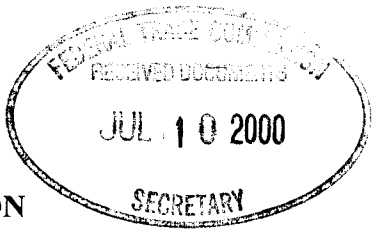


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

TO: The Honorable D. Michael Chappell
Administrative Law Judge

MOTION OF AVENTIS PHARMACEUTICALS, INC. FOR LEAVE TO FILE LIMITED REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTIONS TO COMPEL

Pursuant to Rule 3.22(c) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.22(c), Respondent Aventis Pharmaceuticals, Inc., formerly known as Hoechst Marion Roussel, Inc. ("HMR"), respectfully request leave to file the attached, limited reply to Complaint Counsel's Opposition to Respondents' Motions to Compel. This reply is necessary to reply to a matter raised for the first time in Complaint Counsel's Opposition to Respondents' Motions to Compel, dated June 23, 2000, which could not have been anticipated at the time that HMR filed its original Motion to Compel Discovery.

WHEREFORE, for the reasons more fully set forth in the accompanying Memorandum in Support of Respondent HMR's Motion to Compel, HMR respectfully requests

that this Court enter an Order granting Respondents' Motions to Compel, and grant such other and further relief as the Court may deem just and proper.

Dated: July 10, 2000

Respectfully Submitted,

James M. Spears
D. Edward Wilson, Jr.
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

AVENTIS PHARMACEUTICALS, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE LIMITED REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTIONS TO COMPEL, AND PROPOSED REPLY MEMORANDUM

Pursuant to Rule 3.22(c) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.22(c), and the precedents construing it, Respondent Aventis Pharmaceuticals, Inc., formerly known as Hoechst Marion Roussel, Inc. ("HMR"), respectfully requests leave of this Court to reply to a matter raised for the first time in Complaint Counsel's Opposition to Respondents' Motions to Compel, dated June 23, 2000, which could not have been anticipated at the time that HMR filed its original Motion to Compel Discovery.

As described more fully below, in response to Respondent's discovery request, Complaint Counsel refused to search for and/or produce any documents other than those from files pertaining to the investigation which preceded the filing of the Complaint in this matter and the original investigation of this transaction, which took place in the context of a proposed merger. In refusing to extend the scope of its search to other files or non-privileged materials which may have been produced or obtained in other investigations, Complaint Counsel has both mischaracterized the scope and substance of HMR's production requests and misstated the law

applicable to this transaction in order to artificially inflate Complaint Counsel's claims of burdensomeness and bolster Complaint Counsel's argument that the requested materials are not relevant to this case.

Commission Rule 3.22(c) contemplates that a party who has filed a motion in Commission proceedings normally "shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission." 16 C.F.R. § 3.22(c). Such an exercise of discretion has been deemed to be appropriate where the responsive papers filed by a party opposing the motion "raise[] 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). Counsel for Respondents respectfully submits that it could not have anticipated in its original motion that Complaint Counsel would mischaracterize the scope and nature of the disputed document request or urge a novel theory of law in order to defeat the document request on grounds of burdensomeness and relevancy. Accordingly, we respectfully request that this Court accept and consider this brief reply.[1]

---

1. Complaint Counsel has modified its positions since the "meet and confer" discussions between the parties. While Complaint Counsel changed its privileged document list in ways that it refused even to contemplate at the "meet and confer," its revised list continues to suffer from the many serious deficiencies previously identified by Respondents. Moreover, in response to Respondent's Motion to Compel, Complaint Counsel asserted factual and legal arguments and justifications for withholding documents that it failed to assert during the parties' negotiations. (*See, e.g.,* Opp. Br. at 20-21, 23-24; *compare* June 9, 2000 Letter from Markus Meier to James Spears (the "Meier Letter"), *and* Complaint Counsel's Objections and Responses to Respondent Aventis Pharmaceuticals, Inc.'s Second Request for the Production of Documents ("Complaint Counsel's Objections"), at 3.) While Respondent HMR believes that these adjustments in Complaint Counsel's position do not fundamentally modify the inadequacies of Complaint Counsel's response to the document request, this sort of evolving response is hardly what Commission Rule 3.22(f) anticipates. If Respondents are to be held to the stringent time frames contemplated by the Commission's procedural rules, Respondents should not be forced to file multiple motions and briefs in order to smoke out Complaint Counsel's position. *Cf. Association of American Physicians & Surgeons, Inc. v. Clinton,* 837 F. Supp. 454, 457 (D.D.C. 1993) (condemning government's practice of "fil[ing] an incomplete answer [to discovery requests] and then supplement[ing] it whenever it pleased, effectively divesting this court of control over the discovery process and ensuring that during the briefing process on the motion to compel the government would continue to produce dribbles and drabs of information at its convenience," which "has unnecessarily complicated judicial review by providing (continued...)

