THE FEDERAL TRADE COMMISSION
OF THE UNITED STATES OF AMERICA

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 The Honorable D. Michael Chappell Administrative Law Judge

JOINT MOTION FOR INTERLOCUTORY APPEAL

Cleary, Gottlieb, Steen & Hamilton; Keller and Heckman LLP; Verner, Liipfert, Bernhard, McPherson and Hand, Chartered; George S. Cary; and Steven J. Kaiser, respectfully move the Court to refer a portion of the Court's order permitting certain discovery to go forward against the movants to the Commission for interlocutory appeal. The reasons for this request are as stated in the accompanying Memorandum.

Dated: October 11, 2000

Respectfully submitted,

Mark Leddy /pmm

Mark Leddy
David I. Gelfand

Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 974-1500

Counsel for Cleary, Gottlieb, Steen & Hamilton; George S. Cary; and Steven J. Kaiser

THE FEDERAL TRADE COMMISSION
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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 The Honorable D. Michael Chappell Administrative Law Judge

MEMORANDUM IN SUPPORT OF
JOINT REQUEST FOR INTERLOCUTORY APPEAL

This is a request to the Court to refer for interlocutory appeal to the full Commission under 16 C.F.R. § 3.24(b) a portion of its October 3, 2000 Order on Motions to Quash Subpoenas Served by Andrx on Outside Counsel for Biovail.[1] In the portion of the ruling for which interlocutory appeal is sought, the Court permits Andrx Corporation ("Andrx") to proceed with certain discovery against Cleary, Gottlieb, Steen & Hamilton ("Cleary, Gottlieb"); Keller and Heckman LLP ("Keller and Heckman"); Verner, Liipfert, Bernhard, McPherson and Hand, Chartered ("Verner Liipfert"); George S. Cary; and Steven J. Kaiser (together, the "Law Firms"). Although recognizing that the Court carefully reviewed the categories of documents in Andrx's subpoenas and appropriately limited that discovery to a narrow universe relating to particular affirmative defenses, the

Law Firms respectfully submit that the legal and policy implications of requiring attorneys to testify and provide documents regarding their efforts on behalf of a client under the circumstances present here are substantial and should be resolved by the Commission itself. Specifically, where discovery is sought relating to affirmative defenses that are not being litigated in the administrative proceeding, the Law Firms respectfully submit that such discovery should not be permitted, at all, particularly when it has the chilling effect of subjecting attorneys to deposition and document requests simply because they provided information to the Commission that assisted the Commission in challenging unlawful and anticompetitive conduct.

Further, the parties submit that subsequent review by the Commission would be necessarily inadequate and the resolution by the Commission at this stage may materially advance the ultimate termination of the underlying litigation by avoiding time-consuming detours into topics already found by the Court to be irrelevant to the proceedings. Therefore, as discussed more fully below, the Law Firms respectfully request that the Court refer to the Commission for interlocutory review the portion of the Court's Order on Motions to Quash Subpoenas Served by Andrx on Outside Counsel for Biovail that permits discovery against the Law Firms to go forward.

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[1] A copy of the Court's ruling is attached as Exhibit A. The portion of the ruling for which interlocutory appeal is sought is on pages 2 and 3.

I. BACKGROUND

The Commission brought this case in March 2000 alleging that an agreement concerning Cardizem CD between Hoechst AG ("Hoechst") and Andrx violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.[2]

Andrx subpoenaed the Law Firms, each of which had assisted Biovail[3] in presenting its views of the Hoechst-Andrx agreement in various regulatory and judicial forums. The subpoenas as issued called for the Law Firms to turn over virtually all of their files relating to their representation and to testify about the work they performed for Biovail. It was evident that the subpoenas to the Law Firms were intended to divert the Court from the agreement at issue and, instead, to put the conduct of the FTC staff, Biovail, and its counsel on trial.

The Law Firms moved the Court to quash the subpoena. On October 3, 2000, the Court granted the Law Firms' motion in large part, but permitted discovery to

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[2] Under the agreement, Hoechst agreed to pay Andrx $40 million per year in exchange for Andrx's not marketing a generic equivalent to Cardizem CD, one of Hoechst's lucrative pharmaceutical products. The United States District Court for the Eastern District of Michigan, which is presiding over the multi-district litigation proceedings initiated by private litigants challenging the legality of the agreement, recently held that the agreement is a per se violation of Section 1 of the Sherman Act. In re Cardizem CD Antitrust Litig., No. 99-md-1278 (E.D. Mich. June 6, 2000), attached as Exhibit B to the parties' original motion to quash the subpoenas issued to them by Andrx.

