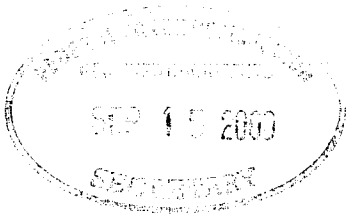
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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

RESPONDENT AVENTIS PHARMACEUTICALS, INC.
MOTION FOR PROTECTIVE ORDER

Respondent Aventis Pharmaceuticals, Inc. ("Aventis") formerly known as Hoechst Marion Roussel, Inc., hereby moves for a protective order precluding or limiting further deposition of two of Aventis' attorneys, Edward Stratemeier and James M. Spears.

The bases of this motion are set forth in the accompanying Memorandum in Support of Motion for Protective Order.

Dated: September 15, 2000

Respectfully Submitted,

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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

TO: The Honorable D. Michael Chappell
Administrative Law Judge

AVENTIS PHARMACEUTICALS, INC.'S
MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER

Pursuant to Rule 3.31(d) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.31(d), Respondent Aventis Pharmaceuticals, Inc. ("Aventis"), formerly known as Hoechst Marion Roussel, Inc. ("HMR"), respectfully requests a protective order precluding or limiting further deposition of two of Aventis' attorneys, Edward Stratemeier and James M. Spears.

I. INTRODUCTION

During the investigatory phase of the Commission's case, Commission attorneys fully deposed both Mr. Stratemeier, Aventis' general counsel, and Mr. Spears, one of Aventis' lead outside attorneys in this matter, with respect to the events that form the basis of the Complaint.

Complaint Counsel has now indicated his desire to depose these witnesses once again. Given the severe disruption and burden inherent in deposing a party's counsel, and the consequent limitations imposed on the practice by the courts, the Commission cannot justify second depositions of these two attorneys.

In the alternative, these deponents are entitled to a protective order limiting the scope of any deposition to matters not addressed in the prior depositions. The Commission had ample opportunity for discovery from these witnesses during the previous depositions, and to allow Complaint Counsel to depose these witnesses regarding subjects covered in the previous depositions would be unduly burdensome and duplicative and would amount to nothing more than harassment of the proposed deponents.

II. FACTS

A. The Proposed Deponents

Mr. Stratemeier joined Aventis' predecessor in 1982 as corporate counsel, and became assistant general counsel in 1985. He has been General Counsel of Aventis, formerly known as HMR, since March 1997. As General Counsel of Aventis, Mr. Stratemeier is ultimately responsible for major decisions with regard to Aventis' litigation of this matter, but is not the attorney within Aventis charged with responsibility for the day-to-day conduct of this litigation.

Mr. Spears is a partner at the law firm of Shook, Hardy & Bacon, LLP, and is Aventis' longstanding outside antitrust counsel. Mr. Spears is currently one of Aventis' lead litigation attorneys in this very matter, as well as in private litigation now pending in federal court involving the same facts.

Messrs. Stratemeier and Spears were involved, on behalf of Aventis, in the negotiation and drafting of the Stipulation and Agreement alleged in the Complaint as anticompetitive.

B. The Commission's Prior Depositions of the Proposed Deponents

The Commission's formal investigation into the events that form the basis for this proceeding was initiated with the issuance of a Resolution Authorizing Use of Compulsory Process on October 15, 1998. As defined in that Resolution, the Commission's investigation was aimed at determining whether HMR and Andrx engaged in unfair methods of competition in violation of Section 5 of the FTC Act, by monopolizing or attempting to monopolize the market for any pharmaceutical product, by entering into any agreement with the purpose or effect of restricting entry into the generic market for any pharmaceutical product, or by otherwise restricting competition in the manufacture or sale of any pharmaceutical product. The Commission authorized the use of "any and all" available compulsory process in connection with its investigation.

