Under the Commission's rules governing adjudicative proceedings, a party may take a deposition so long as "such deposition is reasonably related to yield information" relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. 16 C.F.R. § 3.33.

There is no dispute that the proposed deponents have knowledge relevant to the issues presented in this proceeding, nor could there be. Four of the proposed deponents were the principal negotiators of the agreement that forms the heart of this proceeding.[5] The other

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[4] Each of the investigational hearings was less than eight hours in duration, except the hearings of respondents' in-house counsel (Mr. Lodin and Mr. Stratemeier), both of whom were directly and substantially involved in the negotiation of the Stipulation and Agreement.

[5] *See Commission Denial of Hoechst's Request for Full Commission Review of Denial of Petition to Quash ("Review of Denial to Petition to Quash"),* File No. 981-0368 (Jan. 19, 2000) (public version) (at Attachment D) ("[o]n appeal, Hoechst does not even argue that Spears lacks

deponents also possess substantial knowledge about the Stipulation and Agreement, as well as other key issues relating to the regulatory approval, manufacturing, and marketing/sales of Andrx's generic Cardizem CD product. Indeed, most of the proposed deponents appear on respondents' witness list and are expected to appear at trial.

II. No Grounds Exist for Entry of a Protective Order.

Since relevance is not in dispute, Hoechst and Andrx argue that a protective order should issue on other grounds. Respondents' primary argument is that the proposed depositions are duplicative and burdensome because these individuals were examined during the investigative phase. Hoechst also contends – resurrecting an argument directly rejected by the Commission during the investigation – that its counsel should not be subject to deposition.

A. No Grounds Exist for Granting a Protective Order Where a Person Was Previously Examined During an Investigational Hearing.

In their present motions, Hoechst and Andrx ignore that the Commission's two phases of an antitrust enforcement action – the investigative phase and the adjudicative phase – "have long been recognized as separate and distinct proceedings serving different functions." *Genuine Parts Co. v. Federal Trade Commission*, 445 F.2d 1382, 1387 (5th Cir. 1971) (court held that there is no shift from the investigative phase to the adjudicative phase until a complaint is issued and served). By ignoring this distinction, Hoechst and Andrx seek to deny our legitimate right to develop and refine our case during the adjudicative stage by precluding us from deposing key witnesses with relevant and necessary knowledge about documents produced and positions revealed since the investigative phase ended.

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relevant information or that Spears information could be obtained from other sources"), at 6.

The Supreme Court, in *Hannah v. Larche*, noted this distinction and the purposes served by these separate phase in stating that:

> A typical agency is the Federal Trade Commission. Its rules 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.
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> . . .
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> Fact-finding agencies . . . would be plagued by the injection of collateral issues that would make the investigation interminable. . . . This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.[6]

In addition, the Commission (in denying Hoechst's *Petition to Quash* the subpoena of Mr. Spears during the investigative phase of the current matter) pointed out the distinct purposes of civil litigation and an administrative investigation.

> [T]he aims and limits of administrative investigations often diverge from those of civil litigation. Civil discovery is intended to narrow the issues for trial. An administrative investigation is aimed at

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[6] 363 U.S. 420, 443-446 (1960) (Court held that during investigational hearings, an administrative agency need not supply an individual with rights of apprisal, confrontation and cross-examination). *See also Oklahoma Press Pub. Co v. Walling*, 327 U.S. 186, 201 (1946) (observing that the purpose of an administrative agency's investigative proceeding "is to discover and produce evidence not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so"); *Linde Thompson Langworthy Kohn & Van Dyke v. Resolution Trust Corporation*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) ("[u]nlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it"); *C.H. Robinson Co.*, 67 F.T.C. 1373 (1965) ("[the] history of this proceeding makes it abundantly clear that the distinction between adjudicative and investigational hearings should be kept well-defined"); *cf. United States v. Associated Merchandising Corp.*, 261 F. Supp. 553, 558 (S.D.N.Y. 1966) (court granted the Commission's motion to compel in part, based on its reading of the adjudicative rules, stating that "it is the adjudicative rules, not the investigative ones, which are to govern once a complaint has issued.").

> determining whether violations of law likely exist that should be pursued through litigation.

Review of Denial to Petition to Quash, at 2.

The Commission's rules of procedure also reflect the clear line between the investigative phase of a proceeding and the adjudicative phase. Specifically, the investigative rules permit that "the Commission may order testimony to be taken by deposition at any stage of such investigation." 16 C.F.R. § 2.10. Likewise, the adjudicative phase rules provide that "[a]ny party may take a deposition of a named person . . . provided that such deposition is reasonably expected to yield information within the scope of discovery under Sec. 3.31(c)(1)." 16 C.F.R. § 3.33.

Respondents' proposed limit on post-complaint discovery would seriously threaten the Commission's investigatory function. Commission staff would be forced to look under every rock during its investigations and exhaust all areas of inquiry (*e.g.*, use broad subpoenas for documents and testimony) to avoid being precluded from further developing their case after a complaint issued. As the Supreme Court has observed, this would "convert the investigation into a trial" and "make a shambles of the investigation and stifle the agency in its gathering of facts." *Hannah,* 363 U.S. at 443-446. Such a result would unnecessarily burden Commission resources and, in most cases, harm the interests of private parties seeking an early resolution of Commission investigations. Moreover, in the words of the Commission, the purpose of an administrative investigation is to "determin[] whether violations of law likely exist that should be pursued through litigation." *Review of Denial of Petition to Quash*, at 2.[7]

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[7] *See Genuine Parts v. Federal Trade Commission*, 445 F.2d at 1388 ("[a]n investigation discovers and produces evidence; an adjudication tests such evidence upon a record in an adversary proceeding before an independent hearing examiner to determine whether it sustains

The investigational hearings of the proposed deponents were part of this threshold agency determination. Now that we have entered the adjudicative phase, we have the legitimate right to full discovery to demonstrate that a violation of the antitrust laws has taken place.[8]

B. Hoechst's Argument Objecting to the Deposition of Counsel Was Previously Rejected by the Commission.

Hoechst also seeks to resurrect arguments that previously were rejected by Commissioner Anthony (*Denial of Petition to Quash* (Nov. 1, 1999, at Attachment C)) and affirmed by the full Commission (*Review of Denial to Petition to Quash* (Jan. 19, 2000, Attachment D)) concerning whether Hoechst's counsel could be subpoenaed for an investigational hearing. In its present motion, Hoechst completely ignores the prior decision reached by the Commission on this subject (which only concerned the subpoena of Mr. Spears), rearguing that the deposition of Hoechst's counsel is unduly disruptive and burdensome. In so doing, Hoechst fails to explain why the Commission's conclusion and reasoning that the

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whatever charges are based upon it").

[8] Contrary to respondents' motions, we have not have "ample opportunity" to obtain the information sought through the proposed depositions, nor is this information "obtainable from some other source that is more convenient, less burdensome, or less expensive." *See Hoechst Motion for Protective Order*, at 6-7; *Andrx Motion for Protect Order*, at 4-6. For example, the proposed deponents have unique knowledge about certain documents, events, and issues – such as Mr. Spears's and Mr. Solomon's knowledge about the negotiation of the Stipulation and Agreement, and Mr. Glover's knowledge about Andrx's manufacturing and development efforts. (Andrx witness list, at 3 (noting that Mr. Glover is expected to be called by Andrx as a witness on "manufacturing and technical aspects of Andrx efforts at developing its generic versions of Cardizem CD.")).

In addition, respondents' assertions of undue burden and expense are equally unpersuasive given the significant countervailing benefits of these depositions to the development and refinement of our case. *See Review of Denial to Petition to Quash*, at 6-7 ("[o]n appeal, Hoechst does not even . . . offer any further evidence demonstrating how the hearing would oppress Hoechst. In short, Hoechst has failed to carry its burden of showing good cause for the Commission to quash or limit the Subpoena.").

deposition of an attorney who played a *key role* in the underlying conduct should not apply to this adjudicative proceeding as well.

Indeed, Hoechst's attempt to shield Mr. Spears and Mr. Stratemeier from deposition rests on the same faulty authority it relied upon in the *Petition to Quash* that the Commission rejected. Specifically, Hoechst re-asserts that Eighth Circuit *dicta* from *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), allows for the deposition of opposing counsel only under "limited circumstances." (*Hoechst's Motion for Protective Order,* at 7).[9] Unlike *Shelton*, where the attorney was a tangential figure, however, Mr. Spears and Mr. Stratemeier are the two key Hoechst representatives who negotiated the underlying agreement.[10] As the Commission observed in its *Review of Denial of Petition to Quash*:

> On the contrary [to Hoechst's argument that Spears cannot be considered an actor or participant in the underlying conduct], a negotiator and drafter of an agreement *is* an actor and participant in the formation of that agreement [and t]hat participant's status as counsel does not exempt him from questioning in discovery or, for that matter, administrative investigations.[11]

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[9] The Commission commented in its *Review of Denial of Petition to Quash* that *Shelton* "is merely one of two conflicting lines of authority in the federal courts on a question the Supreme Court has not addressed," and, in any event, the Commission is not bound to follow *Shelton. Id.* at 2-3.

[10] In addition, the "burden shifting" argued by Hoechst (*Hoechst's Motion for Protective Order,* at 8-9) is not appropriate here, but instead should remain on Hoechst to demonstrate why the proposed depositions are improper. *See Rainbow Investors v. Fuji Trucolor*, 168 F.R.D. 34, 36 (W.D. La. 1996) (federal courts generally require "the party seeking a protective order to preclude their attorney's depositions [to] bear[] the burden under Rule 26(c) of demonstrating good cause to preclude or limit discovery"); *see also Review of Denial of Petition to Quash,* at 4-5 (citing additional cases for this proposition).

[11] *Id.* at 4 (citations omitted) (emphasis added); *see also Hoechst's Motion for Protective Order*, at 3 ("Messrs. 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.").

This point was further emphasized by Commissioner Anthony in denying Hoechst's motion to quash the Spears subpoena:

> Clients cannot shield relevant witnesses from testifying by hiring them as counsel. This point – that Spears is a first-hand actor and participant in the actions at issue, rather than a mere outside counsel consulted by the primary actors – seems to be lost on Hoechst. This is a crucial distinction, and one that severely undermines the arguments set forth in Hoechst's Petition.

Denial of Petition to Quash at 5 (citations omitted).[12]

Like the Commission, federal courts also have found it appropriate to allow depositions of opposing counsel where counsel played a material role in the facts underlying the litigation. For example, one federal court concluded that a "protective order will not issue where the attorney's conduct is the basis for the claim or defense or whether the attorney observed or participated in the underlying transaction or occurrence giving rise to the cause of action."[13] Thus, our notices of deposition for Mr. Spears and Mr. Stratemeier are entirely appropriate, necessary to our discovery efforts, and in accord with the Commission's rules.

