UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
HOECHST MARION ROUSSEL, INC., a corporation,	)	
CARDERM CAPITAL L.P., a limited partnership,	)	Docket No. 9293
and	)	
ANDRX CORPORATION, a corporation.	)	

ORDER DENYING RESPONDENTS' MOTIONS FOR PROTECTIVE ORDERS

I.

Respondent Andrx Corporation ("Andrx"), on September 15, 2000, filed its motion for a protective order seeking to preclude Complaint Counsel from taking depositions of five Andrx employees or agents who had been examined by the FTC staff during the investigation which preceded this matter. Also on September 15, 2000, Respondent Aventis Pharmaceuticals, Inc. ("Aventis"), formerly known as Hoechst Marion Roussel, Inc. filed its motion for a protective order to preclude or limit further deposition of two of Aventis' attorneys ("Aventis Motion"). Complaint Counsel filed a consolidated opposition on September 27, 2000. Oral arguments of counsel were heard on October 5, 2000.

For the reasons set forth below, Respondents' motions are DENIED.

II.

Andrx and Aventis both assert that Complaint Counsel should be precluded from taking the depositions of these seven individuals because Complaint Counsel previously took their depositions during the investigatory phase of the Commission's case. In the alternative, Respondents assert, Complaint Counsel should be limited to questioning these individuals to "new" areas of testimony not previously known about during the previous questioning. In addition, Aventis asserts that Complaint Counsel should be precluded from taking the

depositions of Spears and Stratemeier because Spears is Aventis' lead outside counsel and Stratemeier is Aventis' General Counsel.

Complaint Counsel asserts that it needs to take the depositions of these individuals in order to develop and refine its case and to prepare a response to Respondents' defenses, regardless of the fact that these individuals were examined during the pre-complaint investigation. Complaint Counsel further asserts that limiting the subject matter of the proposed depositions to "new" topics is unwarranted and unworkable. In response to Aventis' argument that Spears and Stratemeier should not be deposed because they are counsel for Aventis, Complaint Counsel asserts that Spears and Stratemeier played a material role in the facts underlying the litigation and, thus, it is appropriate to take their depositions.

III.

Respondents rely on federal cases that hold that repeat depositions are disfavored, and where allowed, are limited to new areas. E.g., *Lobb v. United Air Lines, Inc.*, 1993 U.S. App. LEXIS 17495, *2-4 (9th Cir. 1993) (stating "[r]epeat depositions are disfavored" and precluding second round of questioning where party sought second deposition for alleged different purpose, for trial, after completion of earlier deposition, for settlement purposes); *Tri-Star Pictures, Inc. v. Unger*, 171 F.R.D. 94, 102-03 (S.D.N.Y. 1997) ("strictly confin[ing]" second deposition to new areas not covered in the first deposition and forbidding re-questioning on topics covered in previous testimony). Complaint Counsel counters that these cases are not analogous because they arise in context of repeat depositions in the same litigation and that here there is a significant difference between an examination during the investigatory phase of a matter and a deposition taken in the adjudicative phase of the matter.

The Supreme Court, in *Hannah et al. v. Larche et al.*, 363 U.S. 420, 446 (1960), noted that the rules of the Federal Trade Commission "draw a clear distinction between adjudicative proceedings and investigative proceedings." "The reason for these rules [regarding notice of investigation] is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial." *Id.* Also, in *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950), the Supreme Court distinguished the Commission's investigatory "power to get information from those who best can give it" and the judicial power to summon evidence in the course of litigation. The Commission "has a power of inquisition if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not." *Id.* See also *Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) ("Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it.").

The Commission, in explaining differences between the scope of discovery under Part III of the Commission's Rules of Practice and an investigation under Part II, has stated:

> . . . [I]t should be manifest that the Commission's rules of practice are intended to and do provide for comprehensive *pre*-complaint *investigation*. The rules for adjudicatory proceedings are intended to embody the Commission's conviction that, to the fullest extent practicable, the strategy of surprise and the art of concealment will have no place in a Commission proceeding. Hence, we have also provided for thorough *post* complaint *discovery* procedures. . . .
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> A subpoena, deposition, or order requiring access aimed at obtaining information not ordinarily obtainable before issuance of the complaint, additional details, or an extension of information as to disclosed transactions or events for which evidence is to be adduced in support of the complaint is manifestly within the bounds of proper pretrial discovery. . . . There is no provision in the Commission's rules, nor is there any precedent which would, in effect, require complaint counsel to have *all* evidence that he will need prior to the issuance of the complaint. . . .
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> The general rule still remains that an onerous burden would be placed not only on the investigator but upon the party or parties investigated if the preliminary investigation must encompass the gathering of *all* of the details for each and every transaction which may eventually become an evidentiary item in a subsequent complaint. Many Federal Trade Commission proceedings present factual and conceptual complexities. In such cases, complaint counsel may properly find, particularly after the issues are refined in a prehearing conference, that some additional documentation may be required to *round out, extend, or supply further details* for the particular transactions to be pursued.