1. Respondent HMR's Production Requests are not Burdensome.

A review of HMR's production requests reveals that they do not unduly burden Complaint Counsel. Instead, Complaint Counsel has chosen to mischaracterize HMR's document requests, making them appear to sweep with far greater breadth than they in fact do, in an apparent attempt to lower the threshold of burden that it must demonstrate in order to defeat Respondents' discovery requests. (*See, e.g.,* Opp. Br. at 20.) Properly characterized, however, HMR's document requests are limited and carefully calibrated to obtain relevant discovery in the least burdensome possible manner.

As an example, Complaint Counsel has suggested to this Court that HMR's request is unduly burdensome because it seeks information in Commission files concerning "any 'settlement or partial settlement of patent litigation.'" (Opp. Br. at 20.) This characterization is incorrect. In fact, HMR's request only seeks documents concerning (1) third-party communications with the FTC (2) pertaining to the settlement or partial settlement of patent litigation involving (3) a pioneer drug manufacturer and (4) a generic pharmaceutical company in which (5) such settlement includes either (a) any payment from the pioneer to the generic company or (b) a licensing and/or royalty arrangement. (Resp.'s 2d Doc. Request, No. 40.).[2]

Similarly, Complaint Counsel complains that HMR's request is unduly burdensome in that it seeks materials in the FTC's possession that relate to "cardiovascular

---

1. (...continued)
a constantly changing target").

2. Copies of Respondent's Second Request for the Production of Documents, Complaint Counsel's Objections and the Meier Letter are attached to the Declaration of Peter D. Bernstein previously submitted to this Court in support of Respondent's Motion to Compel Discovery, as Exhibits A, B and E thereto, respectively.

products" and the "selection of pharmaceutical products for managed care formularies." (Opp. Br. at 20). Again, this characterization is incorrect. The requests that Complaint Counsel misrepresents as seeking any conceivable information concerning "cardiovascular products" are in fact carefully tailored to obtain information concerning sales, marketing and promotional strategies for, and sales, revenue and demand-elasticity data concerning, cardiovascular drugs (Resp.'s 2d Doc. Request, Nos. 23-25), standards of care for treatment of hypertension or angina with cardiovascular drug products (*id.*, No. 26), cardiovascular drug substitutability (*id.*, No. 27) and third-party payor cardiovascular drug substitution campaigns (*id.*, No. 33), reimbursement and price adjustment practices and policies of third-party payors with respect to cardiovascular drug products (*id.*, Nos. 34-35), and specimen prescription benefit policies concerning cardiovascular drug products maintained by third-party payors (*id.*, No. 36). Likewise, the requests that Complaint Counsel would label as directed to the "selection of pharmaceutical products for managed care formularies" are narrowly focused to obtain discovery concerning formulary categorization, selection and classification criteria (*id.*, Nos. 29-31), and specifically to identify formularies that list HMR's Cardizem® CD (*id.*, No. 32) and other formularies that may have relevant information by virtue of their participation in this matter (*id.*, No. 28). As is apparent on their face, these requests seek information that this Court will need in order to be able to properly define the relevant market for purposes of this litigation.[3]

---

3. In the "meet and confer" that preceded Respondent's motion, Complaint Counsel presented none of the specific claims of burdensomeness that are now presented in their Brief in Opposition. (*Compare* Opp. Br. at 22, *with* the Meier Letter, *and* Complaint Counsel's Objections at 3.) Instead, Complaint Counsel took the position that Federal Trade Commission staff has no obligation to examine investigative files beyond those involving the Respondents in this action in responding to document requests lodged in this action. Consequently, the "burdensomeness" argument now advanced by Complaint Counsel should properly be viewed as but an effort to add another layer of argument onto a privilege claim that cannot be sustained.