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[12] *See also United Phosphorus, Ltd. v. Midland Fumigant, Inc.* 164 F.R.D. 245, 249 (D. Kan. 1995) ("when a party employs a counsel to represent it in a case where an attorney has played a role in the underlying facts, both the attorney and the party have every reason to expect that the attorney's depositions may be requested.").

[13] *In re Tutu Water Wells Contamination Litig.*, 184 F.R.D. 266, 267 (D.V.I. 1999); *see also Rainbow Investors*, 168 F.R.D. at 38 (court denied motion for protective order where attorney played "key role" in negotiating the transaction at the heart of the underling dispute); *Kaiser v. Mutual Life Ins. Co. of New York*, 161 F.R.D. 378, 382 (S.D. Ind. 1994) ("[e]ven cases in the *Shelton* line recognize that, if an attorney is a witness or actor in prelitigation conduct, he may be deposed the same as any other witness"); *Johnston Dev. Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990) (court denied protective order where it found that it is "both necessary and appropriate [to depose an attorney] where the attorney may be a fact witness, such as an actor or viewer, . . . rather than one who was not a party to any of the underlying transactions giving rise to the action . . . or whose role in a transaction was speculative and not central to the dispute") (citations omitted); *Review of Denial to Petition to Quash* at 3-5 (citing additional federal cases for same proposition).

III. Complaint Counsel Has a Legitimate Right and Need to Take the Proposed Depositions.

Aside from satisfying the Commission's standards for relevancy, we have a fundamental need to take the proposed depositions. These depositions are necessary to allow us to examine new evidence produced and new positions espoused by Hoechst and Andrx. Specifically, since the investigational hearings of the proposed deponents were taken, the following has transpired:

- The Commission issued its complaint against Hoechst and Andrx, summarizing in detail the factual and legal basis for the antitrust allegations – allegations that the Commission staff was still formulating during the investigation.

- Hoechst, Andrx, and numerous third-parties have produced thousands of pages of documents since the investigative hearings took place. For example, we have received documents relating to the June 1999 termination of the Stipulation and Agreement. These documents were produced subsequent to the investigational hearings of Mr. Lodin and Mr. Stratemeier, who were involved in those negotiations. Thus, during the investigational hearings, we did not explore the role of these two individuals in these negotiations and other relevant issues relating to the termination of the Stipulation and Agreement.

  In addition, several boxes of documents concerning Andrx's manufacture of its generic Cardizem CD product were produced to us by Andrx only during the past month. These manufacturing documents are of particular importance for the depositions of Mr. Glover and Mr. Lodin, both of whom are expected to testify concerning issues relating to the manufacturing and development of Andrx's generic Cardizem CD product.

- Hoechst and Andrx have raised a combined thirty-one affirmative defenses, many of which had not been articulated at the time of the investigational hearings. Questioning the proposed deponents on the bases for these defenses is specifically contemplated under the Commission's rule concerning "scope of discovery," which states that parties may obtain discovery "reasonably expected to yield information relevant . . . to the defenses of any respondent." *See* 16 C.F.R. § 3.31(c)(1) (emphasis added).

- Respondents have filed briefs in their private litigation – including *Defendants' Memorandum of Law in Support of Their Motion for Certification Pursuant to 28 U.S.C. § 1292(b)*, filed on June 20, 2000, in *In re Cardizem® CD Antitrust*

Litigation (E.D. Mich.) – that present respondents' positions on a variety of issues that are relevant to the present action in this Court.

- Each of the proposed deponents – except Mr. Spears and Mr. Solomon – appear on respondents' witness lists. We, therefore, have not had the opportunity to depose the pertinent witnesses concerning their anticipated testimony at trial. As evident from these examples, it is necessary for us to take the proposed

depositions in order to fully examine information and positions revealed since the investigational hearings. This position is supported by a decision in a prior Commission administrative proceeding, in which ALJ Timony rejected a respondent's attempt to quash three subpoenas. *In the Matter of Champion Spark Plug Co.*, 1981 FTC Lexis 185, *2 (1981). In that case, ALJ Timony was presented with a more difficult question than posed here, because (1) complaint counsel sought to re-depose certain individuals who *already had been deposed post-complaint,* and (2) the individuals to be deposed were *third-parties*. Nonetheless, ALJ Timony denied the motion to quash, noting that complaint counsel asserted the need to re-depose these individuals because "they were interviewed over two years ago and [complaint counsel] need[ed] information about GM documents they have obtained since conducting the interviews." ALJ Timony further stated that:

> [I]t is not unusual for prospective witnesses in an antitrust case to be interviewed or deposed several times prior to their testimony. This process often results in a winnowing of the number of witnesses to be called at trial as well as the education of counsel. It helps in narrowing the issues and limiting the evidence to be adduced at the trial.

Id. While respondents' present motions concern a simpler question – whether the Commission's rules allow for *a party* to be deposed *during both the investigative and adjudicative phases* of a proceeding – ALJ Timony's decision further demonstrates that the proposed depositions are appropriate, particularly where as here, the depositions would occur more than one year after the

investigational hearings were held, and after substantial new information has been discovered.[14] The decisions of the federal courts also support our position that the proposed depositions are necessary and appropriate.[15]

IV. Respondents' Alternative Proposal for a Protective Order Limiting the Subjects of the Proposed Depositions is Unwarranted and Unworkable.

Hoechst and Andrx argue in their motions that, if this Court does not preclude the proposed depositions, it should limit the subject matter of the depositions. *See Andrx's Motion for Protective Order,* at 7 ("questions should be strictly confined to [] new topics"); *Hoechst's Motion for Protective Order,* at 11 ("protective order should issue limiting any additional depositions to new matters"). This Court should not entertain such limitations.

While we do not intend to tread over old terrain, it will be necessary to question these witnesses on "matters" and "topics" previously raised during the investigational hearings

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[14] ALJ Timony's Order limited the scope of the second depositions to "subjects discussed in the documents recently obtained or matters occurring since the previous interviews." We contend that imposing such a limitation in the present matter (as discussed in greater detail below), is unwarranted.

[15] Fed. R. Civ. Proc. R. 30(a)(2) requires that a party seek leave of the court before re-deposing an individual. While that rule is clearly not applicable here considering the distinct purposes served by investigative and adjudicative proceedings, the case law arising under that rule is instructive on the circumstances when a second deposition is appropriate (under a more stringent standard than the relevancy standard that governs under the Commission's rules). In particular, there are numerous cases in which a federal court has granted leave for a second deposition under facts similar to those present here. *See e.g., Collins v. Int'l Diary Queen*, 189 F.R.D. 496, 498 (M.D. Ga. 1999) (motion for leave granted where "[b]ecause of the time that had elapsed, the addition of new claims, and the evident knowledge of the witnesses in particular areas, re-examination of the two witnesses is likely to provide additional information not obtainable at the first depositions"); *Tri-Star Pictures, Inc. v. Unger*, 171 F.R.D. 94, 102 (S.D.N.Y. 1997) (motion to compel second deposition of party's general counsel granted where that party had asserted new claims for which the general counsel possessed relevant information); *Crossley v. Iroquois Foundry Co.,* 1992 U.S. Dist. LEXIS 7368, * 7-8 (E.D. Pa. 1992) (leave for second deposition granted where a videotape and certain relevant documents were not produced until after the deponent's original deposition).

where new information that has been produced by respondents and third-parties, or where respondents' have asserted affirmative defenses. Thus, the "new" subject matter limitation proposed by Hoechst and Andrx is unreasonable. For example, under their proposed "new" matter limitation, we would be blocked from questioning their witnesses – including Mr. Spears, Mr. Solomon, Mr. Stratemeier, and Mr. Lodin – about the Stipulation and Agreement, which is central to this case and was touched upon in many of the investigational hearings. Nor would we be able to question Mr. Glover concerning the boxes of manufacturing documents that were recently produced by Andrx, because this "topic" was raised during his investigational hearing.

Clearly we have a legitimate right to question the proposed deponents about these subjects and other subjects previously raised during investigational hearings, particularly concerning any documents produced or positions espoused by respondents since the complaint was issued that bear on the Stipulation and Agreement. In addition, if the limitations proposed by respondents (or some similar limitation) were adopted, we expect that this ultimately would embroil this Court in resolving disputes over the terms of the limitations.

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For the reasons discussed above, respondents' motions for protective order should be denied in their entirety.

Respectfully Submitted,

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Seth C. Silber

Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: September 27, 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

RESPONDENT ANDRX CORPORATION'S
REVISED WITNESS LIST

Pursuant to the Court's Scheduling Order, respondent Andrx Corporation ("Andrx") submits the following revised list of fact witnesses. Complaint Counsel has stonewalled in providing discovery, which also has had the effect of encouraging third parties to do the same. Only limited non-party document and no deposition discovery noticed by respondents has occurred. For example, respondents have not been able to depose or obtain meaningful document discovery from Complaint Counsel's "star witness" -- Biovail Corporation. Nor has the FDA produced any documents in response to our subpoena. As a result, the respondents have been impeded in obtaining important discovery and thereby are seriously prejudiced in their ability to identify potential witnesses. Because Andrx so far has not had a reasonable opportunity to develop the record in this action, its identification of potential witnesses at this point is, by necessity, preliminary and limited.

Subject to the foregoing and Andrx's right to supplement, modify or amend its identification of witnesses as circumstances warrant (and to identify rebuttal witnesses), Andrx provides the following preliminary listing of fact witnesses. We

reserve the right not to call any of the persons listed herein to testify at the hearing, as circumstances may warrant.[1]

A. Witnesses Listed Elsewhere:

Andrx hereby lists and reserves the right to present testimony, by deposition or orally by live witness, from any other person who has been or may be identified by Complaint Counsel and/or the other respondents, either on initial disclosures, the listing of individuals/entities with which Complaint Counsel has communicated regarding the subject matter of this proceeding, and/or preliminary or final witness lists, and any other person from whom discovery is sought or who is called to testify. Such testimony may pertain to the subject matter designated by the other party and/or related issues.

B. Additional Witnesses:

1. Dr. Xiu-Xiu Chen:

Dr. Chen is currently an Andrx employee who is expected to testify about the manufacturing and technical aspect of Andrx's efforts at developing its generic version of Cardizem CD.

2. David Gardner:

Mr. Gardner is a former Vice President-Regulatory Affairs for Andrx. He is expected to testify concerning the general regulatory framework applicable to, among other things, the development and marketing of generic drugs. He also is expected to

[1] Certain of the witnesses are identified below in response to Complaint Counsel's improper listing of various proposed witnesses.

testify concerning the efforts undertaken by Andrx to obtain regulatory approval for its generic version of Cardizem CD.

