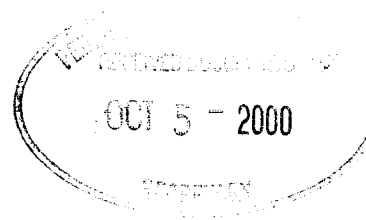


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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

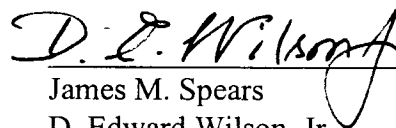
**AVENTIS PHARMACEUTICALS, INC.'S
MOTION FOR LEAVE TO RESPOND TO NON-PARTY WITNESS AETNA U.S.
HEALTHCARE, INC.'S MEMORANDUM IN OPPOSITION TO AVENTIS
PHARMACEUTICALS, INC.'S MOTION TO ENFORCE COMPLIANCE WITH THE
SUBPOENA ISSUED TO NON-PARTY AETNA U.S. HEALTHCARE**

Respondent Aventis Pharmaceuticals, Inc. ("Aventis") respectfully submits this Motion for Leave to Respond to Non-party Witness Aetna U.S. Healthcare, Inc.'s Memorandum in Opposition to Aventis Pharmaceuticals, Inc.'s Motion to Enforce Compliance With The Subpoena

Issued to Non-party Aetna U.S. Healthcare. In its Reply, Aetna raises new matters not previously briefed to the Court and for this reason Aventis requests that it be allowed to file the attached, short response.

Dated: October 5, 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

Attorneys for Respondent

Aventis Pharmaceuticals, Inc.

**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 GRANTING AVENTIS PHARMACEUTICALS, INC.'S
MOTION FOR LEAVE TO RESPOND TO NON-PARTY WITNESS AETNA U.S.
HEALTHCARE, INC'S MEMORANDUM IN OPPOSITION TO AVENTIS
PHARMACEUTICALS, INC.'S MOTION TO ENFORCE COMPLIANCE WITH THE
SUBPOENA ISSUED TO NON-PARTY AETNA U.S. HEALTHCARE**

IT IS HEREBY ORDERED THAT Aventis Pharmaceuticals, Inc.'s Motion to Respond to Non-party Witness Aetna U.S. Healthcare, Inc's Memorandum in Opposition to Aventis Pharmaceuticals, Inc.'s Motion to Enforce Compliance with the Subpoena Issued to Non-party Aetna U.S. Healthcare is hereby GRANTED.

Dated: October ____, 2000

D. Michael Chappell
Administrative Law Judge

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

**AVENTIS' REPLY TO
AETNA'S MEMORANDUM IN OPPOSITION TO
AVENTIS PHARMACEUTICALS, INC.'S MOTION
TO ENFORCE COMPLIANCE WITH THE SUBPOENA
ISSUED TO NON-PARTY AETNA U.S. HEALTHCARE**

Respondent Aventis Pharmaceuticals, Inc. ("Aventis") respectfully submits this reply to Non-party Witness Aetna U.S. Healthcare, Inc.'s ("Aetna") Memorandum in Opposition to Aventis Pharmaceuticals, Inc.'s Motion to Enforce Compliance with the Subpoena Issued to Non-party Aetna U.S. Healthcare ("Opposition").¹

-
1. On September 25, 2000, Aventis received by facsimile transmission a document entitled Non-party Witness Aetna U.S. Healthcare, Inc.'s Motion For a Protective Order Pursuant to 16 C.F.R. § 3.31(c)(2)&(d). As Aetna's Opposition is merely a recasting of that document and Aetna's motion is not a filing recognized by FTC practice rules, Aventis will not respond to that document unless requested by this Court.

I. INTRODUCTION

At issue in these pleadings is: (1) whether Aetna has properly objected to the FTC subpoena Aventis served in this matter; and, if so, (2) whether such objections have merit. Aetna's Opposition presents three issues:

1. Did Aventis properly serve the FTC subpoena;
2. Does an order from *In re Cardizem CD Antitrust Litigation*, MDL 1278 (E.D. Mich.) ("MDL") prohibit this Court from ordering production of requested documents; and,
3. Are the documents sought relevant to this proceeding.

