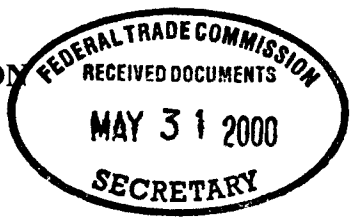
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

AVENTIS PHARMACEUTICALS, INC.'S MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSELS' MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION TO STRIKE

Pursuant to Rule 3.22(c) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.22(c), Respondent Aventis Pharmaceuticals, Inc., formerly known as Hoechst Marion Roussel, Inc. ("HMR"), respectfully opposes Complaint Counsels' Motion for Leave to File Reply in Support of Motion to Strike, dated May 26, 2000. As described more fully below, because of their potential for dilatory abuse, reply memoranda normally are not permitted under the Commission's rules, and Complaint Counsel has utterly failed to address, much less carry, its burden of demonstrating that a reply to Respondents' opposition memoranda might be necessary or even appropriate. As a result, Complaint Counsel's motion for leave to reply should be denied. Moreover, while remaining absolutely silent on the question of any putative anticompetitive effect that might be attributable to Respondents' conduct, Complaint Counsel's proposed reply memorandum underscores many of the trenchant disputes between the parties over Complaint Counsel's characterizations of the facts and the law in this case. As a result, Respondent HMR respectfully renews its request that this Court deny Complaint Counsel's motion to strike in its entirety.

Under the Commission's Rules, "[i]n general, movants have no right to reply to answers opposing their motions." *Campbell Soup Co.*, 1989 FTC Lexis 40, at *1-2 (June 14, 1989) (citing Rule 3.22(c)); *see Amway Corp.*, 1976 FTC Lexis 210, at *5 (July 27, 1976) ("Respondent had no right to reply [to *de facto* motion to extend time] and the administrative law judge is not bound to wait decision until the moving party files such a reply.").[1] Although exceptions to this general rule may be granted at the discretion of the presiding administrative law judge or of the Commission, Complaint Counsel must initially bear the heavy burden, as the proponent of the motion to strike that is the subject of its proposed reply, of demonstrating that an exception to this rule is justified.[2] *See Campbell Soup Co.*, 1989 FTC Lexis 40, at *1-2 (noting that movant "has not demonstrated sufficient cause for the Commission to make an exception in this case"). "Usually, such leave will only be granted when the answer raises some new point of fact or law which could not have been anticipated in the original motion." *Litton Indus., Inc.*, 1979 FTC Lexis 333, at *1 (June 12, 1979). A mere desire to "clarify" or "correct" statements in a prior pleading is insufficient to support a motion for leave to reply. *See, e.g., Campbell Soup Co.*, 1989 FTC Lexis 40, at *1-2 (motion for leave to reply to complaint counsel's answer opposing appeal "for the limited purpose of clarifying and correcting several statements made in the Complaint Counsel's Opposition Statement" not supported by "demonstrat[ion of] sufficient cause for the Commission to make an exception" to general rule

---

1. Commission Rule 3.22(c) provides, in pertinent part, that "[t]he moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission." 16 C.F.R. § 3.22(c).

2. The burden of coming forward with adequate justification to depart from the Commission's rule perhaps rests heavier on Complaint Counsel than on any other party or intervenor in Commission proceedings, since the Commission's own operating manual explicitly instructs Complaint Counsel that reply briefs "should be avoided as cumbersome, dilatory, and usually unproductive," especially where, as here, "the original memoranda accompanying the motion and answer discuss and distinguish opposing authorities." 2 U.S. Federal Trade Comm'n, *Operating Manual* ch. 10.12.6, at 9 (1991).

prohibiting replies); *Atlantic Richfield Co.*, 1978 FTC Lexis 567, at *1-2 (Aug. 3, 1978) (ordering *sua sponte* complaint counsel to file reply limited to issue raised for the first time in respondent's answer in opposition to motion to produce documents, but denying respondent opportunity to reply where respondent had already addressed issue in its answer in opposition).

