INDEX OF UNREPORTED CASES

Automotive Breakthrough Sciences, Inc., No. 9275, 1996 F.T.C. LEXIS 478 (Nov. 5, 1996)

BASF Wyandotte Corp., No. 9125, 1979 F.T.C. LEXIS 77 (Nov. 20, 1979)

Coca-Cola Co., No. 9215, 1988 F.T.C. LEXIS 164 (Oct. 25, 1988)

College Football Ass'n, No. 9242, 1990 F.T.C. LEXIS 350 (Oct. 9, 1990)

Columbia Hosp. Corp., No. 9256, 1993 F.T.C. LEXIS 180 (July 28, 1993)

Dillard Dep't Stores, Inc., No. 9269, 1996 F.T.C. LEXIS 18 (Feb. 13, 1996)

Diran M. Seropian, M.D., No. 9248, 1991 F.T.C. LEXIS 306 (July 3, 1991)

H.J. Heinz Co., No. 9295, 2001 F.T.C. LEXIS 96 (June 6, 2001)

Int'l Assoc. of Conf. Interp., No. 9270, 1995 F.T.C. LEXIS 452 (Feb. 15, 1995)

New Balance Athletic Shoe Corp., No. 9268, 1994 F.T.C. LEXIS 213 (Oct. 20, 1994)

Rambus Inc., No. 9302, 2003 WL 1866415 (Mar.17, 2003)

Rambus Inc., No. 9302, 2003 F.T.C. LEXIS 49 (Mar. 26, 2003)

R.J. Reynolds Tobacco Co., No. 9285, 1999 F.T.C. LEXIS 14 (Jan. 26, 1999)

Schering-Plough Corp., No. 9297, 2001 FTC LEXIS 198 (Oct. 31, 2001)

Schering-Plough Corp., No. 9297, 2002 WL 31433937 (Feb. 12, 2002)

LEXSEE 1996 FTC LEXIS 478

In the Matter of AUTOMOTIVE BREAKTHROUGH SCIENCES, INC., ABS TECH SCIENCES, INC., corporations, and RICHARD SCHOPS, individually and as an officer and director of said corporations; In the Matter of BRAKE GUARD PRODUCTS, INC., a corporation, and ED F. JONES, individually and as an officer and director of said corporation

DOCKET NO. 9275; DOCKET NO. 9277

Federal Trade Commission

1996 FTC LEXIS 478

ORDER DENYING INTERLOCUTORY APPEALS

November 5, 1996

ORDER:
[*1]

ORDER DENYING INTERLOCUTORY APPEALS

Respondents Brake Guard Products, Inc. and Ed F. Jones ("Brake-Guard") have filed two requests for interlocutory appeals, pursuant to Rule 3.23(b). One seeks interlocutory review of the Order Striking Witnesses, dated October 15, 1996, and the other seeks interlocutory review of the Partial summary Decision, dated October 16, 1996. Rule 3.23(b) requires that the movant satisfy a very stringent showing that the challenged ruling: (1) involve a controlling issue of law; (2) there is a substantial ground for difference of opinion regarding that controlling issue of law; and (3) that an immediate appeal would either materially advance the ultimate termination of the litigation or that subsequent review would be an inadequate remedy. See Rule 3.23(b); Kroger Co., 91 F.T.C. 1146 (1978). Neither of Brake-Guard's requests involve a controlling issue of law, which has been defined as an issue that:

> is not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases.

[*2]
The Times Mirror Co., D. 9103 (Order Denying Interlocutory Appeal, Dec. 20, 1978), slip op. at 1; George Irvin Chevrolet Co., D. 9124 (Order Denying Appeal, April 24, 1979), slip op. at 2. Moreover, granting an interlocutory appeal of either request will slow, not advance the termination of this litigation. Finally, subsequent review of the issues presented will not be an inadequate remedy.

With regard to the request for interlocutory review of the Order Striking Witnesses, I have already granted Brake-Guard a portion of the relief requested. During the ongoing hearings in this matter, on October 24, 1996, I authorized Brake-Guard to present the testimony of the individual it has represented to be the witness "absolutely necessary" to its defense (Respondent Brake-Guard's Request to File an Interlocutory Appeal of the Order Granting Complaint Counsel's Motion to Exclude Witnesses, at 3), subject to Brake-Guard producing that witness for a deposition in Washington, D.C.

Accordingly, it is hereby ORDERED that Brake-Guard's request that I certify interlocutory appeals to the Commission of my Order Striking Witnesses and Partial Summary Decision is hereby DENIED.

LEXSEE 1979 FTC LEXIS 77

In the Matter of BASF WYANDOTTE CORPORATION a corporation.

DOCKET No. 9125

Federal Trade Commission

1979 FTC LEXIS 77

ORDER DENYING INTERLOCUTORY APPEAL

November 20, 1979

ALJ: [*1]

James P. Timony, Administrative Law Judge

ORDER:

By an application dated November 2, 1979, pursuant to Rule 3.23(b), respondent seeks interlocutory review of a Protective Order issued October 23, 1979.

At contention is Paragraph 5(d) of the Protective Order which defines the "qualified persons" who will be able to see the confidential materials, many of which were obtained from respondent's competitors. Respondent argues that the paragraph denies it due process by limiting its choice of independent consultants and by prohibiting its employees from seeing the materials. Respondent asserts that the Protective Order entered in this proceeding is more stringent than those entered by federal courts. By a paper received November 15, 1979, complaint counsel oppose the application. Respondent's competitor, Ciba-Geigy, also submitted a memorandum in opposition to the application.

Rule 3.23(b) implicitly provides that the application for review must justify the need for interlocutory review by showing: (1) the ruling involves a controlling question of law or policy, (2) as to which there is substantial ground for difference of opinion; and (3) that immediate appeal from the ruling may materially **[*2]** advance the ultimate termination of the litigation or a subsequent review will be an inadequate remedy.

Respondent has failed to show that the order involves a controlling question of law within the meaning of Rule 3.23(b). A "controlling question of law" does not mean every question of law decided by the administrative law judge. The question is not whether interlocutory review would resolve an "intellectually intriguing" issue, the early determination of which "would save... considerable trouble and expense." Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 525 (S.D.N.Y. 1973), appeal dismissed, 496 F.2d 1094. n1 A controlling question of law:

n1 Rule 3.23(b) is clearly based on 28 U.S.C. § 1292(b) and court interpretation of that statute is material. Cf., Lehigh Portland Cement Co., 78 F.T.C. 1556, 1557 (1971).

"is not equivalent merely to a question of law which is determinative of the case at hand. The the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." Ibid.

Respondent has made no such showing.

Further, respondent has failed to show that the **[*3]** order involves an issue as to which there is "substantial ground for difference of opinion." Rule 3.23(b). That test has been held to mean that appellant must show a probability of success on appeal of the issue. Berger v. United States, 170 F. Supp. 795, 796-97 (S.D.N.Y. 1959).

Respondent asserts that the Protective Order is more restrictive than those ordered by federal courts in antitrust cases. However, respondent has been unable to cite any authority in support of this proposition.

Respondent argues that Paragraph 5(d) n2 unduly restrains its access to outside consultants, and is a denial of due process. Respondent has not shown that it actually has been unable to hire consultants because of this provision, but rather speculates it will be unable to do so. Counsel for Ciba-Geigy has offered support demonstrating the relative ease with which he found a "qualified chemist" who would accept employment under the terms of the order. n3

n2 Paragraph 5(d) of the Protective Order includes as Qualified Persons:
(d) persons who are assisting complaint counsel and counsel for respondent in the preparation for trial of this proceeding, provided that such persons are not officers, directors, or employees of any company (or subsidiary, division, or affiliate thereof) which is engaged in the production or sale of pigments or dyestuffs, and provided further that such persons are not consultants in the pigments or dyestuffs filed for any such compants or dyestuffs, and provided further company; except that persons employed by respondent for purposes of this proceeding shall be qualified person, provided that for a period of three years such persons are not also employed for pigments or dyestuffs advice other than in this proceeding.

n3 See Response of Ciba-Geigy to Application of Respondent for Interlocutory Review, dated November 15, 1979, wherein counsel for Ciba-Geigy states that he made two phone calls and located a qualified chemist named Percy Perletz, with thirty years of industrial experience in dyestuffs and pigments. Dr. Perletz, a Ph.D. in chemistry, was employed for the las 10-15 years by Allied Chemical Corporation. Dr. Perletz, now recently retired, was sent a copy of the protective order and, after reviewing its terms, apparently informed counsel for Ciba-Geigy that he would be willing to accept employment. **[*4]**

Respondent's argument that failure to designate its employees as "qualified persons" results in denial of due process does not have a substantial likelihood of success on appeal. See, E.I. du Pont de Nemours & Co., (Docket No. 9108, order by Administrative Law Judge Miles J. Brown, dated July 14, 1978).

The application for interlocutory review is denied.

LEXSEE 1988 FTC LEXIS 164

In the Matter of Coca-Cola Company of the Southwest, a Corporation, and Dr Pepper/Seven-Up Company, a Corporation

DOCKET NO. 9215

Federal Trade Commission

1988 FTC LEXIS 164

ORDER RE MOTIONS TO DISMISS

October 25, 1988

ALJ: [*1]

James P. Timony, Administrative Law Judge

ORDER:

ORDER RE MOTIONS TO DISMISS

Respondents move to dismiss the complaint for failure to state a claim upon which relief can be granted, arguing that it challenges the acquisition on an incorrect legal ground, using the standard of Section 7 of the Clayton Act, that it "may tend to substantially lessen competition." The legal standard they would use is found in the Soft Drink Interbrand Competition Act, 15 U.S.C. § 1501-03, providing that exclusive soft drink franchises are valid under the antitrust laws if substantial and effective interbrand competition exists in the market.

Complaint counsel argues that the complaint is legally valid and that the motions are beyond the jurisdiction of the administrative law judge.

Jurisdiction of the administrative law judge

Complaint counsel states the administrative law judge is granted only the authority to conduct fact-finding, n1 and strongly implies that the administrative law judge may not decide questions of law. This startling misconception apparently is based upon a misreading of the cases. n2

n1 Complaint counsel's opposition at p. 11.

n2 Complaint counsel relies on two cases. Both cases explicitly state that an administrative law judge has authority to decide a motion to dismiss challenging the Commission's legal authority to issue the complaint.

> The Commission has made a distinction . . . between those instances in which the motion to dismiss challenges the Commission's legal power to issue the complaint and those in which it seeks to probe the Commission's discretion or judgment on whether or not a proceeding would be in the public interest. It is only in the latter instance in which the [administrative law judge] is considered to be without authority to rule.

Crush International Limited, et al., 80 F.T.C. 1023, 1024 (1972); Suburban Propane Gas Corp., 71 F.T.C. 1695, 1697 n.1 (1967). **[*2]**

The administrative law judge has authority to rule on dismissal motions challenging the Commission's jurisdiction, as distinguished from motions challenging the Commission's administrative determination of the public interest question related to the issuance of the complaint. Order granting motion to dismiss, R.J. Reynolds Tobacco Co., Inc., Docket No. 9206 (August 4, 1986) at p. 2 (Hyun, A.L.J.), rev'd on other grds., Order issued March 4, 1988. The administrative law judge sits in a "judicial capacity" and may dismiss a complaint on the ground that "the facts alleged do not state a cause of action." Florida Citrus Mutual, 50 F.T.C. 959, 961 (1954). This authority of the administrative law judge to decide to dismiss, and to rule as a matter of law, may be exercised whether the issue is constitutional as in R.J. Reynolds Tobacco Co., Inc., or a matter of statutory construction. Cf., Times-Mirror Company, 92 F.T.C. 230 (1978). Similarly, the administrative law judge has authority to dismiss parties where the issue is procedural, such as deleting an individual respondent who is deceased or substituting a respondent improperly named. Crush International Limited, **[*3]** et al., 80 F.T.C. at 1024.

Where the motion to dismiss involves a matter lying in the administrative discretion of the Commission, however, it must be certified for determination, e.g., to argue that the Commission should not proceed against one of several companies engaging in the same practice as the respondent, Moog Industries, Inc. v. FTC, 355 U.S. 411 (1958) and FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967); to stay proceedings pending disposition of a court decision in another case involving a similar issue, Amrep Corp., 87 F.T.C. 283 (1976); to argue that the Commission issued the complaint as a result of industry or congressional pressure, Exxon Corp., 83 F.T.C. 1759 (1974); to add a party, Crush International Limited, et al., 80 F.T.C. at 1024; to argue that the Commission should have instituted a rulemaking proceeding, Boise Cascade Corp., Docket No. 9133, November 21, 1980 (Parker, A.L.J.); to amend the complaint altering the theory of the original complaint, Kaiser Aluminum & Chemical Corp., Docket No. 9080, September 15, 1977 (Timony, A.L.J.). And, of course, the Commission's mental process leading to a determination that it has **[*4]** reason to believe that a proceeding appears to be in the public interest can not be challenged by a motion to dismiss. Florida Citrus Mutual, 50 F.T.C. 959, 961 (1954). n3

n3 This is not to say that such discretion can never be challenged. Moog Industries, Inc. v. FTC, 355 U.S. 411, 414 (1958; FTC V. Universal-Rundle Corp., 387 U.S. 244, 251 (1967). Moreover, FTC v. Klesner, 280 U.S. 19, 30 (1929) indicates that a proceeding that is not in the public interest should be dismissed "at anytime during the course of the proceeding." Since the defense will be supported by facts beyond the pleadings, it should not be determined on a motion to dismiss but on an evidentiary record, either by summary or initial decision. Suburban Propane Gas Corp., 71 FTC 1695, 1698 (1976).