3. Randall Glover:

Mr. Glover is formerly Vice President-Manufacturing Operations for Andrx Pharmaceuticals, Inc.. He is expected to testify concerning the manufacturing and technical aspects of Andrx efforts at developing its generic version of Cardizem CD.

4. Dr. Eliot Hahn:

Dr. Hahn is currently President and Director of Andrx. He is expected to testify concerning Andrx's financial situation during the period relevant to the development of its generic version of Cardizem CD. He also is expected to testify with respect to Andrx's concerns about launching its generic product prior to resolution of the patent issues in the Cardizem CD patent infringement action with HMR. In addition, he is expected to testify about corporate matters and aspects of the FTC investigation of Andrx and the Stipulation.

5. Hoechst Marion Roussel, Inc. § 3.33(c) Deponent(s):

The HMR witness(es) is expected to testify concerning general pharmaceutical market practices, the conduct of the Cardizem CD patent infringement action between HMR and Andrx, and the purpose, meaning, implementation, and effects of the Stipulation and its terms.

6. Gerald J. Houlihan, Esq.:

Mr. Houlihan is a partner in Houlihan & Partners, P.A., counsel to Andrx in the Cardizem CD patent infringement order with HMR. Mr. Houlihan is expected to testify concerning the nature and conduct of the patent action.

7. Elizabeth Jex:

Ms. Jex is an FTC lawyer involved in one or more investigations of Andrx . She is expected to testify concerning the nature and conduct of such investigation(s).

8. David L. Ingelfield:

Mr. Ingelfield is a FTC official involved in one or more investigations of Andrx . He is expected to testify concerning the nature and conduct of such investigation(s).

9. Eric D. Isicoff, Esq.:

Mr. Isicoff is a partner at Isicoff & Ragatz, P.A., counsel to Andrx in the Cardizem CD patent infringement action with HMR. Mr. Isicoff is expected to testify concerning the nature and conduct of the patent action.

10. Scott Lodin, Esq.:

Mr. Lodin is Vice President/General Counsel of Andrx. Mr. Lodin is expected to testify concerning the general regulatory framework applicable to, among other things, the development and marketing of generic drugs. Mr. Lodin also is expected to testify concerning the efforts undertaken by Andrx to obtain regulatory approval for its generic versions of Cardizem CD, as well as dealings with Biovail. In addition, he is expected to testify concerning the nature and conduct of the Cardizem CD patent infringement action with HMR, Andrx's concerns about launching a product prior to resolution of the patent issues, and the background, purpose, meaning, implementation, and effects of the Stipulation and its terms. Furthermore, he is expected to testify regarding the nature and conduct of the FTC's investigation(s) of Andrx and the Stipulation.

11. Angelo C. Malahias:

Mr. Malahias is currently Vice President and the Chief Financial Officer for Andrx. He is expected to testify concerning Andrx's financial situation during the period relevant to the development of its generic version of Cardizem CD. He also is expected to testify with respect to Andrx's concerns about launching its generic product prior to resolution of the patent issues in the Cardizem CD patent infringement action with HMR.

12. Peter Rickman:

Mr. Rickman is an official with the U.S. Food & Drug Administration. He is expected to testify concerning the general regulatory framework applicable to, among other things, the development and marketing of generic drugs. He also is expected to testify concerning the efforts undertaken by Andrx to obtain regulatory approval for its generic version of Cardizem CD.

13. Larry Rosenthal:

Mr. Rosenthal is currently Executive Vice President of Andrx Pharmaceuticals, Inc. He is expected to testify concerning Andrx's practices and activities with respect to the marketing and sales of its generic version of Cardizem CD. He also is expected to testify concerning the scope and definition of the relevant market for Cardizem CD.

14. Diane Servello:

Ms. Servello is currently the Director -- Regulatory Affairs for Andrx Pharmaceuticals, Inc. She is expected to testify concerning the general regulatory framework applicable to, among other things, the development and marketing of generic

drugs. She also is expected to testify concerning the efforts undertaken by Andrx to obtain regulatory approval for its generic version of Cardizem CD.

15. Herschel Sparks, Esq.:

Mr. Sparks is currently Legal Counsel for Andrx. He is expected to testify concerning regulatory issues, Andrx's activities with respect to its generic version of Cardizem CD, and the FTC's investigation of Andrx and the Stipulation.

16. Doug Sporn:

Mr. Sporn is an official in the U.S. Food & Drug Administration. He is expected to testify concerning the general regulatory framework applicable to, among other things, the development and marketing of generic drugs. He also is expected to testify concerning the efforts undertaken by Andrx to obtain regulatory approval for its generic version of Cardizem CD, including the approval sought and obtained for the reformulated version of the product.

17. Dat Trieu, Ph.D.:

Dr. Trieu is currently an Andrx employee who is expected to testify concerning the manufacturing and technical aspects of Andrx's efforts at developing a generic version to Cardizem CD.

C. Persons Cooperating with the FTC But Resisting Discovery

1. David A. Balto:

Mr. Balto is currently Assistant Director of the Bureau of Competition. He is expected to testify with respect to his communications and dealings with Biovail representatives, including George S. Cary, and other third parties concerning the FTC's investigation of the Stipulation between HMR and Andrx.

2. Biovail Corporation § 3.33(c) Deponent(s):

The Biovail witness(es) is expected to testify concerning Biovail's communications and dealings with Andrx, government regulators and others related to Andrx's efforts to develop and market a generic version of Cardizem CD. The Biovail deponent(s) also is expected to testify concerning Biovail's efforts to develop and obtain regulatory approval for its own generic version of Cardizem CD and its efforts to market and sell its generic product. In addition, the Biovail deponent(s) is expected to testify concerning pharmaceutical industry practices with respect to transactions between brand and generic manufacturers.

3. Bruce Brydon:

Mr. Brydon is currently an employee of Biovail. He is expected to testify concerning Biovail's communications and dealings with Andrx, government regulators and others related to Andrx's efforts to develop and market a generic version of Cardizem CD. He also is expected to testify concerning Biovail's efforts to develop and obtain regulatory approval for its own generic version of Cardizem CD and its efforts to market and sell its generic product. In addition, he is expected to testify concerning general pharmaceutical industry practices with respect to transactions between brand and generic manufacturers.

4. Kenneth Cancellara:

Mr. Cancellara is General Counsel of Biovail. He is expected to testify concerning Biovail's communications and dealings with Andrx, government regulators and others related to Andrx's efforts to develop and market a generic version of Cardizem CD. He also is expected to testify concerning Biovail's efforts to develop and

obtain regulatory approval for its own generic version of Cardizem CD and its efforts to market and sell its generic product. In addition, he is expected to testify concerning general pharmaceutical industry practices with respect to transactions between brand and generic manufacturers.

5. George S. Cary:

George Cary is a former FTC official and currently a partner at Cleary, Gottlieb, Steen & Hamilton, which has served as counsel for Biovail. He is expected to testify concerning his communications on Biovail's behalf with FTC officials and other activities and dealings with respect to the FTC's investigation of the Stipulation between HMR and Andrx.

6. Eugene Melnyk:

Mr. Melnyk is currently an employee of Biovail. He is expected to testify concerning Biovail's communications and dealings with Andrx, government regulators and others related to Andrx's efforts to develop and market a generic version of Cardizem CD. He also is expected to testify concerning Biovail's efforts to develop and obtain regulatory approval for its own generic version of Cardizem CD and its efforts to market and sell its generic product. In addition, he is expected to testify concerning general pharmaceutical industry practices with respect to transactions between brand and generic manufacturers.

7. Rolf Reininghaus:

Mr. Reininghaus is currently an employee of Biovail. He is expected to testify concerning Biovail's communications and dealings with Andrx, government regulators and others related to Andrx's efforts to develop and market a generic version

of Cardizem CD. He also is expected to testify concerning Biovail's efforts to develop and obtain regulatory approval for its own generic version of Cardizem CD and its efforts to market and sell its generic product. In addition, he is expected to testify concerning general pharmaceutical industry practices with respect to transactions between brand and generic manufacturers.

8. Sitrick & Co. § 3.33(c) Deponent(s):

Sitrick & Co. is a public relations firm which has acted on Biovail's behalf. The Sitrick deponent(s) is expected to testify concerning the firm's engagement and its activities and dealings on Biovail's behalf in connection with Andrx, HMR, lobbying efforts and public disclosures concerning the FTC's investigation of the Stipulation between HMR and Andrx.

D. Witnesses Regarding Miscellaneous Issues As To Which Meaningful Discovery Has Not Occurred:[2]

1. Abbott Laboratories § 3.33(c) Deponent(s):

The Abbott deponent(s) is expected to testify concerning market practices in the pharmaceutical industry with respect to transactions between brand and generic manufacturers, including transactions involving features similar to the Stipulation between HMR and Andrx.

2. Faulding, Inc. § 3.33(c) Deponent(s):

[2] Because respondents have not been allowed to develop the record so far in discovery, the identity of witnesses remains unknown with respect to various important issues, including, among other things, general pharmaceutical industry practices and the scope and definition of the relevant Cardizem CD market.

The Faulding witness(es) is expected to testify concerning Faulding's efforts at developing, manufacturing and marketing a generic version of Cardizem CD and general pharmaceutical industry practices.

3. Federal Food & Drug § 3/33© Deponent(s):

The FDA witness(es) is expected to testify concerning the general regulatory framework applicable to, among other things, generic drugs and the regulatory approval process as it related to the various applications for a generic version of Cardizem CD.

4. Teva § 3.33(c) Deponent(s):

The Teva witness(es) is expected to testify concerning Teva's efforts at marketing a generic version of Cardizem CD and general pharmaceutical industry practices.

5. Zenith/Goldline Pharmaceuticals § 3.33(c) Deponent(s):

The Zenith/Goldline witness(es) is expected to testify concerning market practices in the pharmaceutical industry with respect to transactions between brand and generic manufacturers, including transactions involving features similar to the Stipulation between HMR and Andrx.

6. Pharmaceutical Company Representatives:

These individuals from various pharmaceutical companies are expected to testify generally about the market for cardiovascular therapy products.

7. Managed Care Provider Representatives:

These individuals from various managed care providers are expected to testify generally about the market for cardiovascular therapy products.