None of Aetna's objections to the subpoena at issue has merit. In stark contrast to good faith efforts of other managed care providers to respond to Aventis' document requests, Aetna has produced only one document responsive to the subpoena issued in this case, and that document was previously produced in the MDL proceeding.² Supplemental Declaration of D. E. Wilson, Jr., attached hereto, at ¶ 5 ("Supplemental Declaration"). Finally, the relevancy of the materials sought to these proceedings is manifest and has not been challenged by any of the other fifteen (15) managed care providers that received identical subpoenas in this proceeding. Accordingly, Aventis' motion should be granted and Aetna should be directed to comply with the subpoena within the next ten (10) calendar days.

II. THE COURT SHOULD STRIKE AETNA'S OBJECTIONS TO THE SUBPOENA

The Court should strike Aetna's Opposition because the objections it raised are untimely. The subpoena at issue was served on Aetna on June 5, 2000. Declaration of D. E.

2. While Aetna's refusal to respond to a subpoena in this matter may serve some strategic or tactical purpose for Aetna in the MDL proceeding, such is not a proper basis for refusing to comply with properly issued subpoena in a Part III Proceeding before the FTC.

Wilson, Jr., in Support of Aventis Pharmaceuticals, Inc.’s Motion for Enforcement of Subpoena Served on Aetna U.S. Healthcare, Inc. ¶ 2.³ Under the Commission’s Rules, objections shall be filed “within the earlier of ten (10) days following service thereof or the time for compliance therewith.” 16 C.F.R. § 3.34(c). Here, Aventis served Aetna with the subpoena at issues *three months* before Aetna filed any objection with the Court. Wilson Declaration at ¶ 2. Consequently, under the clear and unambiguous application of § 3.34(c), Aetna’s objections are untimely and should not be considered.

Aetna attempts to escape the application of this rule by arguing that it transmitted a document entitled “Responses and Objections” to Aventis on July 21, 2000. Opposition at 5. Setting aside both the form and merit of Aetna’s objections, that document was also untimely under the Commission’s rules.

For the past three months, Aventis sought to engage in good faith discussions with Aetna, as it has with other third party witnesses, to address any legitimate concerns Aetna may have had regarding the scope of Aventis’ requests. Aventis filed its motion to compel only after it became clear that Aetna simply refused to produce documents pursuant to the FTC subpoena. Supplemental Declaration at ¶ 4. Aetna now argues that Aventis’ willingness to consider Aetna’s concerns over the course of the last three months somehow relieved Aetna of its obligation to timely object to the subpoena and/or produce responsive documents. Aetna’s untenable position is further evidence that Aetna has embarked upon a course to resist legitimate discovery in this matter at all costs. The Court should not countenance this tactic which essentially rewards a party that neither complies with

3. Attached to Aventis Pharmaceuticals, Inc.’s Memorandum in Support of Motion to Enforce Compliance with the Subpoena Served on Aetna U.S. Healthcare, Inc. Hereinafter “Wilson Declaration.”

the rules nor makes a good faith effort to present objections in a timely and proper fashion.⁴ For these reasons, the Court should strike Aetna's objections to the subpoena and grant Aventis' motion. Further, for reasons more fully set forth below, even if the Court is inclined to consider the arguments Aetna raises in opposition to Aventis' motion, Aventis' motion should be granted.

III. SERVICE OF THE SUBPOENA WAS PROPER

Aetna attempts to avoid its obligation to comply with the subpoena by arguing that the subpoena was served by registered mail on Aetna's "Custodian of Records." In truth, the Aetna subpoena was *addressed* to Aetna's Custodian of Records, but was *served* on its registered agent for service of process. A copy of the return receipt from service on Aetna is attached as Exhibit B to the Wilson Declaration.

The Commission Rules do not specifically address the manner in which a party must serve a subpoena on a non-party. Aventis' service of the Aetna subpoena, however, complied with the manner of service specified in the Commission Rules for service by a party on any other party. *See* 16 C.F.R. § 4.4(b). Moreover, service upon a registered agent for service of process is the most stringent standard provided in the Commission Rules for service of process. *See, e.g.*, 16 C.F.R. § 4.4(a) ("any method reasonably certain to inform the affected person, corporation or unincorporated association"). Accordingly, Aetna's argument that service of the subpoena was improper is without merit.

4. Other third party witnesses who have had objections to the scope of discovery or concerns regarding the adequacy of the protective order in this case have readily availed themselves of the procedures provided under the Commission's Rules. Relief has been denied to some and granted to others. But not having made good faith attempt to comply with the Commission's Rules, Aetna now argues that it is entitled to wholly avoid any obligation to respond to a subpoena.