The argument that the administrative law judge is solely a fact-finder misperceives the nature of an administrative trial. The role of the administrative law judge is "functionally comparable" to a trial judge employed in the judicial branch. Butz v. Economou, 438 U.S. 478, 513 (1978); Nash v. Califano, 613 F.2d 10, 15 (2d Cir. 1980); NLRB v. Permanent Label Corp., 657 F.2d 512, 527-28 (3rd Cir. 1981) **[*5]** (Aldisert, concurring). See, Disciplinary Proceedings, 6 Western New England Law Review 807, 810-15 (1984). The judicial power of the administrative law judge springs from the Administrative Procedure Act and the Commission's Rules of Practice. These enumerated powers should be "liberally construed in the light of the history and intent of the Administrative Procedure Act. It was the general statutory purpose to enhance the status and role of [administrative law judges]." Florida Citrus Mutual, 50 F.T.C. at 969-70. (Chairman Howrey, dissenting on other grounds).

The administrative law judge has jurisdiction to decide whether a complaint states a claim upon which relief may be granted.

Merits of the motions

Respondents' motions to dismiss are based on the theory that "the Complaint asserts that Respondent's receipt of best-efforts licenses from Dr Pepper Company and Canada Dry Corporation are violations of the Clayton Act § 7, 15 U.S.C. § 18, and Federal Trade Commission Act § 5, 15 U.S.C. § 45, which assertion is invalid as a matter of law." n4 The applicable statute, they argue, is the Interbrand Competition Act, 15 U.S.C. § 3501-03, which provides that exclusive soft **[*6]** drink franchises are valid under the antitrust laws if substantial and effective interbrand competition exists in the market.

n4 Motions for Dismissal and Answer of Respondent, Coca-Cola Bottling Company of the Southwest p. 1; Motion to Dismiss of Respondent Dr Pepper/Seven-Up Companies, Inc.

Respondents apparently see this case as an attack on the vertical granting of exclusive licenses to market soft drinks. The complaint, however, is based on the horizontal acquisition by Coca-Cola Bottling Company of the Southwest of assets, including the licenses, from another bottler, San Antonio DPB. n5

n5 Respondent Dr Pepper/Seven-Up Company admits the acquisition as alleged. The Answer of respondent Coca-Cola Bottling Company of the Southwest asserts that "Respondent admits that it acquired the Dr Pepper and Canada Dry franchises and other assets in transactions occurring on or about September, 1984 among San Antonio Dr Pepper Bottling Company, Dr Pepper Company, Respondent, and Canada Dry Corporation." Answer p. 3, P7. I am bound, however, to decide the motions to dismiss on the facts alleged in the complaint. 2A Moore's Federal Practice 12-63 (2d ed. 1987).

The Soft Drink Interbrand **[*7]** Competition Act, on its face, is directed at vertical transactions. n6 It has no application to horizonal transactions.

n6 No resort to legislative history is therefore necessary. Sutherland, Statutory Construction, p. 310 (1891).

The motions to dismiss are denied.

LEXSEE 1990 FTC LEXIS 350

In the Matter of COLLEGE FOOTBALL ASSOCIATION, an unincorporated association, and CAPITAL CITIES/ABC, INC., a corporation

DOCKET NO. 9242

Federal Trade Commission

1990 FTC LEXIS 350

ORDER RE MORE DEFINITE STATEMENT

October 9, 1990

ALJ: [*1]

James P. Timony, Administrative Law Judge

Respondent Capital Cities/ABC, Inc. moves for more definite statement of the charges. Complaint counsel opposes, with some exegesis of the theory of the Complaint.

Additional information will undoubtedly be adduced under the rules, but there is enough for a responsive pleading.

The motion is denied.

LEXSEE 1993 FTC LEXIS 180

In the Matter of COLUMBIA HOSPITAL CORPORATION, a corporation.

DOCKET NO. 9256

Federal Trade Commission

1993 FTC LEXIS 180

July 28, 1993

ORDER:
[*1]

ORDER CERTIFYING RESPONDENT'S MOTION TO DISMISS

After the Complaint issued, respondent unilaterally cancelled the Asset Exchange Agreement. On July 15, 1993, respondent filed a motion to dismiss the complaint as no longer in the public interest, and to certify the motion to the Commission. Complaint counsel opposses the motion to dismiss and asks me to recommend that the Commission summarily deny the motion.

The motion to certify is granted. Since the issue is essentially prosecutorial, the certification is without recommendation, except insofar as the plain advice to disregard respondent's settlement proposal. Textron, Inc., Docket No. 9226, Order Denying Joint Motion to Withdraw Matter from Adjudication, May 18, 1990.

Dated: July 28, 1993

MOTION OF COLUMBIA HOSPITAL CORPORATION TO DISMISS THE COMPLAINT AS NO LONGER IN THE PUBLIC INTEREST, AND TO CERTIFY SUCH MOTION TO THE COMMISSION

Pursuant to Section 3.22 of the Commission's Rules of Practice, 16 C.F.R. § 3.22, respondent Columbia Hospital Corporation ("Columbia") hereby moves to dismiss the Complaint on the ground that its prosecution would no longer "be to the interest of the public," 15 U.S.C. § 45(b), **[*2]** and requests that Your Honor certify this motion to the Commission.

At the time the Commission authorized the issuance of a Complaint, Columbia was party to an Asset Exchange Agreement to acquire Medical Center Hospital in Punta Gorda, Florida ("Medical Center"), and related assets. The Commission's Notice of Contemplated Relief sought three substantive remedies from Columbia: 1) divestiture of Medical Center; 2) prior approval of any future hospital acquisitions and mergers in Charlotte County, Florida; and 3) prior notice of other acquisitions by Columbia in an unspecified area. Since the Complaint issued, Columbia has unilaterally cancelled the Asset Exchange Agreement. Thus, the most important component of the relief sought by the Commission in this proceeding already has been achieved. Medical Center Hospital will remain an independent competitor. In addition, Columbia, at the June 15, 1993, Prehearing Conference, publicly expressed its willingness to accept a prior approval requirement for future hospital acquisitions and mergers in Charlotte County.

The only additional relief which the Commission might achieve through the continued prosecution of this matter is prior **[*3]** notice of acquisitions outside of the relevant geographic market alleged in the Complaint. A determination of whether the Commission is entitled to this additional relief can only be made after the matter has been fully litigated. The cost of this litigation to the Commission and the public will far exceed any benefits which the Commission may obtain through the continued litigation of this matter. n1 Therefore, this proceeding is no longer in the public interest.

n1 Furthermore, if the Commission does not ultimately prevail in this matter, the Commission will not only fail to achieve greater relief in the form of prior notice beyond the relevant geographic market, it will also lose the relief which it has already achieved, because Columbia would be free to acquire Medical Center.

For the foregoing reasons, Columbia respectfully requests that Your Honor certify to the Commission its motion to dismiss the Complaint, as has been deemed appropriate in numerous other matters. See Florida Citrus Mutual, 50 F.T.C. 959, 961 (1954); First Buckingham Community, Inc., 73 F.T.C. 938, 944 (1968); Drug Research Corporation, 63 F.T.C. 998, 1014-15 (1963); Certification to the **[*4]** Commission of Respondent's Motion to Dismiss, MidCon Corp., D. 9198 (July 21, 1987).

Columbia further requests that Your Honor recommend that the matter be considered on an expedited basis by the Commission in order to minimize the discovery expenditures during the pendency of this motion.

Respectfully submitted,

Stephen T. Braun
General Counsel
Donald P. Fay
Senior Counsel
COLUMBIA HOSPITAL CORPORATION
777 Main Street
Fort Worth, Texas 76102

Raymond A. Jacobsen, Jr.

Gregory L. Baker

Scott S. Megregian

Jon B. Dubrow

HOWREY & SIMON

1299 Pennsylvania Ave., N.W.

Washington, D.C. 20004

DATED: July 15, 1993

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE COMPLAINT AS NO LONGER IN THE PUBLIC INTEREST

Respondent Columbia Hospital Corporation ("Columbia"), submits this Memorandum in support of its motion to dismiss the Complaint as no longer in the public interest.

The Commission's February 18, 1993 Complaint challenged Columbia's then-proposed acquisition of Medical Center Hospital of Punta Gorda, Florida ("Medical Center") and the Asset Exchange Agreement by which Columbia then sought to acquire Medical Center. The Notice of Contemplated **[*5]** Relief sought three substantive remedies from Columbia: 1) divestiture of Medical Center; 2) a ten-year prior approval requirement for future hospital acquisitions or mergers in the alleged relevant section of the country (Charlotte County, Florida); and 3) a ten-year prior notice requirement for acquisitions in an unspecified geographic area. By letter dated May 5, 1993, Columbia terminated the Asset Exchange Agreement and the proposed acquisition of Medical Center. (See Attachment 1 hereto). Hence, the exchange challenged in the Complaint will not occur. On this basis alone, the Commission is authorized to dismiss this case as no longer in the public interest. n1

n1 See BIC Pen Corp., 89 F.T.C. 139, 143 (1977); Schlumberger Ltd., 103 F.T.C. 78, 83 (1984).

Moreover, as made clear at the Prehearing Conference on June 15, 1993, Columbia is willing to agree to a ten-year prior approval on future acquisitions or mergers in Charlotte County, Florida. (See Attachment 2).

Prior Commission decisions establish that dismissal is in the public interest when abandonment of a transaction provides the Commission with the bulk of its contemplated relief, namely abandonment **[*6]** or divestiture. Columbia's abandonment and willingness to accept a prior approval requirement in Charlotte County clearly provides more than adequate relief in this case. Further prosecution of this case is not in the public interest. Accordingly, the Complaint should be dismissed.

STATEMENT OF FACTS

On October 19, 1992, Columbia agreed to acquire Medical Center Hospital in Punta Gorda, Florida ("Medical Center") from Adventist Health System/Sunbelt Health Care Corporation. Following an investigation by Commission staff, on February 1, 1993, the Commission filed a complaint in Federal district court for the Middle District of Florida seeking a preliminary injunction to prevent consummation of the proposed transaction pending completion of administrative proceedings before the Commission.

On February 18, 1993, the Commission issued its administrative Complaint. The Notice of Contemplated Relief proposed three substantive remedies: 1) divestiture of Medical Center; 2) a ten-year requirement for prior Commission approval of acquisitions or mergers in the alleged relevant geographic market (Charlotte County); and 3) a ten-year requirement for prior notice to the Commission **[*7]** of certain acquisitions in other unspecified areas of the country.

On May 5, 1993, Judge Merryday issued an Order granting the Commission's preliminary injunction motion. On this same date, Columbia terminated the October 19, 1992, Asset Exchange Agreement and abandoned the contemplated transaction. See Exhibit 1.

Columbia does not intend to acquire Medical Center now or at any time in the future. In a June 15, 1993 prehearing conference before Administrative Law Judge Timony, Columbia publicly stated that it was willing to agree to a prior approval requirement for any acquisitions in Charlotte County, Florida.

Judge Timony has scheduled the administrative hearing to begin on February 22, 1994. Extensive discovery will occur prior to the hearing (absent dismissal of this proceeding).

I. WHERE, AS HERE, ABANDONMENT OF A TRANSACTION PROVIDES THE COMMISSION WITH THE BULK OF THE RELIEF SOUGHT IN THE COMPLAINT, DISMISSAL IS APPROPRIATE

A. The Commission Routinely Dismisses Complaints After Transactions Are Abandoned

The Complaint in this matter alleges that the acquisition of Medical Center, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § **[*8]** 18, and that the underlying Asset Exchange Agreement violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Because the contemplated transaction has been abandoned and the Asset Exchange Agreement terminated, the only conduct challenged in this case will not occur.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), authorizes the Commission to institute a proceeding against an allegedly unfair method of competition only if "a proceeding by it in respect thereof would be to the interest of the public." "It is well settled that the Commission can and should dismiss a proceeding at any time when it appears there is a lack of public interest. F.T.C. v. Klesner, 280 U.S. 19 (1929). The Commission has regularly dismissed complaints on this basis." Florida Citrus Mutual, 50 F.T.C. 959, 972 (1954).

In making its determination of whether further proceedings are in the public interest, the Commission weighs a variety of factors, including the public costs of proceeding to obtain additional, marginal relief. Drug Research Corporation, 63 F.T.C. 1014-15 (1963). In most cases, it is not in the public interest to continue proceedings after **[*9]** a proposed acquisition has been abandoned, because abandonment provides the Commission with its most important form of relief without incurring substantial further costs.

The primary form of relief the Commission can achieve in challenging a merger is prevention of the proposed acquisition. Prevention or divestiture has been termed the "chief goal of the litigation . . ." See Certification to the Commission of Respondent's Motion to Dismiss at 3, Schlumberger, Ltd., D. 9164 (September 23, 1983).

The Commission, in its notice of contemplated relief, often seeks additional ancillary forms of relief, such as prior approval or prior notice of future acquisitions. Even when relief such as prior approval and prior notice would be "particularly appropriate," and therefore would be sought if the case proceeded to trial, the Commission staff has acknowledged "that expenditure of significant Commission resources for litigation, 'is not justified solely to achieve a ten-year merger ban.'" See Schlumberger, Ltd., 103, F.T.C. 78, 82 (1984); Certification to the Commission of Respondents' Motions to Dismiss at 2-3, Schlumberger, Ltd., D. 9164 (September 23, 1983). There, the **[*10]** Commission granted Schlumberger's motion to dismiss its Complaint challenging Schlumberger's acquisition of Accutest following the divestiture of that company. See Schlumberger, 103 F.T.C. at 81.