Armed with this Resolution, Commission attorneys obtained thousands of pages of documents from Aventis and indicated their intent to examine Mr. Stratemeier under oath with respect to the negotiation and drafting of the Stipulation and Agreement entered into by HMR, Carderm Capital, L.P., and Andrx Corporation ("Andrx"). Aventis agreed to produce Mr. Stratemeier for deposition without the need for subpoena *ad testificandum*, and he appeared for questioning before several Commission attorneys (including Bradley Albert and Geoffrey Oliver), on two occasions. The first session was held on May 13, 1999, beginning at 9:30 a.m. and concluding at 5:05 p.m. The second session was on June 8, 1999, beginning at 1:56 p.m. and lasting until 6:54 p.m. The transcripts for both sessions totaled 284 pages.

Mr. Stratemeier was placed under oath and Commission attorneys questioned him in detail with respect to the negotiation and drafting of the Stipulation and Agreement as well as the final settlement of the Florida patent litigation between HMR and Andrx (the "Settlement Agreement"), including the circumstances leading up to those agreements. Commission attorneys presented Mr. Stratemeier with various drafts of the Stipulation and Agreement and correspondence between HMR and Andrx, and inquired into the purpose, meaning, and origin of numerous provisions of the Stipulation and Agreement in various stages of its negotiation. One of the Commission attorneys present during questioning was Complaint Counsel, Bradley Albert.

Subsequently, Commission attorneys indicated their desire to examine Aventis' outside antitrust counsel, Mr. Spears. A conference call was held on August 18, 1999, to discuss the Commission's request. During that conference, Commission attorneys Bradley Albert and Geoffrey Oliver explained that the examination of Mr. Spears would focus on the negotiation and drafting of the Stipulation and Agreement and the Settlement Agreement, including specific provisions of various drafts, and of the final versions of these agreements. Mr. Albert and Mr. Oliver also explained that the Commission would inquire into Mr. Spears' "thought processes or communications with his client" regarding these agreements, and that HMR could then decide whether to assert or waive any privileges implicated by such questions. Mr. Bradley confirmed the Commission's position in a follow-up letter.

Thereafter, in September, 1999, the Commission issued and served a subpoena *ad testificandum* upon Mr. Spears. The subpoena ordered Mr. Spears to appear and testify at a 'hearing or deposition' before Bradley S. Albert or other designated Commission Counsel. Aventis petitioned the Commission to quash the subpoena on the grounds that, *inter alia*, Commission attorneys had

failed to make the sort of heightened showing of relevance and need typically required to justify a deposition of opposing counsel, and that the subpoena was not appropriately limited in scope and improperly encroached upon the attorney-client privilege and attorney work product. Aventis' petition to quash was denied by a single Commissioner, and Aventis' petition for full Commission review was also denied.

Mr. Spears appeared for a deposition[1] that began at 9:00 a.m. on February 23, 2000, and concluded at 2:15 p.m. Four attorneys appeared on behalf of the Commission, including Mr. Albert and Mr. Oliver. As with the depositions of Mr. Stratemeier, Mr. Spears was placed under oath and was subjected to several hours of questioning relating to the negotiation and drafting of the Stipulation and Agreement. Commission Counsel presented Mr. Spears with various drafts of the agreement and correspondence between HMR and Andrx, and inquired into the purpose, meaning, origin, and other aspects of numerous provisions of the agreement and proposed changes. Commission Counsel also inquired into the negotiation and drafting of the Settlement Agreement. The transcript of this deposition totaled 106 pages.

C. Complaint Counsel's Pending Requests for Additional Depositions

Complaint Counsel recently advised Aventis that he intended to re-depose Mr. Stratemeier and Mr. Spears. Aventis indicated its objection to further depositions of its attorneys and met and conferred with Complaint Counsel. Despite good faith efforts, the parties could not

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1. The Commission attorneys who conducted this examination called it an "investigational hearing." Of course, as discussed in further detail below, for purposes of this motion it is the nature and character of the examination that is relevant, not what Commission employees may choose to call it at a given time. *See generally Jones v. State Farm Fire & Casualty Co.*, 129 F.R.D. 170 (N.D.Ind. 1990).

resolve their dispute over the necessity for, and/or the scope of, any additional depositions of Mr. Stratemeier and Mr. Spears, and the parties agreed that the issue would be placed before the Court on Aventis' Motion for Protective Order.