[3] Biovail is a maker of a competing generic form of Cardizem CD. The agreement between Hoechst and Andrx harmed Biovail because it had the effect under FDA procedures of blocking Biovail's introduction of its own generic Cardizem CD product to the marketplace. Accordingly, Biovail, with the assistance of counsel, sought relief on several fronts. It brought a private action against Hoechst in the United States District Court for the District of New Jersey, alleging among other things that the agreement violated the federal antitrust laws. It approached the FDA about changing the FDA's procedures so that companies in Biovail's position would not be blocked by agreements in the nature of the Hoechst/Andrx Agreement. It lobbied Congress to change the law.

go forward on two of the categories of discovery, including permitting the depositions of Mr. Cary, Mr. Kaiser, and Mr. Dubeck. In a separate ruling granting in part the Complaint Counsel's motion to strike certain defenses, the Court expressly limited discovery into areas relevant to the defenses not struck. See Order on Mot. to Strike, at 5 (Attached as Exhibit B) (holding that discovery into non-struck areas "will be limited"). The Court also held that the specific affirmative defenses to which the Law Firm discovery related (defenses 7, 8, 18, and 19) "cannot be litigated in this proceeding." Id.

II. THE PORTION OF THE COURT'S RULING PERMITTING DISCOVERY OF THE LAW FIRMS SHOULD BE REVIEWED BY THE FULL COMMISSION

Section 3.23 of the Commissions Rules of Practice specifies the circumstances in which the Court should refer a ruling or portion of a ruling to the full Commission for interlocutory review. Such review is warranted where "the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate determination of the litigation or subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b). These circumstances are present here.

There is no question that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion. In addition to striking or limiting several of Andrx's affirmative defenses., the Court previously has held that the issue of whether the proceeding was brought in the "public interest" cannot be litigated in this forum. See Order Mot. to Strike, at 5; see also In the Matter of Exxon,

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And it sought to persuade the FTC to bring an enforcement action against Hoechst and Andrx to put a stop to this sort of blatantly anticompetitive practice.

83 F.T.C. 1759, 1760 (1974) (finding that once the Commission has resolved that a violation has occurred and that it is in the public interest to bring a claim against the offending party, "the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred").

The remaining discovery is all directed toward this very issue. The discovery has been limited to "non-privileged communications, to/from Biovail or Biovail agents, regarding the Biovail Law Firms' communications with the FTC staff concerning the HMR/Andrx matter" and depositions of Biovail's attorneys pertaining thereto. The only possible use for this information is in attacking the Commission's public-interest determination. Because the Court already has determined that this issue is not properly before it, Andrx has no legitimate need for this discovery. The Law Firms respectfully submit that the permitted discovery is not, therefore, "reasonably expected to yield information relevant to the defense of Andrx," Order Mot. to Quash, at 3 – at least not as that defense is to be presented to this Court.

Whether such discovery should be permitted in these circumstances is an important question of law and policy that should be decided by the Commission. Allowing the permitted discovery to go forward likely would have a chilling effect on parties seeking to provide information to the Commission as it investigates potentially anticompetitive conduct. Such information is often vital for the Commission in evaluating its case. The Court's ruling likewise can be expected to have a chilling effect on attorneys, who under this ruling would routinely expect to be deposed about their work for clients and be required to produce documents. This is among the reasons that

discovery against a parties' attorneys is generally disfavored. See Mem. in Support of Joint Mot. to Quash, at 6-10.

Subsequent review of the Court's decision will be an inadequate remedy. Once the Law Firms produce their documents and the individual attorneys are subjected to deposition, the consequences of the Court's ruling – requiring the Law Firms to submit to discovery – already will have been carried out. If the Commission later determines the discovery was improper, there would be nothing the Commission or Andrx could do at that point to undo this damage. Also, once the information has been revealed and depositions completed, the Law Firms will have little incentive to litigate these issues before the Commission. Thus, the only meaningful opportunity for Commission review will be at this point in the proceedings.