Complaint Counsel's motion makes absolutely no effort to show that the reply that it now wishes to file would meet this rather exacting standard. Indeed, the standard is never even acknowledged. Moreover, Complaint Counsel's proposed reply explicitly acknowledges that the arguments that Complaint Counsel now so strenuously seeks to challenge in reply were not asserted for the first time in Respondents' opposition briefs, but either were in fact or could have been anticipated in Complaint Counsel's original motion. (*See, e.g.*, Proposed Reply at 3-4 ("No fewer than 20 times in its Opposition, Andrx accuses the FTC staff of misconduct during the pre-complaint investigation, and *it has made similar allegations in its Answer and during the Scheduling Conference before this Court,*" and "[r]elying on th[e] defense [characterized by Complaint Counsel as one of "selective enforcement"], Andrx has already sought to pry into various open and closed Commission non-public law enforcement investigations" (emphasis added)); *compare* Proposed Reply at 2-3, *with* Opening Br. at 3-4 (repeating, at times verbatim, Complaint Counsel's argument in opposition to Respondents' affirmative defense challenging "reason to believe" determination).)

If these were the only factors to be taken into consideration, these reasons alone would compel the denial of Complaint Counsel's motion for leave to reply. Complaint Counsel's utter disregard for, and complete failure even to attempt to demonstrate its satisfaction of, its burden of persuasion under Rule 3.22(c) is exacerbated, however, by the rigorous and stringent deadlines mandated by the Commission's adjudicative rules. Given the very real and

significant pressures that the Commission's expedited time-frames place on both the parties and this tribunal, motions such as that presently urged by Complaint Counsel that are normally not permitted under the Commission's Rules should not be filed, or countenanced by this Court, until and unless counsel has made a good faith effort to ascertain the propriety of such filing and at least offered some basis in the motion that would support such filing. Neither Respondents nor this tribunal should be forced to expend precious time and resources considering and responding to motions that Complaint Counsel has submitted in such a cavalier manner and to such dilatory effect.

While the foregoing is sufficient to dispense with Complaint Counsel's motion for leave to reply, its proposed reply memorandum warrants several additional but brief observations. First, Complaint Counsel's proposed reply memorandum presents nothing relevant that was not otherwise fully presented in Complaint Counsel's original Memorandum. While Complaint Counsel continues to attack several affirmative defenses propounded by Respondent Andrx Pharmaceuticals, Inc. ("Andrx") (*see, e.g.,* Proposed Reply at 1-4), Complaint Counsel makes no effort to show prejudice, as that term was clearly and unambiguously defined by this tribunal in *Dura Lube*,[3] and has not demonstrated that the scope of discovery that would be proper were the challenged affirmative defenses struck would be materially different than if the defenses in question were to remain in the case. Having made the effort to prepare a reply and having completely failed to make the requisite showing of prejudice, it can only be assumed that Complaint Counsel cannot make the requisite showing.

---

3. *Dura Lube Corp.*, 2000 FTC Lexis 1, at *33-34 (Jan. 14, 2000) (suggesting that prejudice prong of motion to strike standard requires demonstration that "the challenged defense would require lengthy discovery, result in considerable delay in the proceedings, or result in the introduction of irrelevant evidence at the hearing").

Respondent HMR would also observe that Complaint Counsel's proposed reply memorandum remains silent on the issue of anticompetitive effect. As noted in its opposition brief, Respondent HMR believes that the Complaint's failure to allege any anticompetitive effect stemming from the putatively illegal conduct of HMR and Andrx suggests that the Commission may not have formed the requisite "reason to believe" as to the principal elements of this case. (HMR Br. at 8-11.) In its proposed reply, Complaint Counsel offers no response and makes no effort to further enlighten either Respondents or this tribunal as to this critical issue.[4] Thus, the question of whether the Commission possessed any reason to believe that any anticompetitive effect stemmed from any conduct of HMR and Andrx remains, for the moment, an open issue. Until and unless Complaint Counsel exhibits a willingness and ability to accept its burdens of pleading and proof, it may not tenably assert that a Complaint that alleges something less than a