III. ARGUMENT

A. Additional Depositions of Aventis' Attorneys Cannot Be Justified

The scope and limits of discovery in this administrative proceeding are essentially the same as for discovery under the Federal Rules of Civil Procedure. First, the information sought must be relevant and not privileged. *See* 16 C.F.R. § 3.31(c)(1) & (c)(2); *compare* Fed.R.Civ.P. 26(b)(1). Even where relevant and non-privileged information is sought, the frequency or extent of discovery "shall be limited" by the ALJ if:

> (i) The discover[y] sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) The party seeking discovery has had ample opportunity for discovery in the action to obtain the information sought; or
>
> (iii) The burden and expense of the proposed discovery outweigh its likely benefit.

16 C.F.R. § 3.31(c)(1); *compare* Fed.R.Civ.P. 26(b)(ii). The ALJ may issue protective orders denying discovery or "make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." 16 C.F.R. § 3.31(d); *compare* Fed.R.Civ.P. 26(c). These articulations of the limits on discovery and the standards for issuance of protective orders are essentially identical to the language contained in the Federal Rules

of Civil Procedure. *See* Fed.R.Civ.P. 26(b)(2) & (c). Accordingly, case law interpreting the similar language of the Federal Rules should be considered persuasive authority.[2]

In this case, Aventis respectfully submits that the proposed additional depositions of Mr. Stratemeier and Mr. Spears are not justified and should not be permitted in light of the very limited circumstances under which *any* deposition of opposing counsel will be allowed, let alone a second deposition regarding the same subject matter.

Courts have repeatedly recognized that any deposition of opposing counsel presents particularly sensitive and difficult issues of attorney-client privilege and work product protection, as well as an inherent risk of prejudice, harassment, and unnecessary delay. Thus, the deposition of opposing counsel is discouraged and may be allowed only under limited circumstances. According to the Eighth Circuit:

> Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony. Finally, the practice of deposing opposing counsel detracts from the quality of client representation. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent. Moreover, the "chilling effect" that such practice will have on the truthful communications from the client to the attorney is obvious.

Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).

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2. Cases involving the Federal Rules of Civil Procedure are often considered as persuasive authority in Commission proceedings. *See generally Dura Lube Corp.*, 2000 FTC Lexis 1, at *31 (Jan. 14, 2000) (apparently considering caselaw relating to Fed. R. Civ. P. 12(f) in ruling on motion to strike).

For these reasons, even where the attorney has witnessed relevant nonprivileged conversations or events that underlie the litigation, courts generally require a heightened showing that the deposition is appropriate and necessary. As stated by the court in *American Cas. Co. of Reading v. Krieger*, 160 F.R.D. 582, 588 (S.D. Cal. 1995):

> Most courts which have addressed these issues have held that the taking of opposing counsel's deposition should be permitted only in limited circumstances and that, because of the potential for abuse inherent in deposing an opponent's attorney, the party seeking the deposition must demonstrate its propriety and need before the deposition may go forward. Courts have reached this conclusion even where it is clear that the attorney *is* a witness to relevant, nonprivileged events and/or conversations.

Id. (emphasis in original; citations omitted); *see also West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. 301, 302-03 (S.D. Fla. 1990).

Thus, although the Federal Rules do not exempt a party's attorney from being subject to a deposition, such depositions are disfavored and there is a presumption against allowing them. *See, e.g., Evans v. Atwood*, 1999 WL 1032811 at *2 (D.D.C. Sept. 29 , 1999) (not reported in F.Supp.); *Corp. for Public Broadcasting v. American Automobile Centennial Commission*, 1999 WL 1815561 at *1 (D.D.C. Feb. 2, 1999). "The rationale for this presumption against attorney depositions is that depositions of counsel, even if limited to relevant and non-privileged information, are likely to have a disruptive effect on the attorney-client relationship and on the litigation of the case." *Evans* 1999 WL 1032811 at *2. Accordingly, contrary to the ordinary requirement that the party opposing a deposition show "good cause" why the deposition should not be had, the burden is often shifted to the party seeking to depose its adversary's counsel to demonstrate the propriety

of and need for such a deposition. *Id.* (citing *Mike v. Dymon, Inc.*, 169 F.R.D. 376, 378 (D. Kan. 1996)); *see also Corp. for Public Broadcasting*, 1999 WL 1815561 at *1.