All-State Indus., et al., 72 F.T.C. 1020, 1023-24, 1967 FTC LEXIS 159, *6-10 (Nov. 13, 1967) (emphasis in original).

In re Chain Pharmacy Ass'n, Inc., et al., 1990 FTC LEXIS 193 (June 20, 1990) presents a situation similar to the instant conflict. There, an agent of respondent refused to answer questions in a deposition in Part III adjudication on the grounds that complaint counsel had asked him the same questions during an investigational hearing. Noting that the Rules of Practice adopt a liberal approach to discovery and that the discovery sought need only be relevant and holding that "the Rules do not prohibit repetitive questioning[,]" the Administrative Law Judge ordered respondents to submit to depositions and to answer the questions. *Id.* at *2-4.

Simply because the agents of Respondents were examined during the pre-complaint investigation does not preclude Complaint Counsel from taking the depositions of these individuals in accordance with Part III of the Commission's Rules of Practice. Although the Administrative Law Judge retains the discretion to limit discovery if it is unreasonably

cumulative or duplicative, and may enter a protective order to deny discovery to protect a party from annoyance, oppression or undue burden, or to prevent undue delay in the proceeding, 16 C.F.R. § § 3.31(c), 3.31(d), those circumstances are not present here.

IV.

Aventis' motion for a protective order seeks to preclude Complaint Counsel from taking the depositions of Spears and Stratemeier on the additional grounds that depositions of opposing counsel are disfavored and may be allowed only under limited circumstances. Complaint Counsel asserts that the Commission and federal courts have found it appropriate to allow depositions of opposing counsel where counsel played a material role in the facts underlying the litigation.

Judicial decisions and precedents under the Federal Rules of Civil Procedure concerning discovery motions, though not controlling, provide helpful guidance for resolving discovery disputes in Commission proceedings. *L.G. Balfour Co., et al.*, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS 367, *4 (Oct. 5, 1962); *In re Int'l Ass'n of Conference Interpreters*, 1995 FTC LEXIS 21, *17 (Jan. 24, 1995). Federal courts determining whether to permit the deposition of opposing counsel apply conflicting standards. *See generally Sparton Corp. v. United States*, 44 Fed. Cl. 557, 560 (Ct. Cl. 1999) (discussing conflicting cases). *Compare Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (allowing the deposition of opposing counsel 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") *with Johnston Dev. Group, Inc., et al. v. Carpenters Local Union No. 1578, et al.*, 130 F.R.D. 348, 353 (D.N.J. 1990) (blocking the deposition of opposing counsel only where the party opposing the deposition "establishes 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).

Regardless of which standard is used, nearly all courts recognize that the deposition of a party's attorney may be both necessary and appropriate when the attorney is a fact witness, such as an actor or a viewer. *American Casualty Co. v. Krieger, et al.*, 160 F.R.D. 582, 588 (S.D. Cal. 1995); *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85-86 n.2 (M.D.N.C. 1987). "In cases where the attorney's conduct itself is the basis of a claim or defense, there is little doubt that the attorney may be examined as any other witness[.]" *Johnston Dev. Group*, 130 F.R.D. at 352 (*citing Jamison v. Miracle Mile Rambler, Inc.*, 536 F.2d 560 (3d Cir. 1976); *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 610 F. Supp. 1319 (D. Del. 1985), *aff'd*, 769 F.2d 152 (3d Cir. 1985); *Scovill Manufacturing Co. v. Sunbeam*, 61 F.R.D. 598 (D. Del. 1973)). *See also In re Tutu Water Wells Contamination Litig.*, 184 F.R.D. 266, 267 (D.V.I. 1999) ("A protective order will not issue where the attorney's conduct is the basis for the claim or defense

or where the attorney observed or participated in the underlying transaction or occurrence giving rise to the cause of action."); *Rainbow Investors Group, Inc. v. Fuji Trucolor*, 168 F.R.D. 34, 38 (W.D. La. 1996) (denying motion for protective order where attorney played "key role" in negotiating the transaction at the heart of the underlying dispute).

In the present case, Aventis admits that "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." Aventis Motion at 3. As actors or participants in the negotiation and drafting of the Stipulation and Agreement at issue, Spears and Stratemeier may be deposed. Inquiry shall be limited to relevant, non-privileged information.

It is hereby ORDERED that Respondents' motions for protective orders are denied.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: October 12, 2000