In numerous cases, the Commission has opted not to proceed with an action once the parties to a merger have abandoned a proposed transaction. n2 See BIC Pen Corp., 89 F.T.C. 435, 438-39 (1976) (abandonment accomplished by termination of the acquisition agreement); Schlumberger, Ltd., 103 F.T.C. 78, 81 (1984) (abandonment through divestiture of acquired company) Cargill, Inc., 86 F.T.C. 1226, 1231 (1975) (divestiture of acquired company); National Portland Cement Co., 71 F.T.C. 395, 485 (1967); Crane Co., 61 F.T.C. 1462, 1467-68 (1962); Food Town Stores, Inc., 88 F.T.C. 435, 439 (1976); Rhinechem Corporation, 94 F.T.C. 132, 135 (1979); Purex Corp., Ltd., [1973-76 Transfer Binder] Trade Reg. Rep. (CCH) P 20,370 (June 26, 1973). See also First Buckingham Community, Inc., 73 F.T.C. 938, 947 (1968) (dismissal on public interest grounds after "positive, unqualified affirmation that respondents have discontinued, and will not resume . . ." challenged business **[*11]** practices).

n2 In the cases cited below, the Commission dismissed the Complaint without achieving any relief other than preventing the proposed acquisition or obtaining divestiture of an acquired company.

B. Prosecution of Abandoned Transactions Is Only Justified Where (Unlike Here) Significant Additional Relief Is Necessary Or Where Almost All Costs Associated With The Litigation Have Already Been Incurred

The few cases in which the Commission has not dismissed complaints after the underlying acquisition has been abandoned are clearly distinguishable from this matter. See, e.g., Order Denying Motion to Dismiss, MidCon Corporation, D. 9198 (November 16, 1987); Order Denying Respondent's Motion for Dismissal of the Complaint, The Coca-Cola Company, D. 9207 (August 9, 1988). In these cases, abandonment of the transaction did not justify dismissal of a complaint because (unlike here) it did not provide an adequate remedy for the competitive harm underlying the complaint.

In Coca-Cola, the Commission rejected Coca-Cola's motion to dismiss on public interest grounds despite Coca-Cola's abandonment of its proposed acquisition of Dr Pepper. The Commission **[*12]** staff in that case alleged that the proposed acquisition would lessen competition among manufacturers of carbonated soft drink concentrates in two ways. In addition to alleging that the acquisition would lessen horizontal competition through the purchase of a competitor, Commission staff argued that the proposed acquisition would also reduce horizontal competition by creating a contractual tie between Coca-Cola and the so-called third bottler network.

Coca-Cola argued that continued prosecution of the action was against the public interest because abandonment of the underlying transaction provided the Commission with substantially all of the relief included in the Commission's Notice of Contemplated Relief. However, the abandonment of the Coca-Cola/Dr Pepper transaction did not remedy the alleged competitive harm which might have occurred to the so-called third bottler network, so prior approval over certain bottler transactions might also be necessary. n3 See Order Denying Respondent's Motion for Dismissal of the Complaint, The Coca-Cola Company D. 9207 (August 9, 1987) and Dissenting Statement of Chairman Oliver.

n3 The issue of prior approval of bottler acquisitions was litigated before Judge Parker and the Commission. No final decision regarding the adverse or beneficial competitive effects of such acquisitions or the appropriateness of a prior approval requirement has been made. **[*13]**

In short, abandonment of the proposed transaction did not remedy one of the Commission's two principal theories of anticompetitive conduct relied on in issuing the Complaint. Therefore, continued prosecution of the matter was the only means by which the Commission could obtain the prospective relief it believed was necessary to protect the public interest. In contrast, in this case there is no second theory of competitive harm alleged. As in most merger cases, the Commission's goal in bringing this action was to preserve Medical Center as an independent competitor, which has already been achieved by Columbia's termination of the Asset Exchange Agreement.

In MidCon, MidCon Corporation had acquired securities of a competitor, United Energy Resources ("UER"). After administrative trial, but prior to the initial decision, MidCon "divested" its holdings in UER, and claimed that this rendered further proceedings moot, and not in the public interest. See Order Denying Motion to Dismiss, Midcon Corporation, D. 9198 (November 16, 1987). However, the sale of the UER securities was not absolute, as there were significant ongoing financial ties between MidCon and the purchaser, **[*14]** LaSalle Energy Corporation ("LaSalle"), including a promissory note by which MidCon would acquire an equity interest in LaSalle in the event LaSalle defaulted on its payment obligations relating to the UER securities. See id. at 2; MidCon Corporation, 111 F.T.C. 100, 103-04 (1988). In addition, there were other ties between MidCon and LaSalle which supported a conclusion that the "divestiture" would not establish UER as an independent competitor of MidCon. See id.

In MidCon, therefore, the divestiture of the acquired company, subject to a retained security interest, did not represent true abandonment of the challenged transaction. There was a realistic possibility that the challenged transaction would be reconstituted by MidCon's foreclosure of its retained security interest. In denying MidCon's motion to dismiss, the Commission emphasized that because the trial had already concluded, further proceedings would involve minimal expense, and no substantial cost savings would result from a dismissal of the proceeding. See Order Denying Motion to Dismiss, MidCon Corporation, D. 9198 (November 16, 1987). In contrast, the proceedings in this matter are in **[*15]** their initial stages, with no discovery having been conducted in anticipation of a full administrative trial. At the June 15, 1993 pretrial hearing Judge Timony readily agreed that this is a complex case which will require substantial discovery before it is ready for trial.

II. CONTINUED PROSECUTION OF THIS CASE IS NOT IN THE PUBLIC INTEREST BECAUSE COLUMBIA'S ABANDONMENT OF THE MEDICAL CENTER TRANSACTION PROVIDES THE COMMISSION ADEQUATE RELIEF AND FURTHER PROSECUTION WOULD IMPOSE SUBSTANTIAL BURDENS AND COSTS ON THE COMMISSION, COLUMBIA AND THIRD PARTIES.

A. The Commission Has Already Obtained The Principal Relief To Which It Could Be Entitled If A Violation Of Law Were Proved

The Commission has already secured the principal relief to which it would be entitled in the event it could successfully prove that Columbia's abandoned acquisition of Medical Center would have violated Section 7 of the Clayton Act or Section 5 of the FTC Act. The Commission's Notice of Contemplated Relief in this case included three substantive remedies in addition to cancellation of the Asset Exchange Agreement, namely divestiture of Medical Center, prior approval of acquisitions or mergers **[*16]** in Charlotte County, and a ten year notice requirement for acquisitions in an unspecified geographic area. Columbia has canceled the Asset Exchange Agreement and will not acquire Medical Center. Moreover, Columbia's offer to accept a prior approval requirement in Charlotte County meets the Commission's second substantive relief provision.

The only additional relief sought, which the Commission can not obtain short of a full trial on the merits, is a prior notice requirement for acquisitions in an unspecified geographic area. Columbia believes that the greatest prior notice relief the Commission could obtain, if the abandoned acquisition were eventually found to have violated the antitrust laws after a full adjudicative trial and appeal, would be a prior notice requirement for otherwise non-reportable transactions involving general acute care hospitals. See American Medical International, 104 F.T.C. 1, 221-26 (1984) ("AMI"); Hospital Corporation of America, 106 F.T.C. 361, 520-27 (1986), aff'd, 807 F.2d 1381 (7th Cir. 1986) ("HCA"). n4 Litigating this entire case over the issue of prior notice is not in the public interest. See e.g. Schlumberger, 103 F.T.C. **[*17]** at 81.

n4 This prior notice requirement would have no effect on acquisitions reportable under the Hart-Scott-Rodino Act. 15 U.S.C. § 18(a). See AMI, 104 F.T.C. at 226; HCA, 106 F.T.C. at 525.

Furthermore, prior notice may not be an appropriate remedy in this case even if the Commission were to prevail in litigation. If Columbia's proposed acquisition of Medical Center were found to have violated the antitrust laws, it could only be a violation of Section 5 of the FTC Act. There could be no violation of Section 7 of the Clayton Act because the transaction was not consummated. See Complaint P 15, Columbia Hospital Corporation, D. 9256 (1993). This presents a material distinction from HCA and AMI, where the acquisitions had been completed, and Section 7 had been found violated. Under these circumstances, it would be incongruous for the Commission to obtain the same relief from Columbia as it did from AMI and HCA.

Although a prior notice requirement was ordered in HCA and AMI under different circumstances, such a requirement very well might be found not to be appropriate where, as here, the transaction has been abandoned. In two recent hospital **[*18]** merger cases, the Commission has approved consent orders which preserved the target company as an independent competitor and contained a prior approval requirement, but not prior notice. See University Health, et. al., 5 Trade Reg. Rep. (CCH) P 23,218 (September 22, 1992); The Reading Hospital, et. al., 5 Trade Reg. Rep. (CCH) P 22,785 (April 24, 1990). Furthermore, the Commission recently published a proposed consent order which provided only for prior approval for future transactions in the alleged geographic market and did not even require divestiture of the acquired hospital. See Dominican Santa Cruz Hospital, et. al., Trade Reg. Rep. (CCH) P 23,345 (March 16, 1993). n5

n5 The Commission has not yet given final approval to this consent order.

B. Significant Costs And Risks Would Be Imposed If The Commission Pursues Further Remedies

Full adjudication of this case will involve extensive testimony by a large number of expert and lay witnesses to reach conclusions on the implications of patient flow data (and the reasons for that flow), the ability of managed care organizations to direct patients outside of Charlotte County, as well as additional **[*19]** factors necessary to determine a relevant geographic market. Product market was not litigated at the preliminary injunction hearing, but would be here. The issue of the competitive effects of this transaction, in any geographic market, will also be highly complicated, especially in light of unique factors such as the Florida legislation governing net and gross revenue of hospitals, the extremely high percentage of Medicare and Medicaid recipients in the area, and the bargaining power of managed care organizations. Furthermore, the impacts of the newly adopted Florida health care reform legislation, which will promote the spread of managed care in the state and further increase managed care's already substantial bargaining leverage, will have to be fully explored.

Columbia submits that it has stronger evidence supporting its arguments regarding the geographic market and the lack of adverse competitive effects of the transaction than the Respondent presented in Adventist Health System/West, (hereinafter "Ukiah"), wherein Chief Judge Parker found the acquisition to be lawful. See Adventist Health System/West, Initial Decision D. 9234 (December 9, 1992). Judge Parker **[*20]** found that the merged hospitals competed with hospitals over sixty miles away. See id. at 41-43. Columbia's proposed geographic market includes hospitals located approximately thirty to forty-five miles from Medical Center. Judge Parker also found that there was only a small population of patients (i.e. non-Medicare/Medicaid patients) who could theoretically be subject to an anticompetitive effect. Approximately 75-80% of the patients in Charlotte County and southwest Florida are covered by Medicare and Medicaid. Thus, Columbia is likely to prevail in a trial of this action because its evidence on several key issues is superior to the evidence of the victorious respondent in that case.

While the public benefits of further proceedings in this matter are minimal, the public costs of such proceedings are likely to be substantial. In a statement in support of a consent order in a recent hospital merger, Chairman Steiger noted that, '"because divestiture is problematic here, it is entirely possible that the Commission would obtain nothing more than the relief contained in this consent order after expending scarce enforcement resources in protracted litigation.'" Dominican **[*21]** Santa Cruz Hospital, et. al., Trade Reg. Rep. (CCH) P 23,345 (March 16, 1993). The same cost/benefit analysis applied in this case supports dismissal of the complaint. Discovery will be lengthy and complex, involving depositions and documentary productions from area health care facilities, physicians practicing in southwest Florida, managed care organizations, state officials, and local employers as well as additional possible sources. There will also be extensive expert discovery.

The hearing almost certainly will be protracted, with dozens of witnesses and extensive documentary evidence. In HCA, the hearings commenced November 28, 1983, and concluded May 31, 1984. See 106 F.T.C. at 370. In AMI, trial commenced September 20, 1982, and concluded March 2, 1983. See 104 F.T.C. at 7. In addition, portions of the hearing may necessitate travel to southwest Florida, further increasing the financial cost to taxpayers.

CONCLUSION

In determining whether further proceedings in this matter are in the public interest, the Commission must "discharge its responsibility to make the most effective possible allocation of its necessarily limited resources of funds and **[*22]** personnel. . . ." Drug Research Corporation, 63 F.T.C. 1014-15 (1963). Given the facts outlined in this Memorandum, further proceedings are clearly not in the public interest.

The future costs of this litigation are obvious and certain. The potential benefits of further litigation are speculative and, even if realized, insignificant. Given Columbia's abandonment of the proposed transaction, the Commission has already achieved the primary relief it sought. Prior notice would provide only marginal benefit to the Commission, as most of Columbia's future acquisitions would likely be reportable under the Hart-Scott-Rodino Act. It is simply not an efficient use of the Commission's resources to continue proceedings in this matter, and the Complaint should be dismissed. By granting dismissal here, the Commission will be acting in accordance with its prior decisions which establish that the public interest requires that unnecessary, but costly, litigation be terminated.

For all the foregoing reasons, respondent Columbia Hospital Corporation respectfully requests that the Complaint be dismissed.

Respectfully submitted,

Stephen T. Braun

General Counsel

Donald P. Fay

Senior Counsel **[*23]**

COLUMBIA HOSPITAL CORP.

777 Main Street

Fort Worth, Texas 76102

Raymond A. Jacobsen, Jr.