Review by the Commission at this stage likewise may materially advance the ultimate termination of the litigation. Andrx apparently is planning to try to put the Commission's conduct on trial in this case, in the guise of challenging the "public interest determination" of the Commission, in an effort to divert attention from Andrx's dealings with Hoechst. Time spent on this frivolous issue – which the Court has recognized "cannot be litigated in this proceeding," Order Mot. to Strike, at 5 – will be time wasted and likely will cause the litigation to become immersed in irrelevant and tangential matters.

III. CONCLUSION

The issues presented are ripe for review by the Commission. They involve important questions of law and policy both in the context of this case and in the broader context of Commission investigations in the future. Resolution by the full Commission

now would materially advance the litigation and would avoid the potential for irreparable harm to the Law Firms. Accordingly, the Law Firms respectfully request that the Court refer to the Commission for interlocutory review the portion of the Court's Order on Motions to Quash Subpoenas Served by Andrx on Outside Counsel for Biovail that permits discovery against the Law Firms to go forward.

Dated: October 11, 2000

Respectfully submitted,

Mark Leddy /pmm

Mark Leddy
David I. Gelfand

Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1801
(202) 974-1500

Counsel for Cleary, Gottlieb, Steen & Hamilton; George S. Cary; and Steven J. Kaiser

John B. Dubeck /pmm

John B. Dubeck

Keller and Heckman LLP
Suite 500 West
1001 G Street, N.W.
Washington, D.C. 20001
(202) 434-4100

Counsel for Keller and Heckman LLP

Richard H. Saltsman

Verner, Liipfert, Bernhard, McPherson and
Hand, Chartered
901 15th Street, N.W.
Washington, D.C. 20005-2301
(202) 371-6000

Counsel for Verner, Liipfert, Bernhard,
McPherson and Hand, Chartered

CERTIFICATE OF SERVICE

I hereby certify that on this day, October 11, 2000, I caused a copy of the foregoing document to be served on the person named below by the means indicated:

By First-Class Mail and Facsimile:

Louis M. Solomon, Esq.
Hal S. Shaftel
Solomon, Zauderer, Ellenhorn, Frischer & Sharp
45 Rockefeller Plaza
New York, New York 10111

By Hand Delivery:

Markus Meier, Esq.
Federal Trade Commission
Washington, D.C. 20580

Richard Feinstein, Esq.
Federal Trade Commission
Washington, D.C. 20580

The Honorable D. Michael Chappell
Federal Trade Commission
Washington, D.C. 20580

Irene Pereira.
Irene C. Pereira

Exhibit A

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 ON MOTIONS TO QUASH SUBPOENAS SERVED BY ANDRX ON OUTSIDE COUNSEL FOR BIOVAIL

I.

Andrx Corporation ("Andrx") served subpoenas on outside counsel who have represented non-party Biovail Corporation International ("Biovail"): Cleary, Gottlieb, Steen & Hamilton; Keller and Heckman LLP; Verner, Liipfert, Bernhard, McPherson and Hand, Chartered; George S. Cary; and Steven J. Kaiser (together, the "Biovail Law Firms"). On June 20, 2000, the Biovail Law Firms moved to quash the subpoenas served on them by Andrx. Also on June 20, 2000, Biovail filed a motion to quash the subpoenas served by Andrx on the Biovail Law Firms. Andrx filed its opposition to the two motions on June 30, 2000. Based on the Court's request, on September 26, 2000, both sides indicated that they had not resolved all disputed issues.

Although the subpoenas were originally broader, Andrx has represented in its September 26, 2000 status report that it now seeks only the following categories of discovery from the Biovail Law Firms:

(1) Confirmation that, through document productions already made by others, Andrx has all the Biovail Law Firms' written communications to or from the FTC;

(2) The Biovail Law Firms' written communications with Sitrick & Co., which was

Biovail's public relations firm, or any members of the press concerning the HMR/Andrx matter;

(3) Non-privileged communications to/from Biovail or Biovail agents, regarding the Biovail Law Firms' communications with the FTC staff concerning the HMR/Andrx matter;

(4) Time records or other diaries/memorializations (with related descriptions) of the Biovail Law Firms reflecting their communications with the FTC staff concerning the HMR/Andrx matter;

(5) Retainer agreements and new matter memos reflecting the matters/projects in connection with which the Biovail Law Firms' communications with the FTC staff regarding the HMR/Andrx matter were conducted; and

(6) The depositions of the three individual attorneys directly and substantially involved in the communications on Biovail's behalf with the FTC staff (i.e., Messrs. Carey, Kaiser and Dubeck).