The fundamental question presented by Complaint Counsel's objection is whether the Federal Trade Commission staff can unilaterally refuse to examine the files which it may have compiled in other investigations and avoid its obligation to produce relevant and non-privileged documents from those files in response to a properly framed document request. In its Opposition, Complaint Counsel candidly and cavalierly makes clear its view that "Respondents are entitled to non-privileged documents from this case file, and that is exactly what we have already provided to them." (Opp. Br. at 20.) In Complaint Counsel's view, there is no situation where Federal Trade Commission staff could be directed by an Administrative Law Judge to examine other investigative files for relevant and non-privileged documents.

This position is clearly incorrect as a matter of law. *Exxon Corp.*, 1980 FTC Lexis 121, at *5-6, *8-9 (Feb. 8, 1980) (rejecting complaint counsel's attempt to "den[y] [respondents] all discovery beyond those materials held in complaint counsel's files" on the basis of complaint counsel's blanket and non-specific privilege claims, finding complaint counsel's objection that such discovery "would require the search of millions of files" to be "not persuasive," and ordering complaint counsel to review and produce or make specific claims of privilege with respect to "eight [other] apparently relevant petroleum-related matters in which the Commission has been involved"). Regardless of how any investigation proceeds, it is simply not true that *all* documents obtained or produced in the course of an investigation are privileged under any reasonable claim. For example, here Respondent HMR requests copies of agreements wholly or partly settling patent litigation between pioneer and generic pharmaceutical companies that the FTC may have collected during the course of its investigations into the area. It is difficult to understand just how a legitimate claim of privilege could be asserted by Complaint

Counsel with respect to documents which most likely have already been made public either as part of the underlying patent litigation or during the course of the Commission's investigation.

Complaint Counsel defends its blanket refusal to produce such documents by suggesting that a flurry of privileges – including the attorney-client and work product privileges, the deliberative process privilege, the so-called law enforcement "investigatory files privilege," and various alleged statutory privileges – can somehow coalesce into an impenetrable wall of absolute privilege. But Complaint Counsel makes no effort to show how such privileges could properly attach to the class of documents described above. Instead of making the threshold showings that the Commission would be required to make to invoke the privileges claimed, Complaint Counsel invokes the general confidentiality standards which guide the Commission's consideration of information requests under the Freedom of Information Act and argues that materials should be produced from Commission files only upon a showing of "substantial need."[4]

Respondent HMR respectfully rejects the notion that it must bear any special burden as it seeks the production of non-privileged and relevant documents from the Commission. Complaint Counsel apparently suggests that Respondent must demonstrate "good cause" before it may obtain documents in other Commission investigative files. (Opp. Br. at 21 & n.28.) However, a "showing of good cause is not a general requirement for the discovery of

---

4. It is well established that, even where certain documents in Commission investigatory files may not be subject to public disclosure under the Freedom of Information Act by virtue of various statutory or regulatory provisions, it does not follow that such documents are privileged from discovery in Commission administrative proceedings or that generalized statutory or regulatory confidentiality provisions can be invoked to frustrate legitimate discovery. *See, e.g., Exxon Corp.*, 1980 FTC Lexis 121, at *11-12 ("not all potentially relevant documents will be available through FOIA, and although broad objections as to privilege have been raised, most of the agencies undoubtedly have records which are neither public nor privileged, and thus subject to discovery"). Indeed, Complaint Counsel now acknowledges that these confidentiality statutes contemplate that "disclosure [of documents covered by these provisions] in administrative litigation may be allowed under the Commission's Rules of Practice." (Opp. Br. at 23 n.31.)