Gregory L. Baker

Scott S. Megregian

Jon B. Dubrow

HOWREY & SIMON

1299 Pennsylvania Ave., N.W.

Washington, D.C. 20004

DATED: July 15, 1993

APPENDIX:

ATTACHMENT 1

May 5, 1993

By Telecopy (407) 897-1919

Adventist Health System/Sunbelt
2400 Bedford Road
Orlando, Florida 32803-1489

Attention: Chief Executive Officer

Ladies and Gentlemen:

Reference is made to the Asset Exchange Agreement dated as of October 19, 1992, between and among Adventist Health System/Sunbelt Health Care Corporation, Adventist Health System/Sunbelt, Inc., Columbia Hospital Corporation, and Basic American Medical, Inc. (the "Asset Exchange Agreement"). Specific reference is made to Section 10.3 of the Asset Exchange Agreement. Pursuant to the provisions thereof, Columbia terminates the Asset Exchange Agreement, effective immediately,

Very truly yours,

COLUMBIA HOSPITAL CORPORATION

By Sheldon H. Lutz, Vice President

ATTACHMENT 2

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE FEDERAL TRADE COMMISSION

DKT/CASE NO. 9256

TITLE In The Matter of: COLUMBIA HOSPITAL CORPORATION

PLACE Washington, D.C.

DATE June 15, **[*24]** 1993

PAGES 1-37

Prehearing Conference

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

[ATTACHMENT 2 TO FOLLOW]

EXHIBIT A

UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of COLUMBIA HOSPITAL CORPORATION a Corporation

DOCKET NO. 9256

ORDER CERTIFYING TO THE COMMISSION RESPONDENT'S MOTION TO DISMISS ON PUBLIC INTEREST GROUNDS

At the request of Respondent,

IT IS ORDERED that Respondent Columbia Hospital Corporation's Motion to Certify to the Commission Respondent's Motion to Dismiss the Complaint as No Longer Being in the Public Interest is hereby GRANTED.

James P. Timony, Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1993, a true and correct copy of the foregoing MOTION OF COLUMBIA HOSPITAL CORPORATION TO DISMISS THE COMPLAINT AS NO LONGER BEING IN THE PUBLIC INTEREST, AND TO CERTIFY SUCH MOTION TO THE COMMISSION, as well as an accompanying PROPOSED ORDER and MEMORANDUM IN SUPPORT were served by HAND DELIVERY upon:

Mark J. Horoschak, Esq.

Bureau of Competition

Federal Trade Commission

601 Pennsylvania Ave., N.W.

Washington, D.C. 20058 **[*25]**

DATED: July 15, 1993

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS n1

Pursuant to Section 3.22 of the Commission's Rules of Practice, 16 C.F.R. § 3.22, complaint counsel hereby opposes the motion of respondent Columbia Hospital Corporation ("Columbia") to dismiss the complaint in this case on public interest grounds. n2 We ask Your Honor to recommend, pursuant to Commission Rule 3.22(a), that the Commission summarily deny Columbia's motion to dismiss. n3 Outright dismissal of this case -- without any safeguard against a renewed attempt by Columbia to carry out the proposed acquisition challenged here -- plainly is not in the public interest.

n1 Columbia does not ask that the proceedings before Your Honor be stayed. We oppose any stay, or other delay, based on the pendency of Columbia's motion.

n2 Columbia does not request that Your Honor order dismissal of the complaint, but rather requests certification of its dismissal motion to the Commission. Columbia's motion for dismissal, solely on the basis that further proceedings in this matter would not be in the public interest, clearly is one "upon which the Administrative Law Judge has no authority to rule," and therefore must be certified to the Commission. Commission Rule 3.22(a); Order Certifying to the Commission the Coca-Cola Company's Motion to Dismiss the

Complaint, Coca-Cola Co., Docket No. 9207 (Oct. 27, 1986), citing Florida Citrus Mutual, 50 F.T.C. 959, 961 (1954). By arguing only that the Commission should end this proceeding as a matter of prosecutorial discretion, Columbia implicitly recognizes -- as it must, see p. 3 below -- that it is not entitled as a matter of law to the relief it seeks, and therefore that Your Honor cannot grant that relief.

n3 We believe the Commission should "summarily" deny Columbia's motion, not only in accordance with Columbia's own request for expedition, see Motion of Columbia Hospital Corporation to Dismiss the Complaint as No Longer in the Public Interest, and to Certify Such Motion to the Commission ("Columbia Motion") at 3, but also because the only issues properly before the Commission (relating to Columbia's motion for outright dismissal of the complaint, as opposed to its alternative suggestions about possible settlement) are straightforward and do not require reconsideration of the governing Commission precedent in Coca-Cola Co., Docket No. 9207 (interlocutory order denying motion to dismiss, Aug. 9, 1988) (discussed in more detail at pp. 5-6 below). **[*26]**

Moreover, Your Honor should make no recommendation on, and the Commission should not give any consideration at all to, Columbia's suggestion that this matter could be settled by a consent agreement, limited to prior approval relief governing hospital acquisitions in the relevant market (forgoing prior notice of acquisitions elsewhere in the country, a form of relief the Commission proposed in its Notice of Contemplated Relief). Commission Rule 3.25 precludes consideration by Your Honor or the Commission of Columbia's "settlement offer," because Columbia has not satisfied the basic requirement of Rule 3.25 that a settlement proposal be presented in the form of an executed proposed consent order. Even if consideration of Columbia's offer is not barred by Rule 3.25, Your Honor cannot make an informed recommendation -- and the Commission cannot reach an informed decision from the adjudicative record -- based on Columbia's general assertions and vague offer. Not only is there no specific settlement offer for the Commission to examine, but no record evidence has yet been adduced relating to the need for the prior notification relief Columbia asks the Commission to forgo.

I. DISMISSING **[*27]** THE COMPLAINT IN THIS PROCEEDING CLEARLY WOULD BE CONTRARY TO THE PUBLIC INTEREST

Columbia argues that its "abandonment" of its proposed acquisition of Medical Center Hospital, after that transaction was preliminarily enjoined by a Federal court, makes further proceedings unwarranted. The Commission recently rejected arguments similar to Columbia's. Moreover, the facts of this case provide no basis for departing from the Commission precedent rejecting Columbia's position. In particular, dismissal of this proceeding would leave Columbia free to revive its illegal, "abandoned" Medical Center acquisition.

Columbia is not entitled -- indeed, does not claim to be entitled -- to dismissal as a matter of law based on its "abandonment" of the Medical Center acquisition. This principle is clear from the Commission's interlocutory orders denying motions to dismiss in Warner Communications, Inc. n4 and MidCon Corp. n5 In Warner, the Commission refused to dismiss the complaint in a case very similar to this one, where respondent's proposed acquisition was called off after it was preliminarily enjoined by a Federal court. The Commission squarely held that "voluntary cessation **[*28]** of unlawful activity is not a basis for halting a law enforcement action," and that a "claim that the allegedly unlawful transaction has been abandoned does not make the matter moot," particularly when it is not "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' in either identical or functionally-equivalent form." n6 Similarly, the Commission in MidCon rejected the argument that respondent's sale of a pipeline company after the complaint was issued (which, respondent argued, eliminated the horizontal competitive overlap giving rise to the Commission's complaint) made the case moot. "[I]f a case could be mooted [merely] by voluntary cessation of allegedly unlawful conduct, the respondent would be 'free to return to his old ways.'" n7 To prevail, a respondent must further demonstrate (as the MidCon respondents did not) that "there is no reasonable expectation that the wrong will be repeated." n8 As we discuss below at p. 7, Columbia has not met its burden of showing that there is no "reasonable expectation" that it will resume the conduct challenged in this case.

n4 Warner Communications, Inc., 105 F.T.C. 342 (1985).

n5 Order Denying Motion to Dismiss, MidCon Corp., Docket No. 9198 (Nov. 16, 1987) ("MidCon Order").

n6 Warner at 342-43, quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968).

n7 MidCon Order at 2, quoting United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953).

n8 Id. **[*29]**

Not only does Columbia's "abandonment" of its plans to acquire Medical Center not make this case moot, but it also fails to demonstrate that there is no need for or public interest in further Commission proceedings in this case. The Commission in Warner and MidCon rejected not only respondents' mootness arguments, but also their arguments that the Commission should end the proceedings against them as no longer in the public interest. In both cases (as we show below is true here), the Commission found dismissal on public interest grounds precluded by unresolved questions of fact making it, at best, "not clear that the allegedly unlawful conduct could not be expected to recur," in the form either of the renewal of the challenged acquisition or some other anticompetitive acquisition in the relevant markets at issue. n9

n9 Warner at 343; MidCon Order at 3-5.

Columbia's position is also at odds with the Commission's interlocutory order denying respondent's unopposed motion to dismiss on public interest grounds in Coca-Cola Co. n10 That decision refutes Columbia's argument -- based entirely on Commission cases predating Coca-Cola (as well as Warner **[*30]** and MidCon) -- that the Commission's policy is to "routinely dismiss[] complaints after [merger] transactions are abandoned." n11 Coca-Cola's claim to have abandoned the challenged acquisition in that case, in the face of a preliminary injunction preventing its consummation, was buttressed by the fact that Dr Pepper, the company Coca-Cola had originally planned to acquire, had since been sold to a third party. n12 Indeed, after that sale, the Court of Appeals vacated as moot the preliminary injunction entered against Coca-Cola, finding "no reasonable expectation that the original merger will be revived." n13 The Commission nevertheless found continuation of the administrative proceeding to be in the public interest. It based that decision on the grounds that "[t]he abandonment of a merger does not automatically moot prospective relief," and in particular did not eliminate "the need for some form of prior approval relief [potentially governing Coca-Cola's acquisitions of any producer or seller of carbonated soft drinks, not just Dr Pepper] if a violation of law is established." The Commission accordingly directed the Administrative Law Judge to resume the adjudicative proceedings **[*31]** so the judge could determine the nature and extent of any appropriate relief. n14

n10 Order Denying Respondent's Motion for Dismissal of the Complaint, Coca-Cola Co., Docket No. 9207 (Aug. 9, 1988) ("Coca-Cola Order").

n11 Memorandum of Law in Support of Respondent's Motion to Dismiss the Complaint as No Longer in the Public Interest ("Columbia Memorandum") at 4.

n12 Coca-Cola Order at 2.

n13 FTC v. Coca-Cola Co., 829 F.2d 191 (D.C. Cir. 1987) (per curiam), unpublished memorandum at 1.

n14 Coca-Cola order at 3. The Administrative Law Judge subsequently found, after completion of trial and based on a full adjudicative record, that no relief was warranted. However, that determination was based on circumstances not present here: complaint counsel's initial recommendation early in the case (with which the Commission subsequently disagreed) that it was not in the public interest for the Commission to seek prior approval relief against Coca-Cola, and what the ALJ viewed as the likelihood that some of the acquisitions that would be subject to prior approval would be efficient rather than anticompetitive. Initial Decision, Coca-Cola Co., Docket No. 9207 (Nov. 30, 1990) at 106-07. The law judge's decision not to enter an order against Coca-Cola is currently on appeal to the Commission.

Columbia seeks to distinguish the Commission's order in Coca-Cola on the grounds that Coca-Cola's termination of the challenged acquisition did not remedy the possibility that acquisition would cause competitive injury to the "third bottler network." Columbia Memorandum at 8. But the Commission did not cite that theory of violation as a basis for its decision not to dismiss the complaint. Columbia also does not explain, and we cannot discern, why termination of the acquisition in Coca-Cola would make the "third bottler" concern any less moot than the more traditional concerns at issue in that case. **[*32]**

This is not an appropriate case for departing from the policy enunciated in Coca-Cola. In particular, if the Commission dismisses the complaint in this case, Columbia will be free to, and may well, renew the proposed acquisition at issue here. n15 n15 Indeed, Columbia emphasizes this possibility, in arguing that the Commission runs the risk that if this case is litigated and Columbia wins, Columbia will be free to acquire Medical Center. Columbia Motion at 2 n.1.

Columbia emphasizes its termination of the agreement to acquire Medical Center, immediately after a Federal court preliminarily enjoined Columbia from consummating that acquisition. But termination of that specific agreement does not preclude another attempt to acquire Medical Center, based on a new agreement. This is a distinction Columbia appears to understand perfectly well. In response to press reports shortly after the Federal court injunction, to the effect that termination of the acquisition agreement meant the Medical Center acquisition had been abandoned, Columbia officials emphasized that was not a valid conclusion:

The day after [Medical Center] hospital's owner announced that its deal with Columbia **[*33]** had died in the wake of a federal court injunction, a Columbia executive said that his Texas-based health corporation *had merely terminated the current agreement. Working out a new agreement is "still an option," said Lee Wood, Columbia's director of investor relations.*

"We have terminated the original agreement," Wood said, "but whether or not we will go forward with Adventist [*Health System/Sunbelt*], *we haven't decided."*

[Columbia spokesperson David] Margulies said that *terminating the agreement between the two companies "does not eliminate any possibilities for making another deal."* n16

n16 "Don't Count Columbia Out," Sarasota (Florida) Herald Tribune (Charlotte A.M. edition), May 10, 1993, at 1A (emphasis added).

Columbia's counsel now represents that "Columbia does not intend to acquire Medical Center now or at any time in the future." n17 However, that representation is at best a statement of Columbia's present intentions. It does not irrevocably bind Columbia. Columbia could change its mind later, and renew its pursuit of Medical Center.

n17 Columbia Memorandum at 3.

