

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



_____)
In the Matter of)
)
HOECHST MARION ROUSSEL, INC.,)
a corporation,)
)
CARDERM CAPITAL L.P.,)
a limited partnership,)
)
and)
)
ANDRX CORPORATION,)
a corporation.)
_____)

Docket No. 9293

**ORDER DENYING AVENTIS' MOTION TO ENFORCE
COMPLIANCE WITH THE SUBPOENA SERVED ON ALPHARMA**

I.

On October 4, 2000, Respondent Aventis Pharmaceuticals, Inc. ("Aventis"), formerly known as Hoechst Marion Roussel, Inc., filed its Motion to Enforce Compliance With The Subpoena Served on Alpharma, Inc. ("Alpharma"). Alpharma responded by filing its Opposition to Aventis' Motion to Enforce Compliance on October 16, 2000.

For the reasons set forth below, Aventis' Motion to Enforce Compliance is DENIED.

II.

Alpharma is a generic pharmaceutical manufacturer. Aventis asserts that its subpoena seeks, in summary, documents from Alpharma relating to marketing studies, market-share incentive contracts with third party payors, documents reflecting substitutability judgments and studies, and other information necessary to determine the proper scope of any relevant product market that includes Cardizem® CD or generic versions of Cardizem® CD. Aventis asserts that it needs these documents to determine the proper relevant product definition. In addition, Aventis asserts, it needs information from Alpharma in order to prepare for the testimony of Mr. Wrobel, Alpharma's Vice President and Chief Legal Officer, who has been identified by Complaint Counsel as a potential witness in this case.

Aventis states that it served a subpoena similar to the one it served on Alharma on approximately fifteen manufacturers of pharmaceutical products. Recipients were selected following an analysis of cardiovascular prescriptions and a review of the preliminary witness list submitted by Complaint Counsel.


Alharma responds that it is not involved in the manufacture of any cardiovascular pharmaceutical products. (Declaration of Smith in Opposition to Motion for Enforcement "Smith Decl." at ¶ 2.) Alharma further asserts that Wrobel was listed as a witness for the FTC without Wrobel's knowledge or agreement. (Smith Decl. at ¶ 6.) At the request of Alharma's counsel, Complaint Counsel wrote to counsel for Aventis to clarify the scope of testimony that Complaint Counsel intends to elicit from Wrobel. (Smith Decl. at ¶ 5.) His intended testimony does not relate to product market definition issues. (July 19, 2000 letter from Daniel Kotchen.)

III.

Discovery sought in a proceeding before the Commission must be "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." 16 C.F.R. § 3.31(c)(1). *Federal Trade Commission v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979). The Commission's Rules of Practice state that "in instances where a nonparty fails to comply with a subpoena or order, the Administrative Law Judge shall certify to the Commission a request that court enforcement of the subpoena or order be sought." 16 C.F.R. § 3.38(c). This rule is derived from the Commission's organic statute which sets forth "in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence." 15 U.S.C. § 49. *See also In re Market Dev. Corp.*, 95 F.T.C. 100, 1980 FTC LEXIS 162, *244-45 (Jan. 15, 1980).

If Alharma has produced all relevant, non-privileged documents responsive to the subpoena, it has not failed to comply with the subpoena. The pleadings and declarations state that Alharma does not manufacture any cardiovascular pharmaceutical products. Therefore, it is unlikely to possess information relevant to the allegations of the complaint or the defenses of the Respondents and responsive to Aventis' subpoena not available elsewhere. Although Alharma may have documents relevant to the issues of the Complaint for which Complaint Counsel intends to elicit testimony from Wrobel, such documents, regarding witnesses, were not requested in the subpoena for which Aventis seeks compliance. Accordingly, Aventis' Motion to Enforce Compliance is DENIED.

ORDERED.



D. Michael Chappell
Administrative Law Judge

Date: October 24, 2000