documents under" the Federal Rules of Civil Procedure,[5] and the Commission likewise rejected the notion that a heightened showing is generally required before obtaining discovery of Commission documents when it most recently amended its procedural rules.[6] Complaint Counsel apparently urges a "good cause" standard based on administrative decisions interpreting Commission rules that have since been amended to eliminate any such heightened showing as a prerequisite to obtaining discovery. *See Kroger Co.*, 1977 FTC Lexis 55, at *5 (Oct. 27, 1977) (on motion for issuance of subpoena to FTC under former Rule 3.36); *Sterling Drug Inc.*, 1976 FTC Lexis 460, at *9 (Mar. 17, 1976) (same). Even if the portions of these decisions on which Complaint Counsel relies continue to be good law under the amended rules, they would only require a showing of "good cause" as to discovery of documents in pending investigations, while requiring no special showing as to documents in closed investigations. Indeed, these same cases required production of factual material contained closed Commission investigative files. *Kroger Co.*, 1977 FTC Lexis 55, at *5-6; *Sterling Drug Inc.*, 1976 FTC Lexis 460, at *8-9. Because Complaint Counsel has refused even to identify responsive documents in other investigative files, it is not clear whether documents collected in any pending investigations are even in issue here.

Complaint Counsel's suggestion that Respondent must bear a heightened burden of need is also apparently based on its assertion that documents contained in any other investigative file "are most likely privileged." (*See* Opp. Br. at 20, 25.) Relying on these

---

5. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984).

6. *See* 61 Fed. Reg. 50,640, 50,643 n.6 (1996) ("By eliminating ALJ pre-approval of discovery from the Commission, the amended rule eliminates the requirement that this showing [that the material sought cannot reasonably be obtained by other means] be made for subpoenas for records of the Commission or for the appearance of Commission employees.").

assertions, Complaint Counsel has refused even to identify or review responsive documents located in any investigative files other than those relating to two investigations that culminated in the Complaint in this matter, much less to make good faith assertions of privilege with respect to any specific documents. Complaint Counsel's vague, conclusory and ultimately self-serving assertion of privilege for all documents collected in the course of other investigations falls far short of the specificity required of the proponent of any privilege under this Commission's rules or in a court of law.[7] Privilege may not be presumed, and blanket and unsubstantiated claims of privilege such as those now asserted by Complaint Counsel have been soundly rejected by federal courts[8] and Commission tribunals[9] alike. Until Complaint Counsel demonstrates with sufficient specificity that particular responsive documents arguably qualify for some privilege, Respondents must demonstrate no more than that the requested discovery is relevant, as that term is liberally construed under the discovery rules. *See Friedman,* 738 F.2d at 1342.

Even if a showing of good cause or substantial need were required, Respondents have amply demonstrated this. For reasons described more fully below, evidence of other

---

7. For example, Complaint Counsel has once again failed to demonstrate that its assertions of law enforcement and deliberative process privileges have been formally claimed "in a deliberate, considered and reasonably specific manner" by the responsible agency official as to any particular documents in any of the investigative files at issue. *See Friedman,* 738 F.2d at 1341-42 (finding agency's blanket assertion of law enforcement privilege to be inadequate where "the files had not been examined for this purpose by responsible members or officers of [the agency]" and "[n]o specific documents or classes of documents had been identified").

8. *See, e.g., Centeno Supermarkets, Inc. v. H.E. Butt Grocery Co.,* No. SA-83-CA-72, 1987 WL 42402, at *4 (W.D. Tex. Sept. 2, 1987) (defendant's broad assertions "that the entire file is protected by either the attorney-client privilege or the work product doctrine" failed to meet Federal Rules' particularity requirement for objections to requests for production and "is insufficient to sustain its objection").

9. *See, e.g., Exxon Corp.,* 1980 FTC Lexis 121, at *5-6 (rejecting complaint counsel's blanket privilege objection to subpoena for production of any Commission documents outside of documents used by complaint counsel in the instant action and in complaint counsel's possession, custody or control; "I will not make an a priori determination that because of the possible, or even probable, existence of widespread privilege among these documents, respondents thereby are denied the opportunity for all discovery beyond those materials held in complaint counsel's files. Questions of privilege will be met as they arise, after appropriate argument on the legal principles and factual settings.").

agreements similar to the Stipulation and Agreement is critical to this Court's evaluation of whether this agreement is the product of some anticompetitive animus, as Complaint Counsel argues, or instead is merely one of many comparable agreements reached between pioneer and generic drug manufacturers during a period of substantial regulatory uncertainty following the passage of the Hatch-Waxman Amendments, during which the implementing regulations of the United States Food and Drug Administration had come under sharp attack in the federal courts. Moreover, Respondents believe that an examination of these documents will show that certain provisions in the Stipulation and Agreement, which Complaint Counsel deems to be reflective of anticompetitive intent, are but reasonable ancillary restraints that will also be found in some of these other agreements.