Granting Columbia the relief it seeks would leave the door open for **[*34]** Columbia to acquire Medical Center, without any reliable safeguard against that possibility. Columbia need only revive its agreement (or enter into a new one) with Medical Center's parent company. n18 Moreover, Columbia has already fulfilled the requirements of the Hart-Scott-Rodino premerger notification statute, 15 U.S.C. § 18a, for its original proposed acquisition of Medical Center; depending on the form and timing of a new or renewed acquisition agreement, Columbia might even be able to acquire Medical Center without a new notification and waiting period. n19 So far as we can tell, the only thing that now stops Columbia from acquiring Medical Center is the preliminary injunction entered by a Federal court this May -- an injunction which will automatically expire if the Commission dismisses the complaint in this matter.

n18 Unlike the situation in Coca-Cola, Medical Center is still in the hands of Adventist Health System/Sunbelt, the other party to the terminated asset acquisition agreement. We are not aware of any decision by AHS/Sunbelt not to sell Medical Center to Columbia should the opportunity arise.

n19 Columbia's notification, based on its existing filing (which has never been withdrawn by Columbia), remains valid for a year after expiration of the waiting period for that filing (which occurred on January 13, 1993). 16 C.F.R. § 803.7. **[*35]**

Dismissal of the complaint would also preclude the possibility of obtaining relief to safeguard against the recurrence of a law violation in "functionally-equivalent form," n20 as opposed to a simple repetition of Columbia's illegal attempt to acquire Medical Center. In particular, while Columbia has forsworn any present intention to acquire Medical Center, it has not ruled out seeking to acquire the other, larger non-Columbia hospital in Charlotte County, Florida, St. Joseph Hospital. The Commission should reserve the option, as it did in Coca-Cola, n21 of obtaining relief to guard against not only the recurrence of the challenged acquisition, but also any attempt by respondent to achieve a similar result through some other acquisition of a direct competitor. n22 n20 Warner, 105 F.T.C. at 343.

n21 Coca-Cola Order at 4.

n22 The possibility of Hart-Scott-Rodino notification for such an acquisition is not an adequate substitute for the certainty of an adequate opportunity to review and if necessary block an acquisition, which prior approval relief would provide. See Warner at 343 (availability of H-S-R notification does not preclude additional "fencing-in" relief against future mergers). **[*36]**

Finally, Columbia's suggestion that the Commission forgo any relief at all, in view of the termination of the proposed Medical Center acquisition, is inconsistent with the Commission's intentions as stated in the Notice of Contemplated Relief in this case. Only one form of proposed relief identified in the Notice -- divestiture -- is expressly made contingent on Columbia's consummation of the Medical Center acquisition. By contrast, there is no such contingency for the prior approval and other forms of relief elsewhere identified in the Notice.

II. COLUMBIA'S "SETTLEMENT OFFER" TO AGREE TO PRIOR APPROVAL RELIEF IS NOT PROPERLY BEFORE YOUR HONOR OR THE COMMISSION

Commission Rule 3.25(b) plainly requires a settlement proposal presented for the Commission's consideration to be a concrete proposed consent order that has been executed by respondent and satisfies other specific requirements. There must be a specific proposed order; it must be executed by respondent; and it must satisfy several procedural requirements set forth in Rule 2.32 of the Commission's Rules (such as waiver of right to seek judicial review). Only such a consent proposal may be certified to the **[*37]** Commission pursuant to Rule 3.25(c) or Rule 3.25(d). n23

n23 Moreover, Rule 3.25 allows settlement by means other than a consent order only through "filing of an admission answer" or submission of a stipulated record and agreed order. Commission Rule 3.25(g).

Despite the explicit requirements of Rule 3.25 governing settlements of adjudicative proceedings, Columbia presents its willingness to agree to some yet unspecified "prior approval requirement in Charlotte County" as support for (or at least a backstop to) its proposal for outright dismissal of the complaint in this case. n24 In the absence of Columbia's proffer of an executed consent agreement satisfying the requirements of Rule 3.25, Your Honor and the Commission should give no weight or consideration at all to Columbia's vague "prior approval" suggestion. Columbia's suggestion comes nowhere near compliance with the specific provisions of Rule 3.25. It would be an abuse of the general provisions of Rule 3.22(a), relating to certification of motions to the Commission, to use that rule to bring before the Commission something clearly disqualified from certification under Rule 3.25. n25

n24 It is not clear whether Columbia believes (incorrectly) that the Commission can dismiss the complaint but still enter a consent order against Columbia, or rather that the "prior approval requirement" to which Columbia proposes to agree actually is something other than a binding, enforceable consent order. If the latter is the case, Columbia's offer is plainly meaningless and frivolous.

n25 Cf. MidCon Order at 3 n.1 (Commission identified Rule 3.25 as the appropriate mechanism to present the Commission with proposals to remedy deficiencies of the divestiture respondents offered, as a substitute for the divestiture sought by complaint counsel). **[*38]**

III. COLUMBIA'S "SETTLEMENT OFFER" CANNOT BE REASONABLY EVALUATED ABSENT A SPECIFIC PROPOSED CONSENT ORDER AND FURTHER DEVELOPMENT OF THE RECORD

At this time, Your Honor and the Commission ought not give any consideration to Columbia's suggestion to settle this matter with a prior approval order, even if consideration is not barred by Rule 3.25. Absent a specific proposed consent order, signed by Columbia, there is no way to determine whether Columbia will sign a order that is binding, enforceable, free of fatal loopholes, meeting the procedural requirements of Rule 2.32, and otherwise consistent with Commission practice and acceptable to the Commission. The absence of a concrete offer thus precludes any informed evaluation of whatever it is Columbia will agree to.

Moreover, absent an evidentiary record in this case (still in the pretrial stage) on relief and other issues, neither Your Honor nor the Commission can make an informed evaluation of whether the trade-off Columbia proposes (forgoing prior notification of hospital acquisitions outside the relevant market, in return for avoidance of litigation risks and expenses) is reasonable. The information required to weigh **[*39]** Columbia's offer, relating to whether the benefits Columbia posits for its proposed disposition of this case outweigh the costs, is at present incomplete and may remain so until development of an adjudicative record in this case. n26

n26 This would not be a problem if, upon submission of a proposed consent order complying with Rule 3.25, the Commission elected to withdraw this matter from adjudication in order to consider the proposal. The Commission could then seek from the parties and others whatever information it felt it needed, without the need to develop an adjudicative record.

We note that the Commission has ordered prior notification relief in two other hospital merger cases, American Medical International n27 and Hospital Corporation of America. n28 Like Columbia, the respondents in those cases were hospital chains with operations extending throughout the United States, with active hospital acquisition programs which sometimes resulted in horizontal acquisitions. Those characteristics raised the prospect of future, competitively problematic [CONFIDENTIAL] acquisitions by the respondents outside the relevant markets in those cases. n29

n27 104 F.T.C. 1 (1984).

n28 106 F.T.C. 361 (1985), aff'd, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987).

n29 Columbia seeks to distinguish AMI and HCA on the grounds that in those cases the challenged acquisitions had been consummated (and so the Section 7 violation had been completed), whereas no Section 7 violation has yet occurred in this case. But the Commission has alleged in this case that Columbia's agreement with AHS/Sunbelt to acquire Medical Center violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. We expect to establish at trial that such a violation has occurred, and that such violation is not moot. Moreover, Columbia should not face a weaker remedy for its antitrust violations just because the Commission here (as it did not in AMI and HCA) thwarted execution of the illegal acquisition agreement, or because AMI's and HCA's acquisitions were terminated after (rather than, as here, before) the Commission's orders against them.

By contrast, the two final consent orders which Columbia cites as cases where the Commission has not imposed prior notification requirements involved respondents whose operations were confined to the relevant markets in those cases, and which did not engage in acquisitions on a regular basis. Those factors indicate less of a need than in this case for Commission oversight of those respondents' future acquisition activities (if any) outside the relevant markets. **[*40]**

Columbia, however, asserts that "most of [its] future acquisitions would likely be reportable under the Hart-Scott-Rodino Act." This is a question on which it is far from clear that Columbia is correct, and which may require discovery and trial for its resolution. n30

n30 The Commission recognized in AMI and HCA that certain limitations of Hart-Scott-Rodino made it likely that competitively significant acquisitions could be consummated without notification. AMI, 104 F.T.C. at 226; HCA, 106 F.T.C. at 516. These limitations include the $ 15 million size-of-transaction threshold (below which hospital acquisitions often fall), noncoverage of leases and management contracts, and the exemption of acquisitions from political subdivisions. Indeed, of the hospital mergers and acquisitions challenged to date by the Federal antitrust enforcement agencies, a third were non-reportable transactions.

IV. CONCLUSION

For the reasons stated above, Your Honor should recommend that the Commission summarily deny Columbia's motion to dismiss. Your Honor should also decline, and recommend that the Commission also decline, to consider Columbia's suggestion about the possible **[*41]** settlement of this matter, unless and until Columbia proffers a specific proposed consent order complying with Section 3.25 of the Commission's Rules.

Respectfully submitted,

Oscar M. Voss

Garry R. Gibbs

Gary H. Schorr

Michael R. Bissegger

Counsel Supporting the Complaint

July 26, 1993

CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the attached COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS was served by facsimile on Raymond A. Jacobsen, Jr., attorney for respondent, on this 26th day of July, 1993.

Oscar M. Voss

LEXSEE 1996 FTC LEXIS 18

In the Matter of DILLARD DEPARTMENT STORES, INC., a corporation

DOCKET NO. 9269

Federal Trade Commission

1996 FTC LEXIS 18

CERTIFICATION TO COMMISSION OF COMPLAINT COUNSEL'S MOTION TO DISMISS AND TO VACATE JURISDICTIONAL RULING

February 13, 1996

ALJ: [*1]

Lewis F. Parker, Administrative Law Judge

ORDER:

At the request of complaint counsel and pursuant to Section 3.22(a) of the Rules of Practice, I certify to the Commission the attached motion to dismiss this matter and to vacate jurisdictional ruling, along with a memorandum of points and authorities in support of the motion.

APPENDIX:

To: The Honorable Lewis F. Parker
Administrative Law Judge

MOTION TO DISMISS MATTER AND TO VACATE JURISDICTIONAL RULING

Pursuant to Commission Rule of Practice, 3.22(a), Complaint Counsel hereby ask that Your Honor certify to the Commission this Motion to dismiss this matter in its entirety and to vacate the partial summary decision of March 16, 1995 concerning the Commission's jurisdiction.

Complaint Counsel make this request because of a change in the applicable law by the Federal Reserve Board subsequent to the Commission's filing of this case, and because it would not be in the public interest to continue litigating this matter solely to resolve the pending jurisdictional issues.

Complaint Counsel respectfully refer Your Honor to the accompanying Memorandum of Points and Authorities in support of this Motion.

Respectfully submitted this 12th day of February, **[*2]** 1996.

Stephen L. Cohen

Philip E. Rothschild

Martha Landesberg

Complaint Counsel

To: The Honorable Lewis F. Parker
Administrative Law Judge

COMPLAINT COUNSEL'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS MATTER AND TO VACATE JURISDICTIONAL RULING

I. SUMMARY

Complaint Counsel submit this memorandum in support of their request that the ALJ certify to the Commission their motion to dismiss this matter and to vacate the ALJ's March 16, 1995 Decision because both are in the public interest. Seven months after the Commission filed this lawsuit against respondent Dillard Department Stores, Inc. (" Dillard's"), the Federal Reserve Board ("FRB"), through its Official Staff Commentary ("OSC"), clarified its interpretation of Section 226.12(b) of Regulation Z. The change in the OSC significantly undermines Counts I and II of the complaint (the primary charges in this matter), because the FRB's clarification imposes a higher legal standard for violations of 226.12 (b) than charged by the Commission in its complaint in this case. Consequently, Complaint Counsel request that the Commission dismiss this matter in the public interest. Additionally, Complaint **[*3]** Counsel request that the Commission vacate a ruling made by the ALJ on March 16, 1995 limiting the Commission's jurisdiction over non-bank agents of banks. Because it would not be in the public interest to continue litigating this matter solely to resolve this jurisdictional issue, and because the ALJ's ruling could complicate future Commission enforcement actions, vacation of the ruling is warranted.

II. RELEVANT BACKGROUND

A. Standard of Conduct

On September 14, 1994, the Commission authorized the issuance of its complaint against Dillard's. The complaint charges Dillard's with violating, *inter alia,* Sections 133, 161, and 162 of the Truth in Lending Act ("TILA"), 15 U.S.C. Sections 1643, 1666, 1666a, and Sections 226.12 and 226.13 of its implementing Regulation Z, which concern consumers' rights when unauthorized charges are made with their credit cards. In particular, Count I of the complaint charges Dillard's with violating Section 133 of the TILA and Section 226.12(b) of Regulation Z by placing unreasonable burdens on consumers through its requirements that consumers complete affidavits, have them notarized, agree to testify in court against the perpetrator, file **[*4]** police reports, and answer questions in person concerning the alleged unauthorized use. The complaint also charges Dillard's with violating Sections 161 and 162 of the TILA and Section 226.13 of Regulation Z (Count II) by failing to conduct a reasonable investigation of consumers' claims, by failing to send notices containing an explanation why Dillard's denied consumers' claims (Count III), and by reporting disputed accounts as delinquent and trying to collect disputed balances (Count IV). The complaint further charges Dillard's with violating Section 165 of the TILA and Section 226.11 of Regulation Z by failing to make refunds on accounts for which it had collected disputed amounts (Count V). Finally, the complaint alleges that these practices were unfair in violation of Section 5 of the FTC Act.