Dated: New York, New York
September 13, 2000

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,
FRISCHER & SHARP

By: _____

Louis M. Solomon
Hal S. Shaftel
Jonathan D. Lupkin
Sharon M. Sash
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New York, New York 10111
(212) 956-3700

Counsel for Respondent Andrx Corporation

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of **Hoechst Marion Roussel, Inc., et al.,** **Respondents.**	Docket No. 9293

AVENTIS PHARMACEUTICALS, INC.'S PRELIMINARY WITNESS LIST

Pursuant to the Court's Scheduling Order, Respondent Aventis Pharmaceuticals, Inc., formerly known as Hoechst Marion Roussel, Inc. ("HMR"), hereby submits this preliminary list of fact witnesses. We reserve the right to present testimony, by deposition or orally by live witness, from any other person who has been or may be identified by Complaint Counsel as a potential witness in this matter and any person from whom discovery is sought. We also reserve the right to supplement, modify or amend this witness list as we secure discovery in this matter and to identify rebuttal witnesses as circumstances may warrant, in accordance with the Court's Scheduling Order. Finally, we reserve the right not to call any of the persons listed herein to testify at the hearing, as circumstances may warrant.

Subject to these reservations of rights, our preliminary witness list is as follows:

THIRD PARTY WITNESSES

1. Bruce Brydon

Mr. Brydon is the Chief Executive Officer and a Director of Biovail Corporation. We expect Mr. Brydon to testify about his participation in a series of meetings between Biovail and Hoechst Marion Roussel, Inc. that took place between August 1997 and March 1998.

2. Kenneth Cancellara

Mr. Cancellara is Senior Vice President, General Counsel, Secretary and a Director of Biovail Corporation. We expect Mr. Cancellara to testify about his participation in a series of meetings between Biovail and Hoechst Marion Roussel, Inc. that took place between August 1997 and March 1998. We also expect Mr. Cancellara to testify concerning Biovail's efforts to develop a generic version of Cardizem® CD and his interactions with the Federal Trade Commission during the pendency of its investigation of Respondent.

3. Mark Canton

Mr. Canton is an employee of, and is or was Vice President and General Manager of the Contract Research Division of, Biovail Corporation. We expect Mr. Canton to testify about his participation in discussions with Quatro Scientific, Inc. ("Quatro") to acquire rights to the drug Probucol, as well as the development of Biovail's cardiovascular therapy products.

4. Dr. Gilles Cote

Dr. Cote is one of the principals of Quatro. We expect Dr. Cote to testify about his participation in discussions with Biovail and Hoechst Marion Roussel, Inc. regarding the development of Probucol.

5. Eugene Melnyk

Mr. Melynk is the Chairman of the Board and a Director of Biovail Corporation. We expect Mr. Melnyk to testify about his participation in a series of meetings between Biovail and Hoechst Marion Roussel, Inc. that took place between August 1997 and March 1998. We also expect Mr. Melnyk to testify concerning Biovail's efforts to develop a generic version of Cardizem® CD and his interactions with the Federal Trade Commission during the pendency of its investigation of Respondent.

6. Rolf Reininghaus

Mr. Reininghaus is Senior Vice President and a Director of Biovail Corporation. We expect Mr. Reininghaus to testify about his participation in a series of meetings between Biovail and Hoechst Marion Roussel, Inc. that took place between August 1997 and March 1998, and in discussions with Quatro and Hoechst Marion Roussel, Inc. We also expect Mr Reininghaus to testify concerning Biovail's efforts to develop a generic version of Cardizem® CD.

7. Biovail Deponent(s) Regarding Biovail's Generic Drug Applications

We expect to call one or more witnesses from Biovail Corporation to testify as to the U.S. Food and Drug Administration's ("FDA's") handling and processing of Biovail's various generic drug applications for cardiovascular therapy products.

8. Faulding Deponent(s) Regarding Faulding's Generic Drug Applications

We expect to call one or more witnesses from Faulding, Inc. to testify as to the FDA's handling and processing of Faulding's application for a generic version of Cardizem® CD and the related patent infringement litigation brought by Hoecht Marion Roussel, Inc.

9. Pharmaceutical Company Representatives

We expect to call individuals from various pharmaceutical companies to testify generally about the market for cardiovascular therapy products.

10. Managed Care Provider Representatives

We expect to call individuals from various managed care providers to testify generally about the market for cardiovascular therapy products.

11. United States Food and Drug Administration Representatives

We expect to call individuals from the U.S. Food and Drug Administration to testify generally about the regulatory approval process for Abbreviated New Drug Applications, New Drug Applications for bioequivalent products, the regulations relating to the implementation of the Hatch-Waxman amendments and comments and suggestions which have been offered by the Federal Trade Commission in the context of recent regulatory proposals. We also expect to call individuals who can testify as to the specific generic drug applications and related filings made by Andrx, Biovail and Faulding for cardiovascular therapy products. We intend to supplement this preliminary witness list with the names of the individuals likely to testify after these persons have been identified.

RESPONDENTS

1. Kelly Blinzler

Ms. Blinzler is the Manager of Forecasting for Hoechst Marion Roussel, Inc. We expect Ms. Blinzler to testify generally about sales projections and forecasting for Cardizem® CD.

2. Frank Ciriello

Mr. Ciriello was the Product Manager for Cardizem® CD for Hoechst Marion Roussel, Inc. We expect Mr. Ciriello to testify generally about the market for cardiovascular therapy products and sales and marketing activities related to Cardizem® CD. We also expect Mr. Ciriello to testify as to HMR's consideration of the proposal by Quatro to utilize Probucol in the treatment of restinosis following angioplasty.

3. James Costigan

Mr. Costigan is a member of the law firm of Hedman, Gibson & Costigan, P.C., and was counsel to Andrx Corporation in the patent infringement litigation brought by Hoechst Marion Roussel, Inc. against Andrx in the Southern District of Florida. We expect Mr. Costigan to testify about the defense of the patent infringement litigation and the efforts undertaken by counsel for Andrx to obtain rulings from the court in that case

4. Randall Glover

Mr. Glover formerly was Vice President of Manufacturing Operations at Andrx Corporation. We expect Mr. Glover to testify about Andrx's research and development efforts relating to the development of generic versions of Cardizem® CD and other anti-hypertension products

5. Elliot Hahn

Mr. Hahn is President and Director of Andrx Corporation. We expect Mr. Hahn to testify about Andrx's research and development, manufacturing, marketing and sales efforts with respect to its generic versions of Cardizem® CD. We also expect Mr. Hahn to testify about the negotiations resulting in the HMR/Andrx Stipulation and Agreement. In addition, we expect Mr. Hahn to testify about Andrx's financial condition during the development of its generic versions of Cardizem® CD and the HMR/Andrx patent litigation.

6. Thomas Heyman

Mr. Heyman is a member of the law firm of Jones, Day, Reavis & Pogue, and was counsel to Hoechst Marion Roussel, Inc. in the patent infringement litigation brought by Hoechst Marion Roussel, Inc. against Andrx in the Southern District of Florida. We expect Mr. Heyman to testify about the prosecution of the patent infringement litigation, the factual and legal basis of HMR's claims, and the factual and legal basis behind the negotiations which led to the ultimate settlement of the HMR/Andrx patent infringement case. We also expect Mr. Heyman to testify about the factual and legal basis of HMR's patent infringement lawsuit against Faulding, as well as his efforts to ascertain whether Biovail's product infringed HMR's patents.

7. Scott Lodin

Mr. Lodin is Vice President and General Counsel of Andrx Corporation. We expect Mr. Lodin to testify about the defense of the HMR/Andrx patent infringement litigation, including the negotiations resulting in the HMR/Andrx Stipulation and Agreement, as well as the final settlement of the litigation. We also expect Mr. Lodin to testify about Andrx's research and development, manufacturing, marketing and sales efforts with respect to its generic versions of Cardizem® CD.

8. Angelo Malahias

Mr. Malahias is Vice President and Chief Financial Officer of Andrx Corporation. We expect Mr. Malahias to testify about Andrx's financial performance.

9. Karen Rice

Ms. Rice is a Product Manager for Andrx Corporation. We expect Ms. Rice to testify generally about market planning and forecasting for prescription drug products.

10. Edward Stratemeier

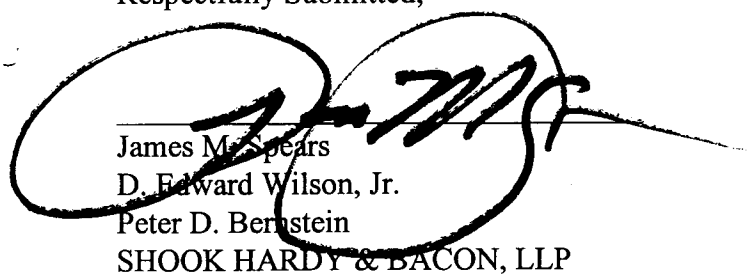
Mr. Stratemeier is Vice President and General Counsel of Hoechst Marion Roussel, Inc. We expect Mr. Stratemeier to testify about the prosecution of the HMR/Andrx patent infringement litigation, including the negotiations resulting in the HMR/Andrx Stipulation and Agreement, as well as the final settlement of the litigation. We also expect Mr. Stratemeier to testify as to patent infringement issues relating to the generic drug applications filed by Faulding/Purepak and Biovail. In addition, we expect him to testify about his participation in a series of meetings between Biovail and Hoechst Marion Roussel, Inc. that took place between August 1997 and March 1998, as well as HMR's consideration of the proposal by Quatro to utilize Probucol in the treatment of restinosis following angioplasty.

WITNESSES DESIGNATED ELSEWHERE

In addition to the foregoing, HMR hereby lists – and reserves the right to present testimony, by deposition or orally by live witness, from – any other person who has been or may be identified by Complaint Counsel or any Respondent, whether on such party's initial disclosures, on any list of any individual or entity with whom Complaint Counsel has communicated or may communicate regarding the subject matter of this proceeding, or on any preliminary or final witness list, as well as any person from whom discovery is sought or who may be called to testify. Such testimony may pertain to the subject matter designated by such other party and/or related issues.