Complaint Counsel argues that, even if Respondents have a need for such documents, Respondents have not established why such informational needs must be satisfied from the Commission's files, and that nothing prevents Respondents from seeking such documents directly by way of third-party discovery. As Complaint Counsel sums up the situation, "[i]n light of respondents' ability to obtain information directly from industry participants, and the irrelevance of the Commission's other non-public investigatory files, there is no basis to impose on complaint counsel the extreme burden of responding to these requests." (Opp. Br. at 23; *see also id.* at 22, 25.)

In response, Respondent HMR would respectfully remind this tribunal and Complaint Counsel that Respondents have not long enjoyed the power of subpoena that the investigative staff has wielded for more that two and one-half years in this area. The discovery schedule imposed upon this case under the Commission's Rules of Practice simply do not permit Respondents to replicate, in a matter of a few short months, the sort of comprehensive document

collection effort that has occupied the Commission's staff for several years. To the extent that the Commission's Rules of Practice mandate expedited discovery in this matter, the Commission's staff should not be heard to argue for the creation of some "good cause" or "substantial need" standard to force Respondents to engage in massive, industry-wide third-party discovery to obtain non-privileged documents currently in the Commission's possession – particularly where, as here, Complaint Counsel's principal motivation appears to be that it simply does not want to be bothered by having to look through its other files for responsive and non-privileged documents.

2. Respondent HMR's Production Requests Seek Relevant Material.

To further justify its refusal to produce these non-privileged documents, Complaint Counsel argues that comparable agreements, entered into by pioneer and generic drug manufacturers, need not be produced because they are "not relevant to the issues presented in this proceeding -- i.e., whether respondents' conduct, as charged in the complaint, violates Section 5 of the FTC Act." (Opp. Br. at *ii.*) According to Complaint Counsel, documents concerning "other patent settlements [are] irrelevant to whether Andrx and Hoechst violated the antitrust laws," ostensibly because the Commission's Complaint "is based on the activities of respondents and respondents alone" and thus, in Complaint Counsel's view, "whether the Stipulation and Agreement is the only such document or not, its illegality is the same." (Opp. Br. at 21.) Respondent HMR respectfully submits that Complaint Counsel's argument fundamentally misstates the governing legal standards, not only as applied to discovery generally, but more specifically as applied to antitrust actions such as this.

As an initial matter, Respondent HMR would observe that in the context of discovery, a party may not properly refuse to produce documents based on claims of irrelevancy

so long as "there is *any possibility* that the information sought may be relevant to the subject matter of the action," taking into account that "[r]elevance for discovery purposes is broadly and liberally construed." 6 James Wm. Moore *et al., Moore's Federal Practice* § 26.41[1], at 26-86 (3d ed. 2000) (emphasis added). A party may even "discover information which is not admissible at trial if such information will have some probable effect on the organization and presentation of the moving party's case." *Smith v. Schlesinger,* 513 F.2d 462, 473 (D.C. Cir. 1975) (permitting discovery of investigative file not placed in administrative record in plaintiff's Administrative Procedure Act case). Once a party places a matter in issue, it may not simply pick and choose among the relevant evidence that it will disclose to the opposing party in discovery but "must submit his or her evidence to the adversarial process." *Whitbeck v. Vital Signs, Inc.,* 163 F.R.D. 398, 399 (D.D.C. 1995) (internal quotations and citation omitted). These liberal discovery rules are particularly applicable in antitrust cases.[10]

Moreover, the Commission's discovery rules parallel the liberal provisions of the Federal Rules. Complaint Counsel is simply wrong to suggest "that discovery is allowed *only* to the extent it may reasonably yield information relevant to the complaint allegations, the proposed relief, or respondents' defenses." (Opp. Br. at 20 (emphasis added).) Not only does Commission Rule 3.31 ***not*** state that discovery is "only" permitted as to the identified matters, but it expressly contemplates and authorizes discovery of information that "appears reasonably calculated to lead to the discovery of admissible evidence." 16 C.F.R. § 3.31(c)(1). Only Complaint Counsel