In determining whether to permit a party to depose an adversary's attorney, the federal courts typically consider whether the party seeking 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." *See Evans* at *2 (citing *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)); *see also Corp. for Public Broadcasting*, 1999 WL 1815561 at *1 (D.D.C. 1999) (not reported in F.Supp.); *Dunkin Donuts, Inc. v. Mandorico,* Inc., 181 F.R.D. 208, 210-212 (D. P.R. 1998); *Caterpillar, Inc. v. Friedemann*, 164 F.R.D. 76, 78-79 (D. Or. 1995); *American Cas. Co.*, 160 F.R.D. at 589; *Harriston v. Chicago Tribune Co.*, 134 F.R.D. 232, 233 (N.D. Ill. 1990); *Advance Systems, Inc. of Green Bay v. APV Baker PMC, Inc.*, 124 F.R.D. 200, 201 (E.D. Wis. 1989).[2]

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2. A slightly different test was articulated by the court in *Johnston Development Group, Inc. v. Carpenters Local Union No. 1578,* 130 F.R.D. 348, 352 (D.N.J. 1990). In *Johnston Development*, the court took the similar approach of "balancing, generally speaking, the necessity for such discovery in the circumstances of the case against its potential to oppress the adverse party and to burden the adversary process." *Johnston Dev. Group, Inc. v. Carpenters Local Union No. 1578,* 130 F.R.D. 348, 352 (D.N.J. 1990). Under this approach, the burden of showing the need for a protective order remains on the party opposing discovery, but a protective order will issue where the subpoena creates undue burden or oppression "measured by (1) the relative quality of information in the attorney's knowledge, that is, whether the deposition would be disproportional to the discovering party's needs; (2) the availability of the information from other sources that are less intrusive into the adversarial process; and (3) the harm to the party's representational rights of its attorney if called upon to give deposition testimony." *Id.* at 353; *see also Macario v. Pratt & Whitney Canada, Inc.*, No. 90-3906, 1991 WL 94278, at *2-*3 (E.D. Pa. May 28, 1991). In *Evans v. Atwood*, 1999 WL 1032811 at *2 n.4 (D.D.C. 1999), the U.S. District Court for the District of Columbia apparently viewed this test as generally consistent with the *Shelton* test, quoted in the text. *Id.* In any event, the analysis for determining whether a *second*

(continued...)

In the instant case, the Commission has already been afforded a full and fair opportunity to depose Mr. Spears and Mr. Stratemeier[3] with respect to the subject matter of these proceedings. Commission attorneys, including Complaint Counsel Bradley Albert, took full advantage of that opportunity, and questioned both deponents in detail regarding the negotiation and drafting of the Stipulation and Agreement, as well as the Settlement Agreement.

Under these circumstances, the Commission's extraordinary request to depose Aventis' attorneys a second time cannot be justified. The Commission has already had one bite at the apple, and has failed to demonstrate the level of compelling need necessary to justify any further depositions of Aventis' attorneys. Certainly, to the extent that Complaint Counsel merely wish to readdress the same subject matter that Commission attorneys covered in the prior depositions, resubjecting these witnesses to the same questioning would be unreasonably cumulative, duplicative, unduly burdensome and harassing. *See* 16 C.F.R. § 3.31(c)(1)(i).

It is submitted that additional depositions of these witnesses could be justified only if Complaint Counsel sought to cover new subject matter that the Commission did not have the opportunity to cover previously, and, then, only if the new information sought satisfies the

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2. (...continued)
deposition of opposing counsel is appropriate would be essentially the same under either articulation of the standard for when a *first* deposition of opposing counsel should be allowed.