Dated: June 30, 2000

Respectfully Submitted,



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Attorneys for Respondent
Aventis Pharmaceuticals, Inc.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of **Hoechst Marion Roussel, Inc., et al.,** **Respondents.**	Docket No. 9293

CERTIFICATE OF SERVICE

I, Scott E. DuPree, hereby certify that on June 30, 2000, a copy of Aventis Pharmaceuticals, Inc.'s Preliminary Witness List was served upon the following persons by hand delivery and/or Federal Express as follows:

Donald S. Clark, Secretary
Federal Trade Commission
Room 172
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Richard Feinstein
Federal Trade Commission
Room 3114
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Markus Meier
Federal Trade Commission
Room 3017
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Washington, D.C. 20580

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Peter O. Safir
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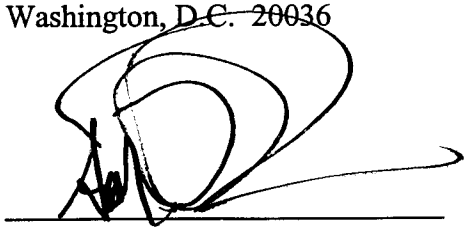

Scott E. DuPree

PUBLIC

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

OFFICE OF THE SECRETARY

November 1, 1999

VIA FACSIMILE AND EXPRESS MAIL

Hoechst Marion Roussel, Inc.
c/o Michael L. Koon, Esquire
SHOOK, HARDY & BACON LLP
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105

Re: *Petition of Hoechst Marion Roussel, Inc. to Quash* – File No. 981-0368, Investigation of Andrx Corp. and Hoechst Marion Roussel, Inc.

Dear Mr. Koon:

This letter advises you of the Federal Trade Commission's ruling on Hoechst Marrion Roussel, Inc.'s ("Hoechst" or "Petitioner") petition to quash the subpoena *ad testificandum* issued to James M. Spears, Esquire ("Petition"). The Petition is denied for the reasons stated below. The new date and time for James M. Spears to appear and give testimony is Wednesday, November 17, 1999 at 9:00 a.m.

This ruling was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4). Hoechst has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1] The filing of a request for review by the full Commission will not stay or otherwise affect the new hearing date, November 17, 1999, unless the Commission rules otherwise. See 16 C.F.R. § 2.7(f).

Hoechst's request for oral argument is denied. Petitioner presented its arguments in substantial detail in its twenty-page Petition. Additional argument both is unnecessary and would only further delay this investigation.

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[1] This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the original by express mail.

I. BACKGROUND

On October 18, 1998, the Commission issued a resolution authorizing the use of compulsory process in a nonpublic investigation to determine whether Hoechst, "Andrx Corporation, or other persons, partnerships, or corporations have engaged or are engaging in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, by monopolizing or attempting to monopolize the market for any pharmaceutical product; by entering into any agreement that has the purpose or effect of restricting entry into the generic market for any pharmaceutical product, or by otherwise restricting competition in the manufacture or sale of any pharmaceutical product."

The investigation of Hoechst and Andrx has focused on an agreement the two companies entered in September, 1997 ("Agreement"), in connection with their litigation of a patent dispute regarding Hoechst's once-a-day diltiazem product, Cardizem CD. As its resolution states, the Commission is concerned that the Agreement may have unlawfully prevented or delayed Andrx and others from marketing generic alternatives, or at least may have been intended to achieve these ends. Thus, the meaning and impact of certain provisions of the Agreement, as well as the intent of the parties in entering into it, are central to the investigation. These points, in turn, are informed by facts regarding the negotiation and related conduct by the parties in arriving at the Agreement.

As part of its effort to gather these facts, on September 3, 1999, the Commission issued a subpoena to James M. Spears, outside counsel to Hoechst, requiring that he appear and give testimony on September 16, 1999, at an investigational hearing to be conducted by FTC attorneys leading the investigation. Staff identified Spears as a potential witness based upon, among other things, the testimony of other witnesses involved in the negotiation of the Agreement.[2] Those witnesses uniformly identified Spears as having led the negotiation on behalf of Hoechst.

Redacted

On September 15, 1999, Hoechst filed a Petition to Quash the subpoena served upon

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[2] In June, 1999, Hoechst and Andrx entered a second related agreement. In its Petition, Hoechst describes this as an agreement settling the patent litigation between the parties. Hoechst adds that Spears represented the company in the negotiation of this agreement as well. Petition at 2. In his communications with Hoechst, the FTC staff attorney leading the investigation indicated that this second related agreement also would be a topic of questioning during their hearing with Spears. *See e.g.*, Petition, Ex. C (Letter from Bradley Albert to counsel for Hoechst, dated August 18, 1999).

Spears. Hoechst argues that (1) the subpoena "seeks privileged information for which the Commission has failed to make the requisite showing of necessity" and (2) "compliance with the subpoena would be unduly burdensome." Petition at 6.

After careful review of the Petition, Commissioner Anthony finds that none of Petitioner's arguments, each addressed separately below, provide a basis for quashing the subpoena.

II. ANALYSIS

A. Hoechst's Privilege and Disqualification Arguments are Baseless.

Hoechst's position in this matter boils down to the proposition that because some of the questions that may be asked during the investigational hearing of Spears might implicate one or more legal privileges, or because the hearing might lead to the disqualification of Spears from representing Hoechst in this and other related matters, Spears should not be required to submit to the hearing. While both arguments are addressed in more detail in later sections of this decision, their fundamental and overarching flaws are worth noting at the outset.

The mere fact that some questions posed during the hearing might be met with a privilege claim does not in any way provide a ground for quashing the subpoena. The questioners cannot know what information is protected by privilege or, for that matter, whether a witness will even choose to invoke an applicable privilege. This is a routine part of investigational hearings. Each witness must appear, listen to each question, and answer or assert a privilege claim as appropriate. See 16 C.F.R. § § 2.9(b)(2). Thus, Petitioner's lengthy arguments regarding attorney-client and work-product privileges are premature.[3]

Petitioner's disqualification argument is likewise premature. Disqualification occurs in those instances where counsel is likely to be called as a witness at trial. See American Bar Association, Model Rule of Professional Conduct 3.7. An FTC hearing in a non-public investigation is not a trial. Rather, it is a process whereby the Commission attempts to gather the information needed to decide *whether* a law enforcement action should be initiated. This decision must be informed by as much relevant evidence as possible. The disqualification issue will not be ripe until and unless, as a result of the investigation, the Commission votes to pursue litigation against Hoechst, and a party to that litigation names Spears as a witness. Spears could be named as a witness by any party to the litigation *whether or not the Commission holds an*

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[3] If, during his hearing, Spears asserts a privilege claim in response to a particular question, and FTC counsel do not believe the privilege applies, the invocation of the privilege can then be properly tested. See 16 C.F.R. § § 2.8A, 2.9, 2.13. Witnesses cannot assert blanket privilege claims, as Hoechst attempts to here, which amount to: "I believe that everything you will ask me will call for privileged information. As I do not intend to waive any privileges, I should not have to appear and listen to your specific questions at all." See, e.g., Petition at 4, 5, Ex. G, *Statement Pursuant to Commission Rule 2.7(d)(2)*, ¶ ¶ 2, 4, 9.

investigational hearing. Of course, FTC counsel would certainly be more likely to name Spears as a witness should the investigational hearing reveal that his testimony is unique and relevant. Apparently recognizing this, Hoechst would have the Commission voluntarily abandon this promising avenue of inquiry. The Commission's mandate to enforce the antitrust laws, however, precludes the Commission from choosing to ignore likely sources of relevant evidence at the request of the target.

B. The Subpoena Meets the Standards for Enforcement Applied by the Courts.

The Federal Trade Commission Act grants the Commission extensive investigatory powers. See 15 U.S.C. §§ 46, 49, 50, and 57b-1. These powers are essential to allow the Commission to carry out its broad mandate. Among the Commission's investigatory powers is the ability to issue subpoenas and the concomitant right to enforce them in the federal district courts. See 15 U.S.C. § 49; 16 C.F.R. § 2.13. The courts apply a deferential standard in enforcement proceedings, asking only whether (i) the investigation is within the Commission's authority, (ii) the information sought is reasonably relevant to the investigation, and (iii) the request is not unduly burdensome. See, e.g., *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992), cert. denied 507 U.S. 910 (1993). Each of these three requisites is met here.

1. Authority

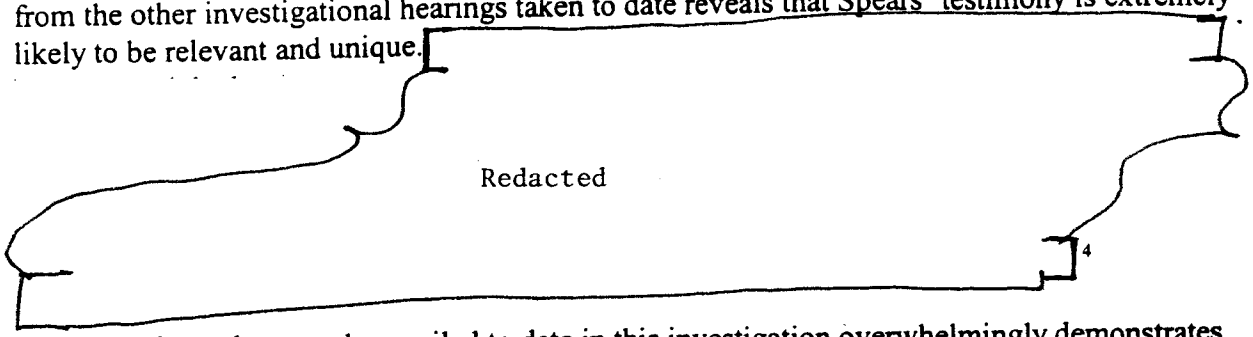
Hoechst does not challenge the Commission's authority to conduct the instant investigation. Indeed, it is beyond cavil that the investigation of a potentially anticompetitive agreement between pharmaceutical companies is within the Commission's statutory authority.

2. Relevance

Hoechst does question the relevance of Spear's testimony to this investigation. While common sense counsels that little testimony is likely to be more relevant to an investigation of an agreement than that of one of its principal negotiators, we need not rely upon common sense alone here.

Hoechst's relevancy challenge is based largely on the contention that there is nothing to be gained from an investigational hearing of Spears that the Commission does not already possess or could not obtain from other sources. Petition at 19. This contention is faulty for several reasons. First, Hoechst, as a target of this non-public investigation, is not in a position to accurately assess what the Commission has so far obtained, or as yet still seeks, through its investigation. Second, the Commission, as it carries out its mandate to enforce the antitrust laws, must conduct its investigation as it sees fit, and plainly cannot simply accept a target's word that nothing fruitful will come out of an investigational hearing of a central participant in a matter under investigation. Finally, and most importantly, Hoechst's argument that the information

sought from Spears is redundant and that "no non-privileged information could be gained through this subpoena that the Commission does not already possess or could readily obtain by further discovery directly from [Hoechst]" is just plain wrong. Id. A review of the transcripts from the other investigational hearings taken to date reveals that Spears' testimony is extremely likely to be relevant and unique.



In short, the record compiled to date in this investigation overwhelmingly demonstrates the relevance of Spears' testimony.

3. Burden

Hoechst argues that it would be unreasonably burdened if Spears were to appear and give testimony at the Commission's investigational hearing because such an appearance "could result in the disqualification" of Spears, and perhaps others in his firm, from representing Hoechst in this investigation and in other actions pending in various courts throughout the country which arise from the same facts and circumstances under investigation here.[5] Petition at 18. This argument is unpersuasive for numerous reasons.