---

4. Complaint Counsel seeks to dispose of any affirmative defense that challenges the Commission's putative "reason to believe" and "public interest" determinations by suggesting "that this Court has no authority to review the Commission's pre-complaint deliberations" and, apparently, that a "public interest" challenge may only be asserted upon a change in circumstances. (Proposed Reply at 2 n.2 (original emphasis).) Complaint Counsel's arguments do nothing to support its motion to strike these affirmative defenses. At best, the cases cited by Complaint Counsel can merely be read to support the proposition that, a motion to dismiss or withdraw a complaint predicated on a lack of public interest or reason to believe should be certified to the Commission for determination, at least to the extent that the motion challenges the discretionary aspects of these determinations. *See TRW, Inc.*, 88 F.T.C. 544 (1976); *Pepsico, Inc.*, 83 F.T.C. 1716 (1974); *Crush Int'l Ltd.*, 80 F.T.C. 1023 (1972). These cases do ***not*** suggest that, or even address the issue of whether, such defenses should be stricken, nor do they overrule, or even consider, the numerous decisions that have rejected motions to strike comparable defenses. *See, e.g., Home Shopping Network, Inc.*, 1995 FTC Lexis 259, at *1 (July 24, 1995) (denying motion to strike public interest and reason to believe defenses); *Outdoor World Corp.*, 1989 FTC Lexis 140, at *1 (Oct. 2, 1989) (denying motion to strike reason to believe defense); *Texas Dental Ass'n*, 1981 FTC Lexis 120, at *2 (May 19, 1981) (denying motion to strike public interest defense); *Driver Training Inst.*, 1976 FTC Lexis 114, at *1 (Oct. 18, 1976) (noting prior order permitting respondents "to plead and prove that this proceeding is not in the public interest"). Complaint Counsel's "changed circumstances" argument is equally unsupported and unavailing. As Respondent HMR pointed out in its opposition brief (HMR Br. at 6-8), and as enunciated in time-honored Supreme Court precedent, changed circumstances or no, once it becomes apparent to the Commission, at any time after the issuance of the complaint, that a proceeding is not in the public interest as a matter of law, the Commission is obligated to dismiss the Complaint or face the reversal of any resulting order on appeal. *FTC v. Klesner*, 280 U.S. 19, 30 (1929). While changed circumstances undoubtedly will support a motion to dismiss for lack of public interest, the Supreme Court's *Klesner* decision makes clear that they are not a necessary predicate to a challenge to a complaint that is subsequently shown never to have been supported by a "specific and substantial" public interest from the outset. *See id.* at 28, 30.

violation of law under applicable legal standards is somehow supported by the kind of "reason to believe" that is mandated by the Federal Trade Commission Act. This glaring omission provides further support for denying Complaint Counsel's motion to strike HMR's Second Additional Defense.

Finally, Respondent HMR would observe that Complaint Counsel has yet again attempted to use its Motion to Strike to urge the resolution of disputed legal issues which are simply not properly before this tribunal at the present time.[5] For example, in its proposed reply memorandum, Complaint Counsel argues that the legality of Andrx's unilateral decision not to market a potentially infringing product is irrelevant to the question of whether that same decision, encapsulated in a broader stipulated preliminary injunction, is lawful. (Proposed Reply at 5.) Indeed, Complaint Counsel devotes more than a page of its proposed reply memorandum to the issue of whether a given action, presumably legal if undertaken unilaterally, becomes illegal if undertaken as part of an agreement. (Proposed Reply at 5-6.)

Such arguments, directed to a determination of disputed questions of law and fact, are not a proper subject for a motion to strike. *See, e.g., Home Shopping Network, Inc.,* 1995 FTC Lexis 259, at *5 (motion to strike "will not be used to decide disputed issues of law"); *Synchronal Corp.,* 1992 FTC Lexis 61, at *1 (Mar. 5, 1992) ("a motion to strike will be denied . . . if there are disputed questions of fact or law"); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1381, at 672-78 (2d ed. 1990) ("*Wright & Miller*") ("even

---

5. Complaint Counsel has also renewed its attempt to press for a *de facto* motion *in limine* under the guise of a motion to strike. (*See, e.g.,* Proposed Reply at 4). As Respondent HMR previously noted in opposing Complaint Counsel's motion to strike (*see* HMR Br. at 16-19), a motion to strike is not a proper vehicle for such tactical gamesmanship. *Cf. Capplanco Eleven, Inc. v. Xerox Corp.,* No. 88 C 8565, 1990 WL 51892, at *1 (N.D. Ill. Apr. 12, 1990) (denying motions *in limine* based on grounds of relevancy and prejudice, court notes that "it is inappropriate to exclude evidence as irrelevant without the context of trial, particularly where the movant does not precisely identify the evidence sought to be excluded").