When the Commission filed its complaint against Dillard's, the provisions of the TILA, Regulation Z, and the OSC relating to claims of unauthorized use under Section 226.12(b) supported the violations charged in this case. However, at that time, the law did not specifically define a card issuer's obligations when cardholders asserted unauthorized use of their credit card. Section 133(a) **[*5]** (1) of the TILA provides that a cardholder's liability for unauthorized use of a credit card cannot exceed $ 50, and even this limited liability cannot be imposed unless certain conditions are met. No liability can be imposed, for example, unless the unauthorized use occurs before the card issuer is notified that an unauthorized use has or may occur as a result of loss, theft, or otherwise. n1 Section 133 of the TILA places no time requirements or special procedures on the cardholder to report potential unauthorized use. n2 By providing that notification may be given by telephone or in writing, at the option of the person giving it, Section 226.12(b) (3) of Regulation Z ensures that it will be easy to notify card issuers of potential unauthorized use. n3 Section 133(b) of the TILA states that the burden of proof is upon the card issuer to show that the use was authorized. Given the above, it would be inconsistent with Section 133(b) of the TILA and Section 226.12 of Regulation Z to allow a card issuer to shift to the cardholder the burden of proving that use was unauthorized after notification of potential unauthorized use but prior to any action (presumably brought in court). n4 **[*6]** See Complaint Counsel's Nonbinding Statement at 4 (filed Nov. 7, 1994). See also Commission Letter to William M. Wiles, Secretary, Feb. 15, 1995, at 3-4 (describing the above interpretation of the applicable law). Accordingly, Count I of the complaint charges Dillard's with violating the TILA and Regulation Z by placing unreasonable burdens on consumers who asserted claims of unauthorized use. See Complaint paragraphs 13 and 14.

n1 Other conditions under § 133(a) (1) are: 1) that the card is an accepted credit card; 2) that the card issuer has given adequate notice to the cardholder of potential liability; 3) that the card issuer has provided the cardholder with a description of how to notify the card issuer of potential loss, theft or unauthorized use; and 4) that the card issuer has provided a method whereby the user of the card can be identified as the person authorized to use it.

n2 *Cf.* § 226.13 of Regulation Z (requiring cardholders to inform the card issuer in writing of billing errors within 60 days of receiving the billing statement on which the error appears). See also OSC 12(b) (3) -3.

n3 Notice of potential unauthorized use does not even need to be initiated by the cardholder. OSC 12(b) (3) -2. **[*7]**

n4 This reading of the law is consistent with § 161 of the TILA and § 226.13 of Regulation Z, which govern the rights and obligations of creditors when responding to billing errors, which can include errors caused by unauthorized use. Unauthorized use claims can fall under either § § 226.12 or 226.13 of Regulation Z, or potentially both, depending on whether the cardholder meets the more specific requirements of the "billing error notice" provisions in § 226.13(b). Section 226.13(f) of Regulation Z requires creditors to conduct a reasonable investigation after a cardholder notifies the creditor of a potential billing error.

On December 14, 1994, the FRB issued a proposed revision to Section 226.12(b) of the OSC. 59 Fed. Reg. 64,351-59. Among other things, the FRB proposed adding to the OSC a requirement that creditors must conduct a reasonable investigation when consumers claim unauthorized use of their credit cards. While using somewhat different language than the Commission's complaint, the reasonable investigation standard under the FRB proposal reflected the same principle as the unreasonable burden standard in the Commission complaint. The FRB proposal, however, specifically **[*8]** set forth what creditors were allowed to do in conducting a "reasonable investigation" when they request cooperation from a cardholder:

> In conducting its investigation, the card issuer may reasonably request the cardholder's cooperation, but the card issuer may not automatically deny a claim based solely on the cardholder's failure or refusal to comply with a particular request.

59 Fed. Reg. at 64,356 (emphasis added). This standard differed somewhat from that alleged in Paragraphs 12 and 13 of the complaint in which the Commission charged Dillard's with holding consumers liable if they did not comply with Dillard's requirements. n5

n5 Paragraph 12 states:

> Dillard's has held cardholders liable for asserted unauthorized use of their credit card in excess of the statutory limit if cardholders have failed to comply with one or more of the procedures described in PARAGRAPHS SEVEN through ELEVEN.

Paragraph 13 states:

> By and through the acts and practices alleged in PARAGRAPHS SEVEN through TWELVE, and others not specifically set forth herein, Dillard's has placed unreasonable burdens on cardholders who have asserted unauthorized use of their credit card.

[*9]

On February 15, 1995, the Commission submitted comments to the FRB concerning the proposed revisions. In commenting on the above-quoted provision, the Commission wrote to the FRB:

> The Commission is concerned, however, with the use of the terms " automatically" and "solely" in evaluating the cardholder's failure or refusal to comply with a particular request as the basis for denying a cardholder's claim . . . . As long as card issuers have any minor reason for denying a cardholder's claim, which is in addition to the cardholder's failure to comply with a request (e.g., a request to provide a written statement), the card issuer might argue that it complied with the language of the proposed comment, since it did not "automatically" or "solely" deny the claim based on a failure to comply with a particular request. To avoid this result and ensure that card issuers conduct reasonable investigations, the

> Commission suggests deleting "automatically," and further suggests replacing "solely" with the term "primarily."

Letter to William W. Wiles, Secretary, at 6-7.

On April 3, 1995, the FRB promulgated its final OSC in which it adopted its original December 14 language instead **[*10]** of the Commission's proposed language. 60 Fed. Reg 16771, 16778. Thus, creditors could meet the standard announced by the FRB for conducting a reasonable investigation as long as they did not deny consumers' claims "solely" or "automatically" because consumers did not comply with a specific creditor request. n6

> n6 Although it is not absolutely clear that the Commission would have to meet the revised FRB standard in proving Count I of its complaint against Dillard's because the practices occurred prior to the revision, it is likely that the ALJ would apply FRB inerpretations of what constitutes a reasonable investigation. See Ford Motor Co. v. Milholland, 444 U.S. 555, 565 (1980) (FRB OSC is dispositive "unless demonstrably irrational"). In addition, it is likely that the ALJ would read the new 226.12(b) standards into the reasonable investigation requirements of 226.13, even though that section was not revised by the FRB.

In addition, the FRB imposed a cardholder cooperation requirement that had not been part of the proposed OSC revision. Specifically, the FRB stated:

> If the card issuer otherwise had no knowledge of facts confirming the unauthorized use, the lack of **[*11]** information resulting from the cardholder's failure or refusal to comply with a particular request may lead the card issuer reasonably to terminate the investigation.

60 Fed. Reg. 16,771, 16,778. Thus, if consumers failed to provide the card issuer with adequate information concerning the unauthorized use, and the card issuer had no other means to obtain information about the use, the card issuer could terminate its investigation and hold the cardholder liable for the unauthorized charges.

B. Jurisdictional Issue

Shortly after the FRB put out for comment its revisions to 226.12(b) (but before they were final), Dillard's filed a motion for partial summary decision, n7 arguing that during part of the period covered by the allegations of the complaint (after June 18, 1991), Dillard's had either transferred its credit card accounts or transferred the servicing of its accounts to its wholly -owned subsidiary, Dillard National Bank, and, therefore, when Dillard's performed contractual services for the bank, the Office of the Comptroller of the Currency had exclusive jurisdiction over Dillard's. On February 6, 1995, Complaint Counsel filed their opposition to Dillard's motion, **[*12]** arguing that the FTC had jurisdiction over Dillard's for these transactions, and that there had been no express or implied repeal of the FTC's broad residual jurisdiction over agents of non-banks. On March 16, 1995, Judge Parker issued a Partial Summary Decision holding that the FTC did not have jurisdiction over Dillard's after June 18, 1991, and dismissing all allegations of the complaint from that time on.

> n7 Dillard's Renewed Motion for Partial Summary Decision, filed Jan. 23, 1995.

Because of the possible far-reaching consequences of the ALJ's March 16 Decision, on March 24, Complaint Counsel filed a notice of appeal to the Commission of the ALJ's Decision. On April 14, respondent filed a motion to dismiss the appeal, and on June 8, the Commission granted respondent's motion without reaching the merits of the appeal. n8

> n8 The Commission determined, among other things, that because the March 16 Decision did not constitute an "initial decision" under the Commission's rules, it was not appealable directly to the Commission at that time because it was an interlocutory order.

III. THE COMMISSION SHOULD DISMISS THE COMPLAINT AND VACATE THE ALJ'S JURISDICTIONAL RULING **[*13]** IN THE PUBLIC INTEREST

A. The Change In The Law By The FRB Warrants Dismissal Of The Complaint As In The Public Interest

It is well settled that the Commission can dismiss a proceeding any time it appears there is a lack of public interest. FTC v. Klesner, 280 U.S. 19 (1929).

> In considering such administrative matters as whether to issue a complaint, or, as here, whether to go on with further proceedings in a case that has already been commenced by issuance of a complaint, the Commission is required to take into account a broad range of considerations bearing upon the public interest. In order to discharge its responsibility to make the most effective possible allocation of its necessarily limited resources of funds and personnel, the Commission must consider - - as a matter of administrative judgment and discretion - - which of the various courses of action open to it should be followed.

Drug Research Corp., 63 FTC 998, 1014 (1963) (order dismissing complaint). Only the Commission, and not an ALJ, can make this determination. Id. at 1015. Among the many factors the Commission may consider are whether special and unique circumstances exist (Id.); the **[*14]** business has been discontinued (First Buckingham Community, Inc., 73 FTC 938, 947 (1968)); the circumstances have changed (Rhinechem Corp. et al., 94 FTC 132, 133 (1979) (order dismissing complaint)); or the law has changed (R.J. Reynolds Tobacco Co., Inc., D. 9206 (Dec. 1, 1986)(order denying Bureau Director's motion for leave to file statement), Century 21 Commodore Plaza, Inc., 95 FTC 808, 816 (1980) (order granting Complaint Counsel's motion for dismissal)).

Seven months after the Commission issued its complaint against Dillard's, the FRB articulated a new standard for credit card issuers when handling claims of unauthorized use. "[If] the law in effect when the complaint was issued has changed so significantly as to undermine or eliminate the alleged cause of action," Complaint Counsel should so inform the Commission. R.J. Reynolds Tobacco Co., Inc., Dec. 1, 1986 Order at 3-4.

In issuing Count I of its complaint, the Commission found reason to believe, even in the absence of specific enumerated requirements under Section 133 of the TILA and Section 226.12(b) of Regulation Z, that Dillard's had unlawfully placed unreasonable burdens on consumers when determining **[*15]** whether the questioned charges were, in fact, authorized. Complaint Paragraph 13. In promulgating its final OSC, the FRB stated a somewhat different standard than that of the Commission: a duty to conduct a reasonable investigation instead of not imposing unreasonable burdens . Although the theoretical underpinnings of both concepts are similar in that they both impose a reasonableness standard on creditors, there is an important difference between the FRB's approach and the approach outlined in the Commission's complaint. According to the FRB, an investigation is reasonable as long as creditors do not "automatically" deny consumers' claims "solely" because the consumers fail to comply with a specific request. The standard imposed by the Commission was not so limiting.

Anticipating the likelihood that the ALJ and the Commission would require us to prove our case using the "new" FRB standard (and it is likely that the 226.12(b) standard would be applied to Count II of the complaint as well), n9 staff pursued discovery of evidence relevant to whether Dillard's had denied claims solely or automatically because consumers did not comply with a particular request. Some of the evidence **[*16]** gathered to date does point to law violations by Dillard's. Nevertheless, we believe it would be difficult to prevail under the new standard.

n9 Count II concerns Dillard's alleged violations of Section 226.13 of Regulation Z. In determining what constitutes a "reasonable investigation" under § 226.13 of Regulation Z, it is likely that the ALJ would consider the "reasonable investigation" definition in § 226.12(b).

In addition, the revised OSC also allows creditors to stop processing claims if they cannot get information from the cardholder that cannot be obtained elsewhere. OSC 226.12(b)-3, 60 Fed. Reg. 16,771, 16,674, 16,678 (Apr. 3, 1995). This "creditor safety valve" poses an additional hurdle for staff not present at the time the complaint was filed. When the Commission brought its case against Dillard's, the only written requirement imposed on cardholders related to notification. n10 With this change , card issuers can now deny claims when they do not obtain the cardholder's cooperation in conducting an investigation.

n10 See discussion at 4, *supra.*

Because of these changes in the applicable legal standard promulgated by the FRB through the OSC, the Commission **[*17]** should exercise its prosecutorial discretion to dismiss this matter.

B. It Is Also In The Public Interest To Vacate The ALJ's Ruling Concerning The Commission's Jurisdiction

As explained above, on March 16, 1995, the ALJ ruled that the Commission did not have jurisdiction over non-bank agents of banks. n11 Because this ruling concerns important jurisdictional issues that will not be reviewed by the Commission should this matter be dismissed, it should not be allowed to stand , especially when the reason it would remain untested involves independent, unrelated issues as described above. Clearly, it is not in the public interest to continue litigating this case merely to enable the Commission to resolve these jurisdictional issues. Although it is not clear what precedential value the ALJ's decision may have, n12 to avoid confusion concerning the ruling's impact, it would be in the public interest to vacate the ALJ's March 16 Decision.

n11 We note that on August 16, 1995, the Commission promulgated its Telemarketing Sales Rule, 16 C.F.R. Part 310 et seq., 60 Fed. Reg. 43,842 (Aug. 23, 1995), which contains statements concerning the Commission's jurisdiction under the FTC Act that conflict with the ALJ's ruling. **[*18]**

n12 While the Commission has not spoken on the precedential value of decisions of its administrative officers, courts have held in other administrative cases concerning the Office of Personnel Management and the Environmental Protection Agency that only agency decisions were entitled to much deference. See Horner v. Burns, 783 F.2d 196, 202 (Fed. Cir. 1986) (upholding M.S.P.B. Rule that unreviewed decisions of presiding officials lack precedential value); United States v. Allen, 494 F. Supp. 107, 111 (W.D. Wis. 1980) (unreviewed ALJ decision to issue a subpoena has no precedential value).