Disqualification is not an issue that the Commission created by serving a subpoena upon Spears. Rather, this threat, to the extent it exists, was created by Hoechst when it first chose to have its outside counsel act as the company's negotiator of the Agreement at issue and again when it chose to retain Spears to represent the company in connection with the Commission's investigation and other litigation relating to that Agreement. Lawyers and their clients routinely face the issue of whether representation by a lawyer is advisable in a matter where the possibility exists that the lawyer may be a witness. Clients cannot shield relevant witnesses from testifying by hiring them as counsel. This point – that Spears is a first-hand actor and participant in the actions at issue, rather than a mere outside counsel consulted by the primary actors – seems to be

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[4] While the Andrx representatives might provide some testimony on these points, they, of course, can only provide the perspective of one party to the negotiation. In addition, it bears noting that discussions between Spears and his Andrx counterpart, as well as the drafts they exchanged, are not privileged.

[5] With respect to Hoechst's suggestion that the threat of disqualification might extend to other related cases pending across the country, the Commission has no control of these third-party cases and the witnesses that the plaintiffs (or even co-defendants) in these cases might call. Moreover, the Commission's investigational hearings are non-public. See 16 C.F.R. 2.8(c).

lost on Hoechst. Compare *Johnston Development Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352-54 (D.N.J. 1990) (deposition permitted where counsel was a fact witness by virtue of participating in a series of meetings), with Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986) (deposition not allowed where attorney was not an actor or witness to the events at issue). This is a crucial distinction, and one that severely undermines the arguments set forth in Hoechst's Petition.

In addition, Spears would not be disqualified merely because he had testified in an investigational hearing. Hoechst argues that the hearing would make it more likely that Spears would be called as a witness should this investigation prompt the Commission to file suit or issue an administrative complaint. This argument proves too much. If the hearing shows that he has no relevant or unique information, his risk of being called as a witness and, therefore, disqualified, is remote. On the other hand, if he has such information, and its probity outweighs the prejudice to Hoechst that would result from his disqualification, he *should* be a witness. Spears' fate is controlled not by his attendance at a hearing, but rather by the nature of the evidence he possesses. The investigational hearing, therefore, only affects the likelihood that Spears will be called as a witness in any potential trial to the extent that it provides a basis for informing that decision. Hoechst seeks to render the possibility of Spears being called as a witness "less likely" by asking the Commission to commit to willful ignorance as to what evidence Spears has to offer.

In sum, the subpoena was issued in connection with a proper investigation, seeks relevant information, and does not pose an unreasonable burden on Hoechst.

C. Hoechst's Privilege Arguments Are Premature and Misplaced.

Hoechst's Petition largely ignores the legal standards, addressed above, applicable to the enforcement of an FTC subpoena. Instead, Hoechst poses privilege arguments based upon precedents arising under the Federal Rules of Civil Procedure. Hoechst's fervent protestations of privilege are premature and misplaced.

Hoechst argues that because some questions asked during the hearing may solicit information for which a privilege could be claimed, holding the hearing at all is improper and the subpoena invalid. If this were the case, the Commission could hold no investigational hearings because in every hearing there is the prospect of inquiries into privileged matters. While Spears' status as Hoechst's outside counsel may well give rise to privileges that may be properly asserted in response to specific questions, that does not excuse him from having to attend the hearing at all. In short, he must appear, listen to each question asked by the examiners, and either answer or assert any privileges that he or Hoechst believes apply. See 16 C.F.R. § 2.9

Throughout its Petition, Hoechst confuses this issue. Again and again Hoechst makes arguments to the effect that the subpoena is aimed at intruding "upon protected attorney-client

communications and attorney thought processes . . . " and that "compliance with the Commission's subpoena will require [Hoechst's] counsel to disclose privileged information and other protected material . . . ." Petition at 7, 13. While questions, if and when posed, may call for such information, Hoechst is not being compelled to provide it. The issue here is simply whether Spears must appear for a hearing, not the validity of any privileges Hoechst might claim in response to questions asked during the hearing. Indeed, no assessment of privilege claims is even possible because as yet, no questions have been posed and no proper assertions of privilege have been lodged.

Relying on case law arising in the context of civil discovery, Hoechst argues that before the Commission can interview Spears, it "must offer proof of relevancy and need." Petition at 7. More specifically, Hoechst argues that the Commission "must show: (1) the information sought is otherwise not available; (2) the information sought is relevant and non-privileged; and (3) the information sought is critical to the preparation of the case." Id. (citations omitted).

As this is still an investigation, rather than a case pending before a judge, it is unclear to whom Hoechst believes these prerequisite showings must be made. This oversight demonstrates Hoechst's fundamental failure to appreciate the context of this subpoena: an investigation undertaken by the Commission pursuant to its statutory authority, rather than discovery undertaken in connection with litigation. While both are "investigatory" in nature, their bases and aims are quite different, and so too, therefore, are the rules that govern them.[6] As the Ninth Circuit explained in *EEOC v. Deer Valley Unified School Dist.*, 968 F.2d 904 (9th Cir. 1992):

> The function of administrative investigatory subpoenas differs from that of the discovery provisions of the Federal Rules of Civil Procedure. The discovery provisions apply to actions that have already been filed with the court, and the parties are seeking to develop evidence for the action that is before the court. The statutory subpoena authority, on the other hand, is designed for administrative investigations, which may or may not result in any further action before the district court. The enforcement is dependent upon the interpretation of statutory

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[6] For example, the relevancy inquiry applicable to administrative compulsory process is different than the inquiry applicable to civil litigation discovery demands:

> [U]nlike a court which gathers information only as it relates to issues relevant to the litigation at hand, an agency in its acquisition of facts is not bound by the parameters of a particular case or controversy. . . . . Because the need for investigating allegations of unlawful activity is a substantial one, the law requires that courts give agencies leeway when considering relevance objections.

FTC v. Invention Submission Corp., 1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,351 (D.D.C. 1991), aff'd, 965 F.2d 1086 (D.C. Cir. 1992), cert. denied 507 U.S. 910 (1993). Thus, the bounds of relevancy in the context of an investigation are broader than those applicable to a civil suit.

authority, not interpretations of the discovery provisions of the Federal Rules of Civil Procedure.

Id. at 906; see also *Linde Thompson Langworthy Kohn & Van Dyke v. RTC*, 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"); *EPA v. Alyeska Pipeline Service Co.*, 836 F.2d 443, 447 (9th Cir. 1988) ("An administrative agency, unlike parties relying on the judicial discovery process, need not first allege a violation of the law before it can investigate"(internal citations omitted)). Thus, Hoechst's arguments regarding the Commission's failure to make requisite showings of relevancy and necessity begin from the mistaken premise that federal discovery rules apply here; they do not.

Even assuming that Hoechst was arguing by analogy in discussing the discovery standards applied by courts considering whether to allow a party to depose opposing counsel, *i.e.*, that such precedent is persuasive, but not binding, authority,[7] the argument still fails. This is so because, leaving aside the issue of whether the *Shelton* standards are applicable and appropriate in the context of a Commission investigation, all of those standards – (i) the information is not available for another source, (ii) it is relevant and non-privileged, and (iii) it is important to the case – are plainly met here.

The primary focus of the investigational hearing of Spears will be on communications between Spears and representatives of Andrx relating to the negotiation and drafting of the Agreement. As Spears was the only Hoechst representative taking part in many of these communications, the information he can offer is not available from any other source. As discussed above, this information is clearly relevant. Moreover, communications with third-parties are not privileged. Finally, the details of the crafting of the Agreement are essential to this investigation. In order to evaluate the likely effects of the Agreement and the parties' asserted business justifications, the Commission must obtain an understanding of the meaning and operation of specific provisions of the Agreement, as well as the purpose of the parties in including those provisions or, indeed, of not including others. Learning the thought processes that went into these negotiations, as reflected in discussions between the parties' representatives and in the drafts they exchanged, is crucial to the investigation.[8]

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[7] The Commission carefully considers the use of its compulsory process powers each time they are exercised. While not technically bound by precedents established under the Federal Rules of Civil Procedure, and recognizing that the aims and limits applicable in its investigations often diverge from those applicable in litigation, the Commission's consideration of whether to issue compulsory process in a given case is informed by some of the same touchstones used by courts in assessing discovery requests in the context of civil litigation.

[8] None of the forgoing is intended to in any way place limits on the avenues of inquiry that the FTC counsel conducting this investigation may pursue in the course of the hearing. Rather, it merely is intended to provide an example of at least one important line of inquiry that meets all of the *Shelton* standards. The Commission is confident that the FTC staff conducting the investigation will work as cooperatively as possible with

III. CONCLUSION

For all of the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), the new date and time for James M. Spears to appear and give testimony is Wednesday, November 17, 1999 at 9:00 a.m.

By direction of the Commission.

Donald S. Clark
Secretary

Spears and Hoechst in dealing with areas where privileges might be implicated.

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

Office of the Secretary

PUBLIC RECORD VERSION

January 19, 2000

VIA FACSIMILE AND EXPRESS MAIL

Hoechst Marion Roussel, Inc.
c/o Michael L. Koon, Esquire
SHOOK, HARDY & BACON LLP
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105

Re: *Request for Full Commission Review of Denial of Petition to Quash*, File No. 981-0368, Investigation of Andrx Corp. and Hoechst Marion Roussel, Inc.

Dear Mr. Koon:

This letter advises you of the Federal Trade Commission's ruling on Hoechst Marion Roussel, Inc.'s ("Hoechst" or "Petitioner") *Request for Full Commission Review of Denial of Petition to Quash* ("Appeal"). The Appeal seeks review of the November 1, 1999 letter ruling by Commissioner Anthony ("Initial Ruling") denying the September 15, 1999 *Petition of Hoechst Marion Roussel, Inc. to Quash* ("Petition") the subpoena *ad testificandum* issued to James M. Spears, Esquire ("Subpoena"), outside counsel to Hoechst. For the reasons set forth below, the Commission affirms the Initial Ruling and sets January 27, 2000 at 9:00 a.m. as the new date and time for Spears to appear and give testimony. Petitioner's request for oral argument is denied.

1. Background

The focus of this investigation is a September, 1997 agreement between Hoechst and Andrx Corporation (the "Agreement"). As the Initial Ruling states: "The Commission is concerned that the Agreement may have unlawfully prevented or delayed Andrx and others from marketing generic alternatives, or at least may have been intended to achieve these ends." Initial Ruling at 2. In its Appeal, Hoechst does not dispute that Spears took the lead in negotiating and drafting the Agreement on behalf of Hoechst or that Spears is the most knowledgeable Hoechst representative with respect to many of the negotiations and drafts. *See id.* at 2, 5.