IV. DISCOVERY RULINGS FROM *IN RE CARDIZEM CD ANTITRUST LITIGATION*, MDL 1278 (E.D. MICH.) ARE IRRELEVANT IN THIS PROCEEDING

Aetna attempts to avoid the FTC subpoena by arguing that it has produced to Aventis all documents it produced to the defendants in the MDL action. Opposition at 6. This argument is, of course, irrelevant to the issues of (1) whether Aetna may properly refuse to respond to a subpoena issued in this case; and (2) whether the documents at issue in the FTC subpoena are relevant to this administrative proceeding involving different issues and different parties. The fact that Aetna may or may not be in compliance with a discovery order in some other litigation simply has no bearing on Aetna's obligation to respond here.

A. The Documents Sought in the Two Actions Are Not Identical

Aetna's assertion that it produced documents in the MDL is completely irrelevant to the issue of whether it has an obligation to produce documents pursuant to the FTC subpoena for one very simple reason: the documents sought through the FTC subpoena are different from those sought from Aetna in the MDL. Documents sought in this proceeding relate to Complaint Counsel's assertion that once-daily diltiazem products constitute the appropriate product market for antitrust purposes. For that reason, the FTC subpoena focused on how Aetna, as one of this country's largest managed care providers, treats various categories of anti-hypertensive drugs. The subpoena seeks documents relating to standards of treatment, pharmaceutical formulary management and design and incentive clauses in pharmaceutical contracts. By contrast, discovery in the MDL proceeding thus far has focused on class certification issues and all documents produced by Aetna in that litigation, *save one*, pertain to contracts between Aetna and local pharmacies in Michigan. *Id.* While such documents may be relevant to class certification issues in the MDL, those thousands of pages have

little or nothing to do with the FTC's Complaint or Aventis' defense in the instant case.⁵ Opposition, Exhibit G.

B. Discovery Rulings Entered in the MDL Action Have No Effect on This Proceeding

Aetna also tries to avoid its obligation to respond to the FTC subpoena by arguing that MDL discovery orders somehow preclude Aventis from seeking the documents at issue in the FTC subpoena. This argument is wholly without merit. Nothing in any MDL discovery order can reasonably be read to limit the permissible scope of discovery in this, or any other, proceeding. Discovery limitations in some other proceeding clearly do not invalidate or otherwise limit a proper subpoena seeking materials relevant to this proceeding.

Aetna's compliance or non-compliance with discovery requests in its role as a class action plaintiff does not relieve Aetna of its obligation to respond reasonably to a subpoena in this matter. Indeed, it is questionable whether the deference this tribunal normally extends to third party witnesses should be extended to a third party actively engaged in private litigation with the respondents over many of the same issues in this proceeding. Because Aetna has a direct pecuniary interest in frustrating Aventis' ability to defend itself in this action, it would be more appropriate to view Aetna's objections through the lens of self-interest that more accurately reflects Aetna's motivation in this proceeding.

Moreover, Aetna's argument that the FTC subpoena is Aventis' attempt to circumvent discovery limitations in the MDL is simply untrue. The subpoena directed to Aetna is identical to

5. Aetna agrees that discovery in the MDL action was limited "to the state of Michigan as an exemplar." Opposition at 6.

subpoenas directed to other fifteen (15) managed care providers. Aventis seeks the documents at issue because they are essential to its defense in *this* proceeding.

V. AVENTIS' REQUEST IS BALANCED AND REASONABLE

As noted earlier, the documents sought by the subpoena relate to Complaint Counsel's assertion that once-daily diltiazem products constitute a properly defined product market for antitrust purposes. Accordingly, the FTC subpoena seeks documents illustrating how Aetna, as one of this country's largest managed care providers, treats various categories of anti-hypertensive drugs.

The exact document requests Aetna claims are over broad and seek documents not relevant to this proceeding were served on fifteen (15) other managed-care providers. Only three of these other companies objected to the FTC subpoenas. Those companies, however, *did not* object to the relevancy of the document requests. Rather, the companies objected to producing documents pursuant to the Second Amended Protective Order⁶ which they argued did not provide sufficient assurances of confidentiality for documents the companies were required to produce.⁷

The fact that these other companies complied with the exact document request Aetna finds so objectionable further supports Aventis' assertion that Aetna's opposition is fueled more by Aetna's desire to protect its interest in the MDL than by any defensible objection. The willingness of fifteen (15) neutral third parties to comply with the document request at issue here says more than any legal argument about the reasonableness of Aventis' requests and the relevancy of the documents it seeks.