In an analagous situation, the authority to vacate the holdings of lower courts is generally recognized in the federal courts. The Federal Rules of Civil Procedure provide federal courts at both the trial and appellate level with explicit authority to modify prior judgments: Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2106.

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review . . . .

28 U.S.C. § 2106. Similarly, when the Commission reviews an **[*19]** initial decision by an ALJ, it can "exercise all the powers which it would have exercised if it had made the initial decision" including adopting, modifying, or setting aside the findings, conclusion, and rules or orders contained in the initial decision. Commission Rules of Practice 3.54(a and (b). See The Coca-Cola Co., 91 FTC 517, 611 (1978) (Commission's scope of review of trial record is "*de novo*") .

As the Supreme Court noted in United States Bancorp Mortg. Co. v. Bonner Mall Partnership, 115 S.Ct. 386, 391 (1994),

> A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.

Because this matter will be dismissed prior to a final adjudication if the Commission grants our motion, it would be inappropriate for the Commission to leave standing a ruling that may or may not have precedential value and that is likely to cause confusion concerning the status of the Commission's jurisdiction over non-bank agents of banks. It is, therefore, in the public interest for the Commission to vacate the ALJ's March 16 Decision.

IV. CONCLUSION

For all of **[*20]** the reasons stated above, Complaint Counsel respectfully request that the ALJ certify to the Commission this motion to dismiss this matter in its entirety and to vacate the ALJ's March 16, 1995 Decision.

Respectfully submitted this 12th day of February, 1996.

Stephen L. Cohen

Philip E. Rothschild

Martha Landesberg

COMPLAINT COUNSEL

LEXSEE 1991 FTC LEXIS 306

In the Matter of DIRAN M. SEROPIAN, M.D.

Docket No. D-9248

Federal Trade Commission

1991 FTC LEXIS 306

ORDER DENYING RESPONDENT'S MOTION FOR A MORE DEFINITE STATEMENT

July 3, 1991

ALJ: [*1]

Lewis F. Parker, Administrative Law Judge

The respondent, Dr. Diran M. Seropian, has filed a motion seeking a more definite statement of the charges against him, claiming that he cannot frame an appropriate response to the complaint since it does not:

1. Describe conduct with which he is charged in an individual capacity.

2. Name the others who were allegedly involved in the combination or conspiracy and does not disclose the acts and coercive means referred to in paragraphs seven and eight.

3. Reveal the basis for the claim that the alleged unlawful acts are continuing, and will continue or recur.

It is true that the complaint lacks the details which Dr. Seropian will need before he can mount a defense against its allegations, but such details need not be given in the complaint. The Rules of Practice, § 3.11(b)(2) require only that the complaint shall contain "a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts . . . alleged to be in violation of the law."

The complaint meets this standard since it gives Dr. Seropian notice of the charges against him. L. G. Balfour v. FTC, 442 F.2d 1, 19 (7th Cir. 1971). **[*2]** The details of the Commission's case will be revealed to Dr. Seropian during the discovery phase of this proceeding, for complaint counsel will file a nonbinding statement and will be required at the appropriate time to turn over to him the names of potential witnesses and copies of documents which they intend to offer in evidence.

Since the complaint does not detail the charges against Dr. Seropian, his answer need not be any more informative. Therefore,

IT IS ORDERED that Dr. Seropian's motion for a more definite statement be, and it hereby is, denied.

LEXSEE 2001 FTC LEXIS 96

In the Matter of H.J. HEINZ COMPANY a corporation; MILNOT HOLDING CORPORATION, a corporation; and MADISON DEARBORN CAPITAL PARTNERS, L.P., a limited partnership

Docket No. 9295

Federal Trade Commission

2001 FTC LEXIS 96

CERTIFICATION TO THE COMMISSION

June 6, 2001

ALJ: [*1]

D. Michael Chappell, Administrative Law Judge

ORDER:

CERTIFICATION TO THE COMMISSION

On May 25, 2001, Complaint Counsel filed with the Office of the Secretary a Motion to Dismiss the above captioned matter. In that motion, Complaint Counsel represents that Respondents H.J. Heinz Company and Milnot Holding Corporation abandoned the challenged transaction immediately after the decision by the U.S. Court of Appeals for the District of Columbia Circuit in F.T.C. v. Heinz Co., et al., 2001 U.S. App. LEXIS 7735 (April 27, 2001). Complaint Counsel further represents that those respondents have consented to the filing of the motion to dismiss, but makes no representation as to the position of Respondent Madison Dearborn Capital Partners, L.P. The motion was not filed as a joint motion, but no opposition has been filed. To the extent that any of the respondents intended to respond, the deadline for filing an opposition was June 4, 2001.

Section 3.22(a) of the Commission's Rules of Practice sets forth that the Administrative Law Judge shall certify to the Commission any motion upon which he has no authority to rule, accompanied by any recommendation that he may deem appropriate. 16 C.F.R. § 3.22(a). **[*2]** Where a motion to dismiss requires a determination as to whether continued litigation would be in the public interest, the Administrative Law Judge is without authority to rule. Columbia Hospital Corp., 1993 FTC LEXIS 180 (July 28, 1993); Midcon Corp., 1987 FTC LEXIS 5 (Nov. 16, 1987). Further, where a motion to dismiss is addressed to the Commission in its administrative capacity, the ALJ shall certify the motion to the Commission. Drug Research Corp., 63 F.T.C. 998 (Oct. 3, 1963).

Accordingly, Complaint Counsel's Motion to Dismiss is hereby certified to the Commission. Because no factual or legal findings have been made, the certification is without recommendation.

ORDERED:

LEXSEE 1995 FTC LEXIS 452

In the Matter of INTERNATIONAL ASSOCIATION OF CONFERENCE INTERPRETERS, a/k/a Association Internationale des Interpretes de Conference, a corporation, and UNITED STATES REGION OF THE INTERNATIONAL ASSOCIATION OF CONFERENCE INTERPRETERS, an unincorporated association

DOCKET NO. 9270

Federal Trade Commission

1995 FTC LEXIS 452

ORDER DENYING MOTION TO CERTIFY INTERLOCUTORY APPEAL

February 15, 1995

ALJ: [*1]

James P. Timony, Administrative Law Judge

ORDER:

ORDER DENYING MOTION TO CERTIFY INTERLOCUTORY APPEAL

Introduction

By an order on January 24, 1995, respondents' Motion to Dismiss was denied. n1 On January 31, 1995, respondents filed a motion to certify an interlocutory appeal to the Commission on two aspects of the denial of their motion to dismiss. Respondents seek certification and Commission review, with a stay of proceedings, of the determination that the Commission can exert personal jurisdiction over AIIC and that principles of international comity do not preclude this action against AIIC.

n1 The order of February 7, 1995, modified and supplemented the case law supporting the ruling on the issue of personal jurisdiction in the January 24, 1995 order.

Appeals of intermediate rulings are disfavored by the Commission. Bristol-Meyers Co. et. al., 90 F.T.C. 273 (1977). The federal courts have a strong policy of discouraging piecemeal litigation. State of N.C. v. Alexander & Alexander Services, 685 F. Supp. 114, 115 (E.D.N.C. 1988). (Certification for immediate appeal denied from order upholding personal jurisdiction over foreign defendants.) n2

n2 In the federal courts, interlocutory appeals are governed by 28 U.S.C. § 1292(b) and the language of this statute mirrors that of Rule 3.23(b). Federal case law provides guidance on the scope of Rule 3.23(b). **[*2]**

Authority to certify an interlocutory appeal is governed by Commission Rule 3.23(b):

> Applications for review of a ruling by the Administrative Law Judge may be allowed only upon request made to the Administrative Law Judge and a determination by the Administrative Law Judge in writing, with justification in support thereof, that 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 termination of the litigation or subsequent review will be an inadequate remedy.

Thus, the test established by Rule 3.23(b) has three parts: (1) there must be a ruling on a controlling issue of law or policy; (2) as to which there is a substantial ground for difference of opinion; and (3) an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. n3

n3 Respondents do not argue that subsequent review will be an inadequate remedy.

A. Personal Jurisdiction

Respondents argue that this dispute about the existence of personal jurisdiction over AIIC "inherently **[*3]** involves a controlling issue of law." Although dismissal of the complaint as to AIIC would be conclusive, that decision is controlled by issues of fact, not law.

There is no dispute about the applicable law in this case. A well-established test for specific jurisdiction is whether the respondents have "purposefully directed" their activities towards the United States. n4

n4 Respondents argue that jurisdiction could not be found over an association unless it controls where its members are present, citing Donatelli v. National Hockey League, 893 F.2d 459, 470-71 (1st Cir. 1990) ("Donatelli"). That case involved a hockey player's unsuccessful attempt to assert solely general jurisdiction in Rhode Island over the National Hockey League because a member team, the Boston Bruins, had, without assistance from the league, held an annual exhibition game there, sold regular season tickets in the state, and sent play-by-play broadcasts into Rhode Island. The defendant league itself did not conduct significant activities in the forum. Id. at 465, 468. The issue was whether minimum contacts were satisfied when the only contacts with the forum arose from one member's presence there. Donatelli holds that when the only contact with a forum is a member's presence, the association must have directed that member to be present in the forum. Here, the jurisdiction is both specific and general, with allegations that AIIC has purposefully undertaken activities directed towards the United States and that its presence here is more than incidental. **[*4]**

The respondents argue about the weight given to particular facts: "there are substantial grounds for difference of opinion regarding the application of the case law concerning personal jurisdiction over associations to the facts of this case." (Motion for Certification at 9). This is not within the interlocutory review process. Rule 3.23(b) does not provide for "early resolution of disputes concerning whether the trial court properly applied the law to the facts." Abortion Rights Mobilization, Inc. v. Regan, 552 F. Supp. 364, 366 (S.D.N.Y. 1982); State of N.C. v. Alexander & Alexander Services, 685 F. Supp. 114, 115 (E.D.N.C. 1988):

> The first substantive clause of § 1292(b) requires that there be a 'controlling question of law . . . .' This standard forecloses interlocutory appeals in situations in which the law is well settled and the dispute arises in the application of the facts at hand to that law. Decisions that are "fact specific" may not be appealed under § 1292(b).

B. Difference of Opinion

Respondents must show that there is a substantial ground for difference of opinion as to the existence of personal jurisdiction over AIIC. To establish such a "substantial **[*5]** ground" under Rule 3.23(b), a party seeking certification must make a showing of a likelihood of success on the merits. Detroit Auto Dealers Association, D. 9189, Order Denying Interlocutory Appeal (Oct. 16, 1985) at 1-2.

The phrase "substantial ground for difference of opinion" requires a finding that the question presents a novel n5 or difficult legal issue. It is this unsettled state of the law that creates a "substantial ground for difference of opinion" and triggers certification. The Order of January 24th, as supplemented on February 7, 1995, relies on settled precedent, not on a novel theory. It is highly unlikely that respondents' appeal would succeed on the merits.

n5 Respondents point out that the Commission has never before entered an order against a foreign association. However, questions of personal jurisdiction turn on the activities of the respondent (i.e., whether they were continuous and systematic or purposefully directed towards the forum) not the respondent's structure, status or identity.

C. Advancing the Termination of this Litigation

Even if AIIC prevailed on its claim that the Commission lacked jurisdiction over it, this litigation could still proceed **[*6]** against the United States Region. In addition, respondents have not made the requisite showing that there is a likelihood of success on the merits. Hence, termination of this litigation will not be advanced by an interlocutory appeal.

A finding of lack of personal jurisdiction over AIIC would not foreclose Commission jurisdiction over the United States Region. The complaint alleges that the United States Region has participated in enforcing the AIIC fee schedules and anticompetitive work rules applied in the United States. (Complaint, PP5, 6) The complaint further alleges that the United States Region is in conspiracy to fix the price, output and marketing of interpretation services in the United States. (Complaint, P13) These allegations, if proven, would justify an order against the United States Region irrespective of what happens to AIIC.

D. Standard of Proof

Respondents argue that there exists a substantial ground for difference of opinion as to the standard of proof complaint counsel must meet to defeat their motion to dismiss for lack of personal jurisdiction. Respondents argue that the preponderance of evidence standard applies even without discovery or an evidentiary **[*7]** hearing.

There is no substantial ground for difference of opinion on the standard of proof for judging motions to dismiss for lack of personal jurisdiction. Complaint counsel need only make a prima facie showing of jurisdiction at this stage of the litigation. United Elec. Radio and Machine Workers v. 163 Pleasant St. Corp., 987 F.2d 39, 43-44 (1st Cir. 1993); Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991); Bullion v. Gillespie, 895 F.2d 213, 217 (5th Cir. 1990).

E. Comity

Respondents also cite considerations of comity as a basis for seeking interlocutory review of the denial of their motion to dismiss. Respondents argue that the January 24 Order held that this action concerns only conduct affecting services rendered in the United States to conclude that it was in accord with principles of international comity, and did not address any other international comity considerations set forth in the International Antitrust Guidelines.