when the defense presents a purely legal question, the courts are very reluctant to determine disputed or substantial issues of law on a motion to strike . . . [,] [n]or will a . . . motion [to strike] be granted if there is a substantial question of fact or a mixed question of law and fact that cannot be resolved, even if it is possible to determine the issue by drawing inferences from acts and statements that are not disputed."). Motions to strike should not be used by Complaint Counsel to test the waters of some theory of antitrust liability. *See RTC v. Gregor,* No. 94 CV 2578, 1995 WL 931093, at *1 (E.D.N.Y. Sept. 29, 1995) ("A motion to strike is 'not the appropriate procedure to determine . . . unclear questions of law,'" quoting *Linker v. Custom-Bilt Mach. Inc.,* 594 F. Supp. 894, 898 (E.D. Pa. 1984)). To the extent that Complaint Counsel wishes to present some novel theory of law, it should do so in a properly framed motion for summary judgment so that both Respondents and this tribunal can have an adequate opportunity to explore and respond to the legal arguments presented. *See* 5A *Wright & Miller* § 1381, at 673-76 (disputed legal questions "quite properly are viewed as determinable only after discovery and a hearing on the merits" rather than on a motion to strike). Indeed, Respondent HMR would welcome any properly presented effort that Complaint Counsel might make to clarify the theories of antitrust liability that appear to animate this case, but respectfully declines Complaint Counsel's invitation to respond to fragmentary conclusions urged in a putative reply offered in belated amplification of Complaint Counsel's Motion to Strike.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Respondent HMR respectfully requests that this Court deny Complaint Counsels' Motion for Leave to File Reply in Support of Motion to Strike, deny Complaint Counsels' Motion to Strike Certain Affirmative Defenses Set

Forth in Respondents' Answers in its entirety, and grant such other and further relief as the Court may deem just and proper.

Dated: May 31, 2000

Respectfully Submitted,

James M. Spears
D. Edward Wilson, Jr.
Michelle R. Mangrum
Peter D. Bernstein
SHOOK HARDY & BACON, LLP
600 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2004
(202) 783-8400

James R. Eiszner
Scott E. DuPree
SHOOK HARDY & BACON, LLP
1200 Main Street
Kansas City, Missouri 64105-2118

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

ORDER DENYING LEAVE TO FILE
REPLY IN SUPPORT OF MOTION TO STRIKE

IT IS HEREBY ORDERED that Complaint Counsels' Motion for Leave to File Reply in Support of Motion to Strike is hereby DENIED.

Dated: _____, 2000

_____
D. Michael Chappell
Administrative Law Judge

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, Peter D. Bernstein, hereby certify that on May 31, 2000, a copy of Aventis Pharmaceuticals, Inc's Memorandum in Opposition to Complaint Counsels' Motion for Leave to File Reply in Support of Motion to Strike, 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

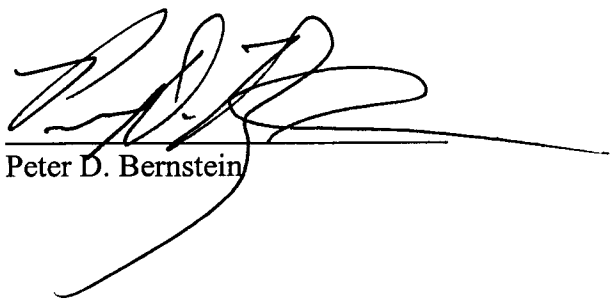
Richard Feinstein
Federal Trade Commission
Room 3114
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Louis M. Solomon [By FedEx]
Solomon, Zauderer, Ellerhorn,
Frischer & Sharp
45 Rockefeller Plaza
New York, NY 10111

Peter O. Safir
Kleinfeld, Kaplan and Becker
1140 19th St., N.W.
Washington, D.C. 20036



Peter D. Bernstein