6. Entered by this Court on August 7, 2000.

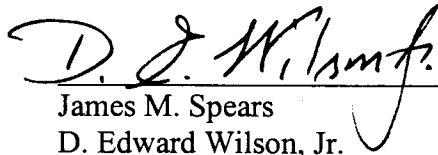
7. On September 28, 2000, the Court denied Kaiser's, Blue Cross and Blue Shield of Michigan's, and United Healthcare's motion to modify the protective order.

VI. CONCLUSION

For these reasons, Respondent Aventis Pharmaceuticals, Inc. respectfully requests this Court enter an Order striking Non-party Witness Aetna U.S. Healthcare, Inc.'s Opposition from the docket. In the alternative, Aventis requests the Court enter an Order granting Aventis' Motion to Enforce Compliance with the Subpoena Issued to Aetna U.S. Healthcare, Inc. and grant such other relief as the Court may deem just and proper.

Dated: October 5, 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

Attorneys for Respondent
Aventis Pharmaceuticals, Inc.

**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

**SUPPLEMENTAL DECLARATION OF D. E. WILSON, JR., IN SUPPORT OF
AVENTIS PHARMACEUTICAL, INC.'S MOTION FOR ENFORCEMENT OF
SUBPOENA SERVED ON AETNA U.S. HEALTH CARE, INC.**

I, D. E. WILSON, JR., hereby state the following pursuant to Rule 3.22(f) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.22(f):

1. I am a member in good standing of the Bar of the District of Columbia Court of Appeals and am presently associated with the firm of Shook Hardy & Bacon LLP, counsel for respondent Aventis Pharmaceuticals, Inc. ("Aventis").

2. I have reviewed Non-party Witness Aetna U.S. Healthcare, Inc's Memorandum in Opposition to Aventis Pharmaceuticals, Inc.'s Motion to Enforce Compliance With The Subpoena Issued to Non-party Aetna U.S. Healthcare and the documents submitted with that Memorandum. I reaffirm the statements made in my Declaration of September 21, 2000, and submitted with

Aventis Pharmaceuticals, Inc.'s Memorandum in Support of Motion to Enforce Compliance with the Subpoena Served on Aetna U.S. Healthcare, Inc.

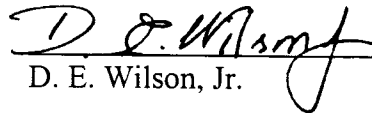
3. In view of counsel for Aetna's repeated statements that the documents produced in the MDL litigation were "completely responsive" to the subpoena issued in this, Part III, litigation, I personally checked twice to ensure that I had received all the documents produced in the MDL litigation and reviewed the documents twice, page-by-page. Only one of the documents is responsive to this subpoena.

4. Following this review, counsel for Aetna again orally assured me that the "MDL documents" were completely responsive to this subpoena. Since August 22, 2000, I have made clear to counsel for Aetna that the documents produced in the MDL litigation were not responsive and that in view of Aetna's position, Aventis would seek to compel discovery.

5. During the course of third party discovery in this case, sixteen (16) subpoena were served on "third party payors" or "managed care providers" by Aventis. Only Aetna has objected on the grounds of relevancy. Every other recipient of this subpoena either has produced, or is in the process of producing, responsive documents.

Executed in Washington, D.C., on October 5, 2000.

Respectfully Submitted,


D. E. Wilson, Jr.

**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

CERTIFICATE OF SERVICE

I, D. E. Wilson, Jr., hereby certify that on October 5, 2000, a copy of Aventis Pharmaceuticals, Inc.'s Motion for Leave to Respond to Non-party Witness Aetna U.S. Healthcare, Inc.'s Memorandum in Opposition to Aventis Pharmaceuticals, Inc.'s Motion to Enforce Compliance With The Subpoena Issued to Non-party Aetna U.S. Healthcare and documents in support thereof and related thereto were 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

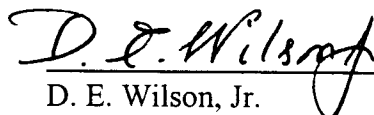
Markus Meier
Federal Trade Commission
Room 3017
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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 St. Phillip [By FedEx]
Lowey, Dannenberg, Bemporad
& Selinger, P.C.
One North Lexington Avenue
White Plains, NY 10601

Jennifer S. Abrams [By FedEx]
Berman, DeValerio, Pease
& Tabacco, P.C.
425 California Street, Suite 2025
San Francisco, CA 94104-2205


D. E. Wilson, Jr.