3. As noted above, Mr. Stratemeier was deposed during two sessions totaling over 12 hours. By way of illustration, it is worth noting that the Supreme Court has adopted a proposed change to Federal Rule of Civil Procedure 30 that would limit all depositions to one day of seven hours (plus reasonable breaks) unless additional time is authorized by the court. This new rule will go into effect December 1, 2000, absent Congressional action. *See* Proposed Fed.R.Civ.P. 30(d)(2) (effective December 1, 2000).

heightened standard for justifying the deposition of opposing counsel. As noted above, this heightened standard typically requires Complaint Counsel to establish 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." *See, e.g., Evans* at *2 (citing *Shelton,* 805 F.2d at 1327). Accordingly, these depositions should not go forward unless the Commission establishes it is seeking important new information that it was unable to discover in the previous depositions, the new information can not be obtained through a less intrusive means of discovery such as written interrogatories. Failing such a showing, it must be concluded that the discovery sought is "unreasonably cumulative and duplicative" and the Commission "has had ample opportunity for discovery in the action to obtain the information sought." 16 C.F.R. § 3.31(c)(1).

The burden and harassment associated with a second deposition of Mr. Spears is particularly acute. Because Mr. Spears is one of Aventis' lead litigation counsel, and heavily involved in Aventis' day-to-day litigation of this very proceeding, his deposition is particularly likely to lead to unnecessary delay, expense, harassment, and distraction from the issues – as well as the potential to disrupt the adversary process by encroaching on protected work product and distracting Mr. Spears from his role as advocate for Aventis in these proceedings.

For these reasons, Aventis respectfully prays that this tribunal issue a protective order preventing any further depositions of Mr. Stratemeier and Mr. Spears.

B. Any Additional Depositions Should Be Limited to Subjects That Could Not Have Been Covered in the Prior Depositions

In the alternative, if an additional deposition of Mr. Stratemeier or Mr. Spears is allowed to proceed, a protective order should issue limiting any additional deposition to new matters.

As discussed above, there is no legal, factual or practical reason why Complaint Counsel should be permitted to engage in cumulative and duplicative examinations of the same witnesses regarding the same subject matter covered in previous examinations.

Almost as a matter of course, whenever a second deposition is permitted of the same witness, courts will enter a protective order limiting the scope of the second deposition to new matters. Courts have issued such limiting orders even where, as here, the prior examination was not conducted as a formally noticed deposition in the litigation. So long as the prior examination was under oath and on the record, there is no reason to permit a party to re-examine the same witness regarding matters that were or could have been addressed in the prior examination.

This reasoning was followed in the highly instructive case of *Jones v. State Farm Fire & Casualty Co.*, 129 F.R.D. 170 (N.D.Ind. 1990). In *Jones*, a fire occurred at plaintiff Jones' residence in April of 1988. Jones filed a claim with the defendant insurance company, State Farm, seeking reimbursement for fire damage under a State Farm policy. The plaintiff gave a recorded statement to a State Farm claims representative in May of 1988. That statement was transcribed and totaled 61 pages. In November of 1988, plaintiff submitted to an examination under oath as required by the insurance policy. That examination was conducted by State Farm's attorney, and was transcribed by a court reporter. The transcript of that examination totaled 106 pages. *Id.* at 170.

After State Farm denied the claim and Jones filed suit, State Farm scheduled a deposition of Jones. Jones filed a motion to quash, arguing that a deposition would be unduly burdensome since Jones already had submitted to two separate examinations totaling 167 pages of transcript. *Id.*

The Court permitted the deposition, reasoning that both sides had engaged in "extensive trial preparations" since the examination under oath had been taken (over a year previously), and noting that State Farm likely had information that had not been available at the time of the examination under oath. The Court concluded that:

> Although State Farm will be permitted to take the deposition of the plaintiff, there is no logical reason why that deposition should duplicate the material covered by the examination under oath or the statement taken by the claims adjuster. Therefore the deposition must be limited to those areas not covered in the previous two statements.