---

10. *See, e.g., Columbia Steel Casting Co. v. Portland General Elec. Co.,* Civ. No. 90-524-FR(LEAD), 1992 WL 55753, at * 1 (D. Or. Mar. 3, 1992) ("discovery in antitrust litigation is liberally granted," and plaintiff was "entitled to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of this litigation"); *Centeno Supermarkets, Inc.,* 1987 WL 42402, at *3 ("There is a general policy of allowing liberal discovery in antitrust cases, particularly where allegations of monopolization are involved. . . . In order to be discoverable, documents need only be relevant to the subject matter of the litigation and not the issues raised by the pleadings.").

could read the Commission's liberal discovery rules as "discovery limitations." (Opp Br. at 20-21.) Moreover, at least one Commission tribunal has specifically rejected the argument that Complaint Counsel now advances, that documents become irrelevant to a Section 5 monopolization case once it is determined that they are located in investigative files other than those that culminated in the litigation in which such discovery is sought.[11]

This case concerns whether the stipulated preliminary injunction reached between HMR and Andrx violates the Federal Trade Commission Act. Under a proper analysis, the questions presented are whether any actual and specific anticompetitive effect was produced by the Stipulation and Agreement, (assuming a specific anticompetitive effect can be demonstrated) whether such effect is outweighed by the pro-competitive effects flowing from the transaction, whether any ancillary restraints are reasonable given the nature of the transaction, and whether the restraints at issue reflect common commercial practice.[12]

---

11. *Exxon Corp.*, 1980 FTC Lexis 121, at *8-9 (permitting discovery of materials from "eight [other] apparently relevant petroleum-related matters in which the Commission has been involved . . . unless shown to be not subject to discovery for reasons other than relevance").

12. As the D.C. Circuit has noted, in analyzing a challenged restraint under the Rule of Reason,

> a court generally will be required to analyze "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the "anticompetitive evils" of the challenged practice must be carefully balanced against its "procompetitive virtues" to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the "net effect" of substantially impeding competition.

Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1979). *See California Dental Ass'n v. FTC*, 128 F.3d 720, 727 (9th Cir. 1997) (Rule of Reason analysis under both Sherman Act Section 1 and FTC Act Section 5 "requires balancing the anticompetitive effects and possible efficiency gains or business justifications of the challenged practice"), *rev'd on other grounds*, 526 U.S. 756, 774 (1999) (requiring more detailed Rule of Reason inquiry than that undertaken by Court of Appeals and FTC, and describing practice proscribed following application of Rule of Reason as one having a "net anticompetitive effect").

Respondent HMR believes that the evidence will show that in response to the substantial legal and regulatory uncertainties following the passage of the Hatch-Waxman Amendments to the Food, Drug and Cosmetics Act and legal challenges mounted against the FDA's implementing regulations in 1997 and 1998, any number of pioneer and generic drug manufacturers reached either full or partial settlements in patent litigation employing agreements which are not dissimilar from that at issue in this case. The fact that other pharmaceutical companies entered into comparable transactions certainly suggests that the considerations which prompted HMR and Andrx to enter into the Stipulation and Agreement were neither unique nor prompted by some anticompetitive animus as the Complaint and Complaint Counsel now suggest. To evaluate the reasonableness of Respondents' conduct under the Rule of Reason, it is not only desirable but necessary for this Court to understand the business, legal and regulatory context in which the HMR/Andrx Stipulation and Agreement arose, and specifically how pharmaceutical companies generally grappled with and responded to the regulatory uncertainty that existed following enactment of the Hatch-Waxman Amendments and mounted with the promulgation of the FDA's implementing regulations and the entry of federal court decisions interpreting those regulations, and during a period in which the Federal Trade Commission was aware of the very practices reflected by the Stipulation and Agreement.[13]

---

13. *See* U.S. Dep't of Justice & U.S. Federal Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 4.1.1 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132 (suggesting that prevalence and nature of comparable practices in an industry are important factors considered in agencies' Rule of Reason analysis of restraints in certain licensing arrangements, noting, among other things, that "[t]he use of similar restraints may be common and procompetitive in an industry, . . . because they contribute to efficient exploitation of the licensed property"); *cf. Board of Trade of City of Chicago v. United States,* 246 U.S. 231, 241 (1918) (noting, in concluding the Court's Rule of Reason analysis of Board's "call rule" limiting price-determining activity to specified market hours, that "[e]very Board of Trade and nearly every trade organization imposes some restraints upon the conduct of business by its members," and "[t]hose relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity").