Rather, Hoechst argues that the Commission must apply the heightened standards used by *some* federal courts in considering whether to permit depositions of opposing counsel in the context of civil litigation. Appeal at 3-6, 11-12. Hoechst further maintains that these standards are not met here. *Id.* at 6-8. Hoechst also argues: (1) that, even if the Commission is unwilling to quash the Subpoena, it should limit the scope of the questioning; and (2) that forcing Spears to

assert any applicable privileges in response to specific questions is inappropriate. The Commission rejects each of these arguments.

II. Analysis

A. An Administrative Investigation Is Not Equivalent to Civil Discovery.

Hoechst argues that certain federal court precedent regarding subpoenas directed to opposing counsel "apply to agency investigatory subpoenas . . . ." Appeal at 6 (citing *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986)). First, to the extent Hoechst is arguing that the Commission is bound to follow this precedent, it is wrong. The Commission is an independent federal agency with its own procedural Rules, not a part of the federal judiciary obliged to apply the Federal Rules of Civil Procedure. Moreover, the precedent upon which Hoechst relies is merely one of two conflicting lines of authority in the federal courts on a question the Supreme Court has not addressed. *See generally Sparton Corp. v. United States*, 44 Fed. Cl. 557, 560 (Ct. Cl. 1999) (collecting cases on both sides of the conflict).

Second, as Commissioner Anthony noted in the Initial Ruling, the aims and limits of administrative investigations often diverge from those of civil litigation. *See* Initial Ruling at 7-8. Civil discovery is intended to narrow the issues for trial. An administrative investigation is aimed at determining whether violations of law likely exist that should be pursued through litigation.[1] The Commission must take these differences into account in determining the persuasive significance of precedent established under the Federal Rules of Civil Procedure to an administrative investigation governed by the Commission's Rules.

B. The *Shelton* Case Is Inapplicable Here.

The normal standards governing subpoenas both in administrative investigations and in civil litigation place on the party opposing the subpoena "the difficult burden of showing that the demands are unduly burdensome or unreasonably broad." *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980). Hoechst, however, advocates the special standards proposed by the Eighth Circuit in *Shelton* for limiting depositions of opposing counsel and urges the Commission to apply those standards to investigational hearings of counsel representing parties under investigation. We decline to do so.

Shelton was a tort suit arising from a Jeep roll-over accident. The district court granted default judgment against the manufacturer after the manufacturer's in-house counsel, during her deposition, refused to state whether she was aware of the existence of any documents relating to

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[1] As the Supreme Court explained fifty years ago, an investigation by the Commission is "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 just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probably violation of the law." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

roll-over tests or accidents in her client's files. The only issue on appeal was whether the attorney's mere acknowledgment of the existence of the documents would constitute work product. The court concluded that because such acknowledgment would reveal the counsel's mental impressions ("mental selective process" in culling certain documents from the voluminous files reviewed during litigation), it was privileged. 805 F.2d at 1326, 1329. In dicta, the court disapproved of depositions of opposing counsel "as a negative development in the area of litigation" and proposed that such depositions should be permitted only where "the party seeking to take the deposition has shown that (1) no other means exist to obtain the information . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Id.* at 1327.[2]

This formulation has been criticized by several other federal courts. *See, e.g., qad.inc v. ALN Associates, Inc.*, 132 F.R.D. 492, 495 (N.D. Ill. 1990) ("This Court's disagreement with a principle stated in such broadbrush terms is respectful but profound. What *Shelton* says may fairly (and properly) reflect an attitude of protecting our brethren at the bar, all other things being equal. But stated as a rule of law it must be viewed as wrong . . . ."); *Rainbow Investors v. Fuji Trucolor*, 168 F.R.D. 34 (W.D. La. 1996); *Kaiser v. Mutual Life Ins. Co. of New York*, 161 F.R.D. 378 (S.D. Ind. 1994); *see also First Security Sav. v. Kansas Bankers Surety Co.*, 115 F.R.D. 181, 182-83 (D. Neb. 1987) (interpreting *Shelton* as not intended to effect a change in the general burden of persuasion for attorney depositions).[3]

At least in the context of administrative investigative subpoenas, the Commission believes that the approach of these latter courts is preferable. The *Shelton* dicta appear to reverse the normal burden of persuasion on subpoenas and add a novel requirement that the party seeking information prove before obtaining it that it is "crucial" to the case. In doing so, the Eighth Circuit was reacting to concerns that private litigants were abusing the discovery process by frequently noticing depositions of opposing counsel as a means of harassment. *See* 805 F.2d at 1327, 1330. The Commission does not frequently issue subpoenas to counsel, nor does it do so in bad faith. Moreover, since Commission investigations are aimed at determining whether to bring a case, it would be premature to require at the investigatory stage a showing that the information sought "is crucial to the preparation of the case."

1. Unlike the Attorney in *Shelton*, Spears Was a Direct Participant.

A key distinction between *Shelton* and the instant matter is that the attorney in *Shelton* was not a material witness or actor in conduct prior to the proceeding in which her testimony was

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[2] The *Shelton* court also stated: "To be sure, the Federal Rules of Civil Procedure do not specifically prohibit the taking of opposing counsel's deposition" and "We do not hold that opposing trial counsel is absolutely immune from being deposed." 805 F.2d at 1327.

[3] Other courts of appeals have declined to take sides in this conflict. *See Nguyen v. Excel Corp.*, 1999 U.S. App. Lexis 32457, *23 (5th Cir. 1999) (assuming, without deciding, "the applicability of the *Shelton* inquiry"); *Boughton v. Cotter Corp.*, 65 F.3d 823, 829 n.7 (10th Cir. 1995) (declining to take sides between the *Shelton* dicta and *qad.inc*).

sought. The *Shelton* attorney was merely being deposed about her client's honesty in responding to discovery. *See* 805 F.2d at 1330. Here, Commission counsel seeks to question Spears about his first-hand participation in the formation of the agreement at the heart of this investigation, which was negotiated, drafted, and executed before the investigation began. As one court aptly noted, "[e]ven cases in the *Shelton* line recognize that, if an attorney is a witness or actor in prelitigation conduct, he may be deposed the same as any other witness." *Kaiser*, 161 F.R.D. at 382 (citations omitted); *see also Bogan v. Northwestern Mut. Life Ins. Co.*, 152 F.R.D. 9, 14 (S.D.N.Y. 1993) (*Shelton* standards do not bar depositions of opposing counsel "where attorneys take part in significant, relevant pre-events and the attorney-client privilege does not apply to the testimony sought"); *Johnston Dev. Group v. Carpenters Local 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990) ("The deposition of the attorney may be 'both necessary and appropriate' where the attorney may be a fact witness, such as an 'actor or viewer,' rather than one who was not a party to any of the underlying transactions giving rise to the action, or whose role in a transaction was speculative and not central to the dispute . . . ."); *In re Tutu Water Wells Contamination*, 184 F.R.D. 266, 267 (D.V.I. 1999) ("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").

In its Appeal, Hoechst argues that Spears cannot be considered an actor or participant "merely because he may have negotiated and or drafted any of the subject documents in the course of his representational duties." Appeal at 7, n.9. On the contrary, a negotiator and drafter of an agreement *is* an actor and participant in the formation of that agreement. That participant's status as counsel does not exempt him from questioning in discovery or, for that matter, administrative investigations. *See, e.g., United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 164 F.R.D. 245, 248 (D. Kan. 1995) ("Attorneys with discoverable facts, not protected by attorney-client privilege or work product, are not exempt from being a source for discovery by virtue of their license to practice law or their employment by a party to represent them in litigation.").

The case of *Rainbow Investors v. Fuji Trucolor*, 168 F.R.D. 34 (W.D. La. 1996), is instructive. There, defendants noticed the opposing counsel's deposition and the plaintiffs moved for a protective order. Finding, among other things, that the attorney played a "key role" "in negotiating the transaction which lies at the heart of this dispute," the court denied the motion and ordered the deposition to proceed. *Id.* at 38; *accord, Tutu*, 184 F.R.D. at 267-68 (deposition of attorney ordered where attorneys "were actors or witnesses to the agreement giving rise to the cause of action . . . ."). In reaching its ruling, the *Rainbow Investors* court declined to follow the *Shelton* court in its apparent reversal of the burden of persuasion. Instead, it explained:

> Federal Rule of Civil Procedure 26(b)(1) allows for discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." Moreover, the Federal Rules of Civil Procedure do not specifically prohibit taking the deposition of counsel. Thus, the party seeking the protective order to preclude their attorney's deposition bears the burden under Rule 26(c) of demonstrating good cause to preclude or limit the testimony.

168 F.R.D. at 36 (citations omitted); *see also Johnston*, 130 F.R.D. at 352-53 ("The preclusion of

attorney depositions is to be analyzed with the same standards as any other protective order motion, with the movant bearing the burden of persuasion under Rule 26(c) . . . ."); *Kaiser*, 161 F.R.D. at 380 ("The burden is on the Rule 26(c) movant to establish adequate grounds ('good cause') for an order protecting against discovery.").

The *Rainbow Investors* court then found that the "plaintiff ha[d] failed to make the required showing of good cause . . . ." 168 F.R.D. at 37. Spears is situated similarly to the attorney in *Rainbow Investors*,[4] and the same approach is appropriate here.

Addressing privilege concerns, the *Rainbow Investors* court held that bona fide attorney-client communications regarding the negotiations were privileged. But "[i]nsofar as [the attorney] was acting more as a negotiator in a business activity on [his client's] behalf than as their attorney, any knowledge possessed by [the attorney] in this regard is discoverable. Moreover, any non-privileged communications between [the attorney] and [the other party to the agreement] are also discoverable." *Id.* at 37. The same is true here: while communications between Spears and Hoechst during the negotiation of the Agreement, to the extent not otherwise subject to waiver, are likely to be privileged, Spears' actions as a negotiator and his communications with Andrx's representatives are proper subjects for inquiry by Commission counsel.

2. The *Shelton* Dicta Are Inconsistent with the Commission's Rules.

Hoechst argues that investigative subpoenas to counsel for a party under investigation should not be enforced unless the FTC attorneys conducting the investigation on behalf of the Commission satisfy the Commission that the *Shelton* factors are met. Appeal at 6 & n.6.[5] Whatever the merits of the *Shelton* dicta and their apparent burden-shifting under the Federal Rules of Civil Procedure, their approach cannot be reconciled with the Commission's Rules.