Jones, 129 F.R.D. at 171. *See also Perry v. Kelly-Springfield Tire Co., Inc.*, 117 F.R.D. 425, 426 (N.D. Ind. 1987) (holding that "there is no logical reason why [the deposing party] should duplicate the same material covered at the first deposition. Therefore, the second deposition will be limited to those areas not covered in the first deposition.").

Similarly, in *Tri-Star Pictures, Inc. v. Unger*, 171 F.R.D. 94 (S.D.N.Y. 1997), the Court ultimately determined that it would permit a second deposition of Ronald Jacobi, Senior Vice President and General Counsel of third-party defendant Columbia Pictures, in light of additional claims that Columbia raised in its amended answer. *Id.* at 100-02. However, the Court granted the deposition only on the condition that the deposition "be strictly confined to new claims and issues raised in Columbia's Amended Third-Party Answer," and held that "because Jacobi has been deposed once, [the deposing party] may not re-question him regarding any of the topics covered in his previous testimony, except where necessary to elicit new testimony regarding new claims and issues raised in Columbia's Amended Third-Party Answer." *Id.* at 102-03.[4]

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4. In addition, the court determined that because of Jacobi's position as Columbia's General (continued...)

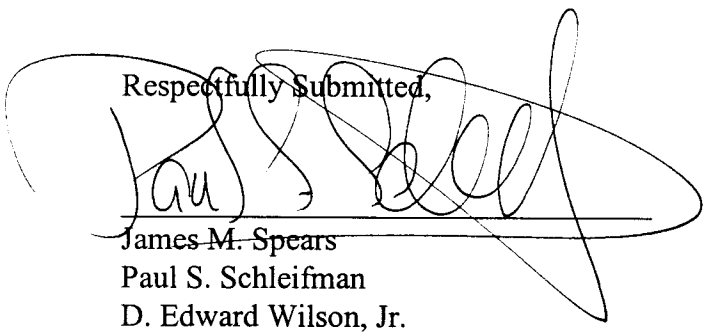
Likewise, there is no reason why any further depositions of Mr. Spears and Mr. Stratemeier should be permitted to cover the same topics addressed in the prior depositions. Accordingly, at a minimum, a protective order should issue limiting the scope of any additional depositions of Mr. Spears and Mr. Stratemeier to topics or matters that were not covered in the Commission's previous depositions.

IV. CONCLUSION

For the foregoing reasons, Aventis respectfully requests that this Court issue a protective order pursuant to Rule 3.31(d), ordering that the proposed depositions of Messrs. Stratemeier and Spears not be had or, in the alternative, that they be limited in scope to new matters not covered in the Commission's prior sworn examinations of these two deponents.

Dated: September 15, 2000

Respectfully Submitted,



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4. (...continued)
Counsel, the deposing party "may not seek to elicit testimony from him which threatens the integrity of the attorney-client privilege." *Id.* at 103.

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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 GRANTING RESPONDENT AVENTIS PHARMACEUTICALS, INC. MOTION FOR PROTECTIVE ORDER

On September 15, 2000, Respondent Aventis Pharmaceuticals, Inc. filed a motion for a protective order precluding further deposition of two of Aventis' attorneys, Edward Stratemeier and James M. Spears. Respondent's motion is GRANTED.

ORDERED:

_____
D. Michael Chappell
Administrative Law Judge

Date: September __, 2000

CERTIFICATE OF SERVICE

I, Peter D. Bernstein, hereby certify that on September 15, 2000, a copy of Aventis Pharmaceuticals, Inc's Memorandum in Support of Motion for Protective Order was served upon the following persons by hand delivery and/or Federal Express as follows:

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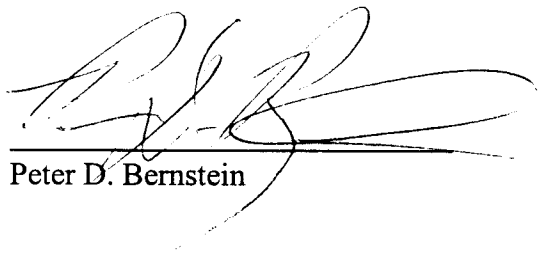

Peter D. Bernstein