This information is directly relevant to an understanding of the procompetitive efficiencies that reasonable businessmen in this industry perceived to emanate from such agreements and that in fact flowed to the marketplace as a whole from these arrangements.[14] Respondent HMR believes that an examination of these other transactions will generally show that the anticompetitive potential of the HMR/Andrx Stipulation and Agreement was substantially less, the pro-competitive effects flowing from the HMR/Andrx Stipulation and Agreement were significantly greater, and the ancillary restraints which draw a substantial portion of Complaint Counsels' attention are not uncommon to transactions of this nature.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Respondent HMR respectfully requests that this Court (1) grant its motion for leave to reply to Complaint Counsel's Opposition to Respondents' Motions to Compel, (2) grant HMR's Motion to Compel Discovery, (3) convene as soon as practicable a status conference to assist in resolving discovery disputes that have

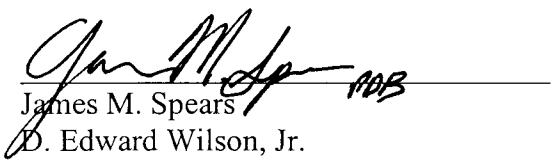
---

14. The cases cited by Complaint Counsel to justify its refusal to search for or produce these documents are not to the contrary. Reaching back to cases decided some 20 years before the Commission's current expedited procedural rules were promulgated, Complaint Counsel attempts to rely on statements in two deceptive advertising cases suggesting that materials in other case files are not relevant to the case at hand. (*See* Opp. Br. at 21 & n.28.) These cases demonstrate nothing more than that the scope of relevant discovery depends on the nature of the case, and that discovery that is relevant to a Rule of Reason competition case may not be relevant to the litigation of deceptive advertising claims. Moreover, it is clear from the face of these decisions that the administrative law judge that authored both opinions applied a more restrictive standard of relevance than is contemplated under current Commission rules. *Compare* 16 C.F.R. § 3.31(c)(1) (1999) (permitting discovery of information relevant to matters in the proceeding, as well as information "reasonably calculated to lead to the discovery of admissible evidence"), *with Kroger Co.*, 1977 FTC Lexis 55, at *3 (applying standards under Rule 3.36, Court states that a requested "document must be relevant to an issue in this proceeding, as determined by the complaint, answer" and a pretrial order partially granting a motion to strike), *and Sterling Drug Inc.*, 1976 FTC Lexis 460, at *7-8 (denying certain discovery on determination that material was "irrelevant to any of the issues in this proceeding"). Finally, even the decisions cited by Complaint Counsel mandated the search for and production of "all responsive material of [a] purely factual nature contained in . . . other closed Commission files," including "purely factual material contained in privileged documents" to the extent segregable. *Kroger Co.*, 1977 FTC Lexis 55, at *5-6; *see also Sterling Drug Inc.*, 1976 FTC Lexis 460, at *7-9 (noting that "respondents are clearly entitled to such material as is purely factual and contained in the prior proceedings category").

arisen in, and to expedite, these proceedings, and (4) grant such other and further relief as the Court may deem just and proper.

Dated: July 10, 2000

Respectfully Submitted,



James M. Spears
D. Edward Wilson, Jr.
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 GRANTING LEAVE TO FILE REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTIONS TO COMPEL

IT IS HEREBY ORDERED that the Motion of Aventis Pharmaceuticals, Inc. for Leave to File Limited Reply to Complaint Counsel's Opposition to Respondents' Motions to Compel is hereby GRANTED.

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 July 10, 2000, a copy of the Motion of Aventis Pharmaceuticals, Inc. for Leave to File Limited Reply to Complaint Counsel's Opposition to Respondents' Motions to Compel 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

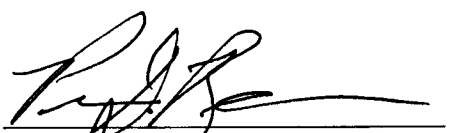
Richard Feinstein
Federal Trade Commission
Room 3114
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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, Ellenhorn,
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