Section 2.7(d) of the Commission's Rules, 16 C.F.R. § 2.7(d) (1999), places the burden

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[4] Some of the similarities are striking. For example, the defendants in *Rainbow Investors* took the deposition of the plaintiff corporation's president, and during that deposition "defendants learned that [the attorney] may possess vital information unknown even to [the president] regarding the negotiation of the [asset sale agreement]." *Id.* at 37; *see also Nguyen*, 1999 U.S. App. Lexis 32457, *23-*24 (approving a deposition of defense counsel "even assuming the applicability of the *Shelton* inquiry" where the defendant had not established that "its executives could . . . respond meaningfully to the questions to be posed"). Here, [investigational hearings] [redacted] revealed that Spears was the only source of vital information regarding the Agreement at issue here. *See* Initial Ruling at 2, 5.

[5] Lest there be any confusion, we note that investigative subpoenas are not issued by FTC staff, but by the Commission. All FTC investigative subpoenas are reviewed and executed by a Commissioner, acting as the Commission's delegate, based upon information provided by Commission staff as to the need to direct compulsory process to the recipient and upon a compulsory process resolution approved by the full Commission.

on the petitioner to show with particularity why a subpoena should be limited or quashed.[5] In the Commission's view, this provision precludes a burden-shifting approach. Instead, the Commission interprets Rule 2.7(d) as requiring *the party seeking to avoid appearance or production obligations* to show good cause according to traditional criteria, as elaborated in *Johnston*:

> The party seeking to block its attorney's deposition concerning relevant information will succeed if it 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 a deposition testimony.

130 F.R.D. at 353.

All three of these concerns were addressed at length in the Initial Ruling, and we affirm and hereby adopt those findings. Specifically, (1) the information possessed by Spears is central to the subject of the investigation, namely the Agreement, Initial Ruling at 4-5, 8; (2) the information is not available from another source, *id.* at 5, 8; and (3) representational harm is speculative,[7] *id.* at 5-6. On appeal, Hoechst does not even argue that Spears lacks relevant information[8] or that the Spears information could be obtained from other sources. Nor does it

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[6] Section 2.7(d)(1) provides, in relevant part:

> Any petition to limit or quash any investigational subpoena . . . shall set forth all assertions of privilege or other factual and legal objections to the subpoena . . . , including all appropriate arguments, affidavits and other supporting documentation.

[7] *See Rainbow Investors*, 168 F.R.D. at 37-38 ("although the prospect of oppression is present in the examination of opposing counsel, I find that the risk is justified here due to the key role [the attorney] played in negotiating the transaction which lies at the heart of this dispute"); *see also Frazier v. S.E. Pa. Transp. Auth.*, 161 F.R.D. 309, 314 (E.D. Pa. 1995) (rejecting the potential disqualification argument "because of the flimsy nature of its premise: whether [the attorney] is compelled to testify at trial depends not on whether his deposition is taken, but on the nature of the information he possesses"); *Bogan*, 152 F.R.D. at 14 ("The fact that an attorney is deposed, or that an adversary claims the testimony is or may be material, does not establish that the attorney should be a witness at trial or must be disqualified. This remedy is not to be lightly imposed.").

[8] Instead, Hoechst argues that the staff has failed to show that the information Spears possesses is "critical to the staff's investigation." Appeal at 6. As noted above, we hold that the staff bears no such burden. Rather, it is Hoechst that is obliged to show that the harm it will suffer as a result of the hearing outweighs the importance of the information that Spears has to offer. Of course, as with all subpoenas, staff must satisfy the executing Commissioner that the subpoena is appropriate and necessary. The status of the recipient as counsel to the target would certainly be a significant factor weighing in the Commissioner's review.

offer any further evidence demonstrating how the hearing would oppress Hoechst. In short, Hoechst has failed to carry its burden of showing good cause for the Commission to quash or limit the Subpoena.

C. Scope and Duration Restrictions.

As an alternative to its argument that the *Shelton* standards apply and preclude the hearing altogether, Hoechst argues that the scope and duration of the hearing should be limited. Appeal at 8-9. We decline to do so because Hoechst has not met its burden to demonstrate the need for such limitations and because we find that no such limitations are necessary or appropriate.

First, Hoechst has failed to propose any specific substantive limitations other than to suggest that inquiries be limited to non-privileged matters in light of general "dangers inherent in attorney depositions." *Id.* at 9. A petitioner seeking to limit a subpoena must present specific proposals for limitation and support those proposals with facts and reasoned argument. *See* 16 C.F.R. 2.7(d)(1). Hoechst has failed to discharge that burden.

Second, limiting the lines of inquiry in advance is unnecessary to protect applicable privileges and inappropriate.[9] It is unnecessary, because Hoechst or Spears is free to assert an appropriate claim of privilege during the investigational hearing in lieu of a response to a specific question. *See* Section D, *infra*; *see also* Letter from B. Albert to M. Koon, September 3, 1999, at 2. In addition, such a limitation is inappropriate because the Commission as the investigator is not in the position to know what areas are likely to be privileged or if a privilege will be waived. A general limitation specifying no more than "only non-privileged matters" is, therefore, essentially meaningless. Moreover, the Commission will not impose a prior restraint that would hobble staff in carrying out its duty to pursue all relevant lines of inquiry. *See United Phosphorus*, 164 F.R.D. at 250 ("The court is unwilling to preclude plaintiff from discovery of facts which may be relevant in this case simply because defendant has chosen Mr. Tillotson to represent it as counsel in this matter notwithstanding his personal knowledge of the underlying

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Hoechst further argues that the Commission does not need the Spears testimony because, Hoechst alleges, the staff has already decided to recommend suit. *Id.* First, whether or not staff has made, or decided to make, a recommendation is a confidential internal matter, and the Commission declines to respond to rumors or allegations regarding such matters. Second, even when a recommendation is made, the investigatory phase is not over until the Commission votes on the recommendation. The Commission, and not the staff, determines whether the evidence amassed by staff provides reason to believe that a violation has occurred. Indeed, the staff is obligated to continue to gather all relevant information to inform the Commission's ultimate decision right up until the final vote is cast regarding the issuance or non-issuance of a complaint.

[9] In its Appeal, Hoechst contends that the Commission's desire for testimony regarding discussions between the representatives of the two parties to the Agreement and the drafts exchanged between those representatives "underscores that the focus of the subpoena is on attorney work product and attorney-client communications." Appeal at 7. Discussions with third parties and documents shared with them are not, however, generally privileged. If any specific communications are privileged, specific objections can be asserted at the appropriate time, as discussed below.

facts which are related to the action."). We concur with the *qad.inc* court, which "reject[ed] any prior restraint in favor of permitting the deposition to go forward, with any individualized objections to be dealt with during its regular course." 132 F.R.D. at 495.

D. Spears Must Assert Privileges in Response to Specific Questions at the Hearing.

Hoechst argues that because "seemingly innocent questions may trench upon privileged matters" and present a "trap for the unwary," requiring the invocation of privileges in response to specific questions is inappropriate.[10] Appeal at 9-11. We disagree.

The general rule in the federal courts is equally applicable here: "Protective orders suppressing depositions are rarely granted; deponents are expected instead to assert their objections during the deposition and allow the questioning parties to develop circumstantial facts in order to explore the propriety of the assertion of the privilege, immunity or other objection." *Kaiser*, 161 F.R.D. at 380, *citing* 8 Fed'l Prac. & Proc. § 2037 at 272. This principle applies with full force when the person giving testimony is an attorney. *See Bogan*, 152 F.R.D. at. 14 ("Counsel whose deposition is sought concededly participated in disputed pre-litigation events which at least may relate to issues raised in this litigation. If questions put at the deposition relate to privileged matters, a proper objection can be interposed at that time."). As one district court explained:

> [C]hallenges to the taking of an attorney's deposition, based upon claims that any of the attorney's testimony will involve disclosure of privileged information or "work product," have been held to be premature. . . . [C]ompletely preventing the taking of a deposition on either of the above grounds would tend to limit or fix the scope of the examination before it began and would usurp the court's role in deciding whether certain questions seek privileged information. *The more appropriate method is to allow the deposition to be taken and permit the attorney to claim privilege in the face of certain questions if necessary.*

Hunt Intern. Resources Corp. v. Binstein, 98 F.R.D. 689, 690 (N.D. Ill. 1983) (emphasis added, citations omitted).

In addition, staff has worked cooperatively with other witnesses in this matter to deal with potential privilege issues, and the Commission is confident that the same consideration will be

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[10] Hoechst argues that the Commission's Rules require privilege objections to be asserted in petitions to quash, and, therefore, requiring privilege claims to be asserted in response to specific questions during a hearing is at odds with the Rules. Appeal at 10. While some privilege claims – most notably those asserted in response to subpoenas *duces tecum* – might well be made in a petition to quash, the specific rule dealing with testimony, Section 2.9, states with regard to claims of privilege: "Where it is claimed . . . that the witness is privileged to refuse to answer a question . . . the witness or counsel for the witness may object on the record to the question . . . and may state briefly and precisely the ground therefor." 16 C.F.R. § 2.9(b)(2) (1999).

extended to Spears.

III. Conclusion

The Commission does not routinely issue investigative subpoenas to counsel for targets in its investigations. Nor does it take lightly the privilege and burden issues potentially raised by such subpoenas. However, where, as here, counsel for a party has acted as the target's agent in conduct that is the subject of the investigation, the attorney is a proper witness and may be a necessary one. This is even more true where, as here, the attorney is the *only* source for certain key information. The Commission will not reverse the burden with respect to investigatory hearings of attorneys; as with all other witnesses, the burden is on the witness, or other objecting party, to show that the hearing should not take place or should be limited. The Commission rejects the notion that a prior restraint is necessary to deal with any privilege or burden issues that an investigatory hearing of counsel might raise. Instead, burden issues should be addressed by a petition to quash in advance of the hearing, and privilege claims should be made in response to individual questions posed at the hearing. A more restrictive approach would unduly interfere with the Commission's ability to carry out its mandate to investigate potential anticompetitive practices that may seriously harm consumers.

The Commission concludes that Commissioner Anthony's November 1, 1999 Initial Ruling fairly and properly considered and addressed all of Petitioner's arguments. Accordingly, the full Commission hereby affirms the Initial Ruling. The Commission amends that ruling only insofar as it set November 17, 1999 as the new return date. The new return date is January 27, 2000.

By direction of the Commission.

Donald S. Clark
Secretary

CERTIFICATE OF SERVICE

I, Seth C. Silber, hereby certify that on September 27, 2000, I caused a copy of the Complaint Counsel's Consolidated Response to Respondents' Motions for Protective Order to be served upon the following persons via overnight delivery and facsimile (without attachments).

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