For the reasons set forth below, the motions to quash are GRANTED in part and DENIED in part.

II.

The subpoenas have been substantially narrowed to limit their burden and scope. Andrx asserts that it seeks only non-privileged information. A remaining question is whether the information Andrx seeks is "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).

Depositions of attorneys may be permissible where the attorneys are fact witnesses. *American Casualty Co. v. Krieger*, 160 F.R.D. 582, 586 (S.D. Cal. 1995). *Shelton v. American Motors Corp*, 805 F.2d 1323, 1327 (8th Cir. 1986) and its progeny hold that courts should order the taking of opposing counsel's deposition only "where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." Unlike *Shelton* and the other cases relied upon by the Biovail Law Firms, the attorneys here are not opposing counsel. Since Carey, Kaiser and Dubeck are not counsel to a party in this proceeding, the dispositive inquiry is not whether other means exist and whether the information is crucial, but whether their depositions are reasonably expected to yield relevant, non-privileged information.

The discovery sought in categories 3 and 6 listed above is reasonably expected to yield information relevant to the defense of Andrx. The motions to quash are DENIED only as to the following:

(1) non-privileged communications, to/from Biovail or Biovail agents, regarding the Biovail Law Firms' communications with the FTC staff concerning the HMR/Andrx matter; and

(2) the depositions of the three individual attorneys requested by Andrx (Carey, Kaiser and Dubeck) relating to non-privileged communications, including to/from Biovail or Biovail agents, regarding the Biovail Law Firms' communications with the FTC staff concerning the HMR/Andrx matter.

In all other respects, the motions to quash are GRANTED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: October 3, 2000

Exhibit B

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 ON COMPLAINT COUNSEL'S MOTION TO STRIKE

I.

Complaint Counsel filed its Motion to Strike Certain Affirmative Defenses Set Forth in Respondents' Answers ("motion to strike") on April 28, 2000. Respondent Aventis Pharmaceuticals, Inc. ("Aventis"), formerly known as Hoechst Marion Roussel, Inc. ("HMR"), Respondent Carderm Capital L.P. ("Carderm"), and Respondent Andrx Corp. ("Andrx") (collectively, "Respondents") filed oppositions on May 19, 2000.

Complaint Counsel filed a motion to file a reply brief and its reply brief in support of its motion to strike on May 26, 2000. Andrx, Aventis and Carderm each filed oppositions to Complaint Counsel's motion to file a reply brief on May 30, 2000, May 31, 2000, and June 1, 2000, respectively. Complaint Counsel's motion to file a reply brief is GRANTED.

Andrx next filed a motion to file a surreply brief and its supplemental submission in opposition on June 5, 2000. Complaint Counsel did not oppose this motion. Andrx's motion to file a surreply, filed June 5, 2000, is GRANTED.

Complaint Counsel next filed a motion to file a supplemental reply brief and its supplemental reply brief in support of its motion to strike on June 12, 2000. Aventis filed a motion to strike Complaint Counsel's motion to file a supplemental reply brief on June 15, 2000.

Complaint Counsel's motion to file a supplemental reply brief is GRANTED. Aventis' motion to strike Complaint Counsel's June 12, 2000 reply brief is DENIED.

Oral arguments of counsel were heard on August 3, 2000. After the August 3, 2000 hearing, the parties submitted letters indicating areas where they had reached agreements. Complaint Counsel's August 7, 2000 letter stated that it had decided to withdraw its motion to strike with respect to Andrx's affirmative defense numbers 2, 14, and 15 and to Aventis' and Carderm's affirmative defense number 13. With this modification, Complaint Counsel's motion to strike challenges Andrx's affirmative defense numbers 7, 8, 12, 17, 18, and 19, and Aventis' and Carderm's affirmative defense number 2.

For the reasons set forth below, Complaint Counsel's Motion to Strike is GRANTED in part and DENIED in part.

II.

The Commission's Rules of Practice do not specifically provide for motions to strike, but the Commission has held that under appropriate circumstances such motions may be granted. *See In re Warner-Lambert Co.*, 82 F.T.C. 749 (1973); *In re Kroger Co.*, 1977 FTC LEXIS 70, *2 (Oct. 18, 1977). However, motions to strike are generally disfavored. *In re Home Shopping Network, Inc.*, 1995 FTC LEXIS 259, *4 (July 24, 1995); *In re Volkswagen of America, Inc.*, No. 9154, slip op. at 2 (July 8, 1981)(Mathias, ALJ).

A motion to strike defenses or portions of an answer will be granted when the answer or defense (1) is unmistakably unrelated or so immaterial as to have no bearing on the issues and (2) prejudices Complaint Counsel by threatening an undue broadening of the issues, by requiring lengthy discovery, or by imposing an undue burden on Complaint Counsel. *In re Dura Lube Corp.*, 2000 FTC LEXIS 1, *34 (August 31, 1999).

III.

A. Reason to Believe and Public Interest Determinations

Aventis' and Carderm's affirmative defense number 2 assert that the Commission has no reason to believe that Respondents violated the Federal Trade Commission Act. In its brief and in oral argument, Aventis has asserted the "reason to believe" standard requires the Commission to have a well-grounded reason to believe that each of the elements defining the alleged offense, including a showing that the conduct had a substantial anticompetitive effect in the marketplace, exist.

Andrx advances four affirmative defenses asserting that this administrative proceeding is not "to the interest of the public." In summary, Andrx's affirmative defense numbers 7 and 8 assert that this proceeding is not in the public interest because: it seeks relief that would deprive consumers of lower-priced generic pharmaceutical products; and the conduct that is subject of the Complaint is over. Andrx's affirmative defense numbers 18 and 19 assert that this proceeding is not in the public interest because: it arose from an improper and illegal publicity campaign surrounding the Commission's non-public investigation; and improper disclosures have been made by or with assistance from Biovail Corporation International which was represented by a former Deputy Director of the Bureau of Competition of the Federal Trade Commission.

Complaint Counsel asserts that the adequacy of the Commission's reason to believe and public interest determination are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts and that the issue to be litigated is not the adequacy of the Commission's pre-complaint information but whether the alleged violation has in fact occurred. Complaint Counsel further asserts that these defenses are not only legally insufficient, but also unduly broaden discovery.

Respondents assert that the defenses should not be stricken because the Supreme Court long ago held that the reason to believe and public interest determinations are subject to judicial review. Further, Respondents assert that Complaint Counsel has failed to establish that maintenance of these defenses would unduly burden or prejudice Complaint Counsel.

For the reasons set forth below, Complaint Counsel's motion to strike Aventis' and Carderm's affirmative defense number 2 is GRANTED. Complaint Counsel's motion to strike Andrx's affirmative defense numbers 7, 8, 18, and 19 is DENIED.

Aventis' and Carderm's Affirmative Defense Number 2

The Federal Trade Commission Act ("FTC Act") imposes two prerequisites that must be satisfied before the Commission may issue a complaint: (1) the Commission must have reason to believe that a party has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce; and (2) it shall appear to the Commission that a proceeding by it would be "to the interest of the public." 15 U.S.C. § 45(b).

It is the Commission's position that:

> it has long been settled that the adequacy of the Commission's "reason to believe" a violation has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is

> not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.

In re Exxon Corp., 83 F.T.C. 1759, 1760 (1974). The Supreme Court, in *Federal Trade Commission v. Standard Oil Co.*, 449 U.S. 232 (1980), noted, without accepting, the Commission's position. *Id.* at 235 n.5. However, the Supreme Court expressly declined to reach the merits of whether the Commission possessed the requisite reason to believe or whether courts can review the Commission's reason to believe. Instead, the Supreme Court held that the issuance of a complaint is not "final agency action" under § 10(c) of the APA, and hence is not reviewable. *Id.* at 238. In so holding, the Supreme Court stated that "the issuance of the complaint is definitive on the question whether the Commission avers reason to believe that the respondent to the complaint is violating the Act." *Id.* at 241.

Though other court precedent presents conflicting standards, one principle that can be gleaned is that the Commission's reason to believe determination may be reviewed for abuse of discretion or in extraordinary circumstances. *Hill Bros. v. Federal Trade Commission*, 9 F.2d 481, 484 (9th Cir. 1926) (The Commission's reason to believe determination is not "a subject of controversy either before the commission or before the court, except in so far as the question of public interest is necessarily involved in the merits of the case . . . ."); *Standard Oil Co. v. Federal Trade Commission*, 596 F.2d 1381, 1386 (1979), rev'd on other grounds 449 U.S. 232 (1980) (citations omitted) (A determination by the FTC that there is "reason to believe" a violation of law has occurred is within the agency's discretion and is not reviewable, but "courts will review an agency action when the alleged abuse of discretion is the violation of 'constitutional, statutory, regulatory or other legal mandates or restrictions."); *Boise Cascade Corp. v. Federal Trade Commission*, 498 F. Supp. 772, 779 (D. Del. 1980) (The Commission's "reason to believe" determination is "committed to agency discretion" and thus is not reviewable in the absence of strong facial indications of bad faith). The Commission's own precedent recognizes that the Commission will review its reason to believe and public interest determinations in extraordinary circumstances. *In re Boise Cascade Corp.*, 97 F.T.C. 246, 247 n.3 (1981).

Aventis' and Carderm's Affirmative Defense Number 2 asserts only that the Commission has no reason to believe that the respondents violated the FTC Act. Aventis and Carderm have not presented strong facial indications of bad faith or the extraordinary circumstances necessary to review the Commission's determination that it had a reason to believe the Respondents violated the FTC Act. Accordingly, Aventis' and Carderm's Affirmative Defense Number 2 is legally insufficient. Further, any attempts to discover the Commission's reason to believe prejudices Complaint Counsel by threatening an undue broadening of discovery into improper areas. Therefore, Complaint Counsel's motion to strike Aventis' and Carderm's Affirmative Defense Number 2 is GRANTED.

Andrx's Affirmative Defense Numbers 7, 8, 18 and 19

The Supreme Court, in *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929), held that courts may review the Commission's determination that a proceeding is "to the interest of the public." *Id.* at 30. While the Commission exercises broad discretion in determining whether a proposed proceeding will be in the public interest, courts may review whether the public interest would be served by the issuance of an order.

> The specific facts established may show, as a matter of law, that the proceeding which it authorized is not in the public interest, within the meaning of the Act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint. If, instead, the Commission enters an order, and later brings suit to enforce it, the court should, without enquiry into the merits, dismiss the suit.

Id. See also *Moretrench v. Federal Trade Commission*, 127 F.2d 792, 795 (2d Cir. 1942) (the Supreme Court in *Klesner* "did indeed decide that the public interest in the controversy was a justiciable issue"). But see *Cotherman v. Federal Trade Commission*, 417 F.2d 587, 594 (5th Cir. 1969) (public interest determination reviewed only for abuse of discretion).

Because Andrx's affirmative defenses challenging the Commission's public interest determination raise issues that may be reviewed by courts, these defenses are not so legally insubstantial or unmistakably unrelated or so immaterial as to have no bearing on the issues. However, the Commission's determination that this proceeding is in the public interest cannot be litigated in this proceeding. *Exxon Corp.*, 83 F.T.C. at 1760. Although the Commission's public interest determination cannot be litigated here, due process requires that this issue be preserved. See *In re Ford Motor Co.*, 1976 FTC LEXIS 38, *1-2 (Dec. 3, 1976). However, any discovery into this area will be limited. For example, Respondents may not probe into the mental processes of the Commissioners. *Boise Cascade*, 498 F. Supp. at 779. Accordingly, Complaint Counsel's motion to strike Andrx's affirmative defense numbers 7, 8, 18, and 19 is DENIED

B. Discriminatory Prosecution

Andrx's Affirmative Defense Number 12

Complaint Counsel next seeks to strike Andrx's affirmative defense number 12, which asserts, among other things, that "[t]he FTC is acting unlawfully and arbitrarily in attempting to single out Andrx for challenge with respect to these commonplace provisions." Complaint Counsel challenges defense number 12 on the grounds that the Commission has broad discretion in choosing to proceed against one member of an industry. Complaint Counsel further asserts that this defense could lead to discovery that would substantially burden and prejudice Complaint Counsel.

Andrx responds that its defense number 12 is broader than a defense of discriminatory prosecution and that the Commission's decision to prosecute Respondents was an abuse of discretion which may be overturned. Andrx further asserts discovery will not be broadened because the same evidence concerning industry practices and other deals will be adduced, whether or not the defense remains as plead, because such evidence is necessary to assess the challenged agreement between Andrx and Aventis under a "rule of reason" analysis.

For the reasons set forth below, Complaint Counsel's motion to strike Andrx's affirmative defense number 12 is GRANTED in part and DENIED in part.

It is well settled that the Commission may, within its broad discretion, choose to proceed against one, a few, or all members of an industry. *Moog Indus., Inc. v. Federal Trade Commission*, 355 U.S. 411, 413 (1958) ("Although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency."). Though the FTC's discretion in proceeding against one competitor may be overturned for a patent abuse of discretion, *Moog*, 355 U.S. at 414, such circumstances are not present here. Therefore, the defense of selective prosecution is legally insufficient. *In re General Motors Corp.*, 103 F.T.C. 641, 644 n.1 (1984); *In re Synchronal Corp.*, 1992 FTC LEXIS 61, *3-4 (March 5, 1992).

Moreover, the defense of selective prosecution is not only legally immaterial, but also threatens discovery into an impermissible area that would prejudice Complaint Counsel. Andrx may not discover mental processes of FTC attorneys' and Commissioners' decision to prosecute Andrx or decision not to challenge agreements by other companies in the industry. *In re Chock Full O' Nuts Corp., Inc.*, 82 F.T.C. 747, 748 (1973); *In re Kroger* Co., 1977 FTC LEXIS 55, *3-4 (October 27, 1977).

Andrx's Affirmative Defense Number 12 will stand, except that Andrx's assertion that "[t]he FTC is acting unlawfully and arbitrarily in attempting to single out Andrx for challenge with respect to these commonplace provisions" is stricken. In this respect, Complaint Counsel's motion to strike Andrx's Affirmative Defense Number 12 is GRANTED in part and DENIED in part.

C. Equitable Defenses

Andrx's Affirmative Defense Number 17

Last, Complaint Counsel seeks to strike Andrx's affirmative defense number 17, which asserts, among other things, that "[t]he Complaint and the relief sought therein are barred by the doctrines of laches, waiver, estoppel, and unclean hands. . . ." Complaint Counsel challenges

defense number 17 on the grounds that none of these equitable doctrines are available as a defense to an action brought by the government in the public interest. Andrx responds that equitable defenses can be asserted because this proceeding has not been brought in the public interest and because there may have been government misconduct.

For the reasons set forth below, Complaint Counsel's motion to strike Andrx's affirmative defense number 17 is DENIED.

Although it is a well settled, general principle that the United States is not subject to the defense of laches in enforcing its rights, *United States v. Summerlin*, 310 U.S. 414, 416 (1940), the equitable defenses of laches, waiver and estoppel may be asserted if the action of the government was not undertaken in the public interest. *See United States v. Reader's Digest Ass'n, Inc.*, 464 F. Supp. 1037, 1043 (D. Del. 1979), *aff'd* 662 F.2d 955 (3d Cir. 1981) (citing *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 80 (1934)). *See also Federal Trade Commission v. Hang-Up Art Enterprises, Inc.*, 1995 U.S. Dist. LEXIS 21444, *12 (C.D. Cal. 1995) (laches may be a defense if "affirmative misconduct" is shown). Further, although unclean hands is not a defense to antitrust liability, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951), an exception can be made "when the agency's conduct is egregious and the resulting prejudice rises to a constitutional level." *Federal Trade Commission v. Image Sales and Consultants, Inc.*, 1997 U.S. Dist. LEXIS 18902, *3-4 (N.D. Ind. 1997). In the instant case, where Andrx has made allegations and representations in pleadings and in open court that this proceeding is not in the public interest and that there may have been government misconduct, the equitable defenses will not be stricken at this time.

However, Andrx's defense number 17 threatens an undue broadening of the issues. Discovery on this defense will be limited. "[T]he mere fact that respondent alleges a matter as an affirmative defense does not necessarily open the door to unlimited discovery." *Ford Motor Co.*, 1976 FTC LEXIS 38, at *2. Complaint Counsel's motion to strike Andrx's affirmative defense number 17 is DENIED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: September 14, 2000