Following the Guidelines, in performing comity analysis, the order addressed: (1) The relative significance of the alleged violation within the United States as compared to abroad. ("The setting of United States fees has significant **[*8]** effects here and minimal effects abroad.") (Order Denying Motion to Dismiss at 3); (2) The nationality of the persons involved in or affected by the conduct. ("Most interpreters practicing in the domestic market are United States residents.") (Id.); (3) The presence or absence of a purpose to affect United States consumers, markets or exporters. ("AIIC's promulgating a schedule of fees, in United States dollars, for interpreters to charge when working in the United States is purposefully directed towards the United States.") (Id. at 2, n. 2); (4) The relative significance and foreseeability of effects of the conduct on the United States as opposed to the effects abroad. ("The complaint is directed at conduct that raises domestic prices and limits the terms of contracts negotiated and performed in the United States.") (Id. at 3) ("That the publication of rates and approval of rules may have taken place in Europe as well as the United States does not diminish the resulting harm to the United States.") (Id.); (5) The existence of reasonable expectations that would be furthered or defeated by the action. ("AIIC cannot claim that this action goes against its reasonable **[*9]** expectations, because it has anticipated being sued for antitrust violations and has a policy for dealing with such suits.") (Id.); (6) The degree of conflict with foreign law or articulated foreign economic policies. ("Because this action concerns only conduct affecting services rendered in the United States, it poses little risk of conflict with foreign law.") (Citing Hartford Fire Ins. Co. v. California, 113 S.Ct. 2891, 2911 (1993).) (Order Denying Motion to Dismiss at 3-4).

Respondents have failed to show that there is a substantial ground for difference of opinion as to the effect of comity considerations on this stage of the litigation.

Respondents make two assertions, not associated with any of the factors cited by the Commission in its Guidelines, that they say raise substantial comity questions justifying certification. Respondents argue that this proceeding could lead to an order abrogating agreements they have negotiated with intergovernmental organizations, such as the United Nations, and that at some point complaint counsel may seek discovery from AIIC. These issues are not ripe. New York Health and Hospitals Corp. v. Blum, 678 F.2d 392, 396 (2d Cir. 1982). **[*10]** Similarly, discovery against AIIC, would raise no substantial comity concerns. Societe Nationale Industrialle Aerospatiale v. United States District Court, 107 S.Ct. 2542, 2556 n.29 (1987).

Certification to the Commission of questions of comity is unlikely to advance materially the ultimate termination of the litigation. The Commission has stated in the Guidelines on International Antitrust that it considers comity factors when deciding to issue complaints, and it presumably did so when it issued the complaint against AIIC. There is no basis in this record for the Commission to conclude on the basis of comity considerations that its recent decision to issue a complaint in this matter was mistaken.

Respondents' motion to certify is denied.

LEXSEE 1994 FTC LEXIS 213

In the Matter of NEW BALANCE ATHLETIC SHOE, INC. a corporation

DOCKET NO. 9268

Federal Trade Commission

1994 FTC LEXIS 213

NO DATE IN ORIGINAL

October 20, 1994

ORDER:
[*1]

ORDER DENYING MOTION TO DISMISS OR FOR A MORE DEFINITE STATEMENT

Respondent moves to dismiss the Complaint (or in the alternative for a more definite statement) as deficient in clarity of facts and theory. At this stage of pleading the allegations appear succinct but informative. Discovery and argument will add detail.

The motion fails.

Dated: October 20, 1994

In the Matter of RAMBUS INCORPORATED, a corporation.
Docket No. 9302
March 17, 2003

Public Version

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S APPLICATION FOR REVIEW OF THE FEBRUARY 28, 2003 ORDER GRANTING COUNSEL'S MOTION TO COMPEL DISCOVERY RELATING TO SUBJECT MATTERS AS TO WHICH RAMBUS'S PRIVILEGE CLAIMS WERE INVALIDATED ON CRIME-FRAUD GROUNDS AND SUBSEQUENTLY WAIVED, PURSUANT TO RULE 3.23(b) OR, IN **THE ALTERNATIVE, REQUEST FOR RECONSIDERATION OF THAT ORDER**

Rambus's Application for Review or Request for Reconsideration suffers from a number of defects. First, Rambus has failed to satisfy the legal standard for either interlocutory appeal or for reconsideration. Second, and perhaps most importantly, Rambus is wrong on the facts. Judge Timony correctly applied the crime-fraud exception to the attorney-client privilege to the facts in this case. Finally, Judge Timony's ruling can, and should, also be upheld on the grounds of waiver.

More fundamentally, Rambus's Application for Review or Request for Reconsideration is based on a flawed interpretation of the Complaint in this case as well as what the facts here show. Rambus portrays the Complaint as narrowly as possible, arguing that it involves only silence. Rambus ignores its affirmatively misleading conduct while it was a JEDEC member, and assumes that, from the moment it withdrew from JEDEC, it was free to engage in whatever conduct it desired. In fact, the Complaint in this matter is considerably broader than Rambus contends. The Complaint alleges that Rambus has engaged, and continues to engage today, in an on-going, unlawful course of conduct that has led to Rambus's monopoly power. The Complaint is not limited to Rambus's failure to disclose relevant patent applications to JEDEC while it was a JEDEC member (even as it sought to amend certain of its applications for the specific purpose of covering synchronous DRAMs). The Complaint also references "other bad-faith, deceptive conduct" through which Rambus "purposefully sought to and did convey to JEDEC the materially false and misleading impression that it possessed no relevant intellectual property rights." Complaint at ¶ ¶ 2, 54, 71; see also Complaint at ¶ ¶ 72-73, 76, 86-87.

Importantly, the Complaint also alleges that Rambus continued to prosecute patent applications covering the same technologies after it left JEDEC, obtained a series of issued patents containing claims covering the technologies in question and, after waiting until the JEDEC standards incorporating these technologies had been adopted and the industry was committed to their use, aggressively began to assert its issued patents against industry members in order to extract large royalty payments. Complaint at ¶ ¶ 91-102. The theory of fraud advanced by Infineon and Micron in their respective private litigations, although differing in many important respects from the antitrust allegations at issue in this case, also included as essential elements Rambus's post-JEDEC patent prosecution and ultimate enforcement of its patents against industry members.

Phrased differently, if Rambus had abandoned its '327 patent and ceased all efforts to obtain patents covering the technologies in question when it withdrew from JEDEC, or even if Rambus had continued its prosecution efforts and obtained patents covering the technologies in question but determined never to enforce them, there would have been no antitrust violation and no grounds to allege fraud. Rambus's post-JEDEC conduct is a necessary element of any violation.

Rambus does not contest here that the requirements of the crime-fraud exception have been established and that it has lost privilege to a wide variety of materials, including attorney notes and billing records, communications between attorneys and Rambus representatives, and communications among Rambus representatives relating to attorney communications. Rambus Memorandum in Opposition to Complaint Counsel's Motion to Compel

Discovery Relating to Subject Matters as to Which Rambus's Privilege Claims Were Invalidated on Crime-Fraud Grounds and Subsequently Waived, January 21, 2003, at 1 ("Rambus does not oppose Complaint Counsel's request for the document discovery ordered by Judge Payne and Judge McKelvie, or their request to question witnesses concerning the subject matter of such documents."). Rather, Rambus seeks to draw an artificial line between its conduct while a JEDEC member (including its efforts to broaden its patent applications) and its post-JEDEC conduct of continuing to broaden its patent applications and ultimately enforcing patents covering the identical technologies. Rambus's contrived distinction does not withstand scrutiny; Judge Timony correctly ruled that the crime-fraud exception to the attorney-client and work product privileges applies equally to Rambus's on-going course of conduct after June 1996.

I. RAMBUS HAS FAILED TO ESTABLISH GROUNDS FOR INTERLOCUTORY APPEAL OR FOR RECONSIDERATION OF JUDGE TIMONY'S ORDER REGARDING DISCOVERY**.**

A. Rambus Has Failed To Demonstrate That Judge Timony's Discovery Order Involves A Controlling Question of Law or Policy, That There Is Substantial Ground For Difference of Opinion, That An Interlocutory Appeal Would Advance The Ultimate Litigation, Or That Subsequent Review Will Be Inadequate

Certification of an application for interlocutory review requires a showing of (1) a controlling question of law or policy (2) as to which there is substantial ground for difference of opinion and (3) that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or (4) subsequent review will be an inadequate remedy. Commission Rule 3.23(b), 16 C.F.R. § 3.23(b). Rambus fails to satisfy any of these requirements.

The standards for interlocutory review are stringent. As Rambus itself has noted, "'[t]he Commission generally looks with disfavor on interlocutory appeals, particularly those seeking review of discovery rulings of an administrative law judge.'" [FN1] "Interlocutory appeals from discovery rulings merit a particularly skeptical reception because they are particularly suited for resolution by the Administrative Law Judge on the scene and particularly conducive to repetitive delay." Schering-Plough, supra (citing In re Bristol Myers Co., 90 F.T.C. 273, 273 (Oct. 7, 1977)). Such is the case here. A ruling regarding privilege constitutes a discovery ruling. See Schering-Plough, supra; In re Atlantic Richfield Co., 1978 FTC LEXIS 562, * 7-8 (July 20, 1978). In addition, Your Honor should also note that an Administrative Law Judge has broad discretion to rule on discovery requests, and his determinations will be reversed only on a showing of clear abuse. [FN2]

Rambus has failed to demonstrate that Judge Timony's discovery order presents a "controlling question of law or policy" as to which there is "substantial ground for difference of opinion" pursuant to Rule 3.23(b). A question of law or policy is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." In re Automotive Breakthrough Sciences, Inc., Dkt. No. 9275; Dkt. No. 9277, 1996 FTC LEXIS 478, *1, Order Denying Interlocutory Appeals (Nov. 5, 1996) (emphasis added). [FN3]

Commission precedent is clear; rulings regarding privileges do not involve a controlling question of law or policy. [FN4] Such is the case here - there is no controlling question of law or policy. Both the attorney-client privilege and the crime-fraud exception are well-settled doctrines of law. Judge Timony's ruling simply involves the discretionary application of those well-settled legal doctrines to the facts of this case. See Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 280 (8th Cir. 1984) ("application of the crime-fraud exception is committed to the district court's discretion."). [FN5] Interlocutory review is not appropriate where the ruling in question was simply committed to the trial judge's discretion and did not involve disputed and controlling questions of law. See 9 J. Moore, Moore's Federal Practice ¶ 110.22 [5] (2d ed. 1986) (review for abuse of discretion not suited to § 1292(b) because there is no controlling question of law).

Rambus also cannot satisfy the requirement of section 3.23(b) that there be "substantial ground for difference of opinion." That element requires a finding that "the question presents a novel or difficult legal issue. It is this unsettled state of the law that creates a 'substantial ground for difference of opinion' and triggers certification." Int'l

Assoc. of Conf. Interpreters, supra; Schering-Plough, supra (quoting Conf. Interpreters). As previously noted, both the attorney-client privilege and the crime-fraud exception are well-settled legal doctrines.

The section 1292(b) cases cited by respondent do not support interlocutory review here. For example, Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), involved the "availability vel non" of the attorney-client privilege of the corporation as against its stockholders. While that issue was deemed to be a controlling question of law as opposed to a question of fact or matter for the discretion of the trial court, no such issue as to the applicability of the attorney-client privilege "vel non" is involved here. Similarly, in Columbia/HCA Healthcare Corporation Billing Practices Litigation, 293 F.3d 289 (6th Cir. 2002), there was substantial diversity of views among the circuits as to the availability and scope of a "selective waiver" theory regarding the attorney-client privilege. In contrast, the crime-fraud exception to the attorney-client privilege is well established. [FN6]

Rambus has not demonstrated that an immediate appeal will materially advance the ultimate termination of the litigation or that subsequent review will be an inadequate remedy. An appeal at this stage would serve only to delay this litigation. Subsequent review would be an adequate remedy because the Commission will be presented with a full evidentiary record (minus the destroyed documents) and can make de novo factual determinations based on what it deems to be properly admitted evidence. Cf. In re Herbert R. Gibson, Sr., Dkt. 9016. 90 F.T.C. 275, Order Granting Respondents' Appeal of Administrative Law Judge's Refusal to Certify Motion to Dismiss for Lack of Public Interest, and Denying Aforesaid Motion (Dec. 12, 1997) (respondents were not prejudiced by the law judge's refusal to certify their motion to dismiss, because the matter was now before the Commission for de novo consideration and determination). [FN7]

B. Rambus Has Failed To Show That Reconsideration of Judge Timony's Discovery Order Is Necessary To Correct A Clear Error Or To Prevent Manifest Injustice

Reconsideration is limited to "exceptional circumstances." Bhatnagar v. Surrendra Overseas Limited, 52 F.3d 1220, 1231 (3rd Cir. 1995); see also Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983) (motions to reconsider should be rare). [FN8] Rambus has not stated a case for reconsideration.

Rambus fails to satisfy any of the three bases on which a motion for reconsideration may be entertained. Reconsideration is appropriate only: (1) if the court is presented with newly discovered evidence, (2) if there is an intervening change in controlling law, or (3) the court committed clear error or the initial decision was manifestly unjust. School District No. 13, Multnomah County, Oregon v. AD and S, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). First, Rambus's Application presents no "newly discovered evidence." Second, there has been no "intervening change in controlling law."

Thus, reconsideration of Judge Timony's discovery order would be appropriate only if Rambus could show that Judge Timony made a "clear error" or that reconsideration of his ruling is necessary to "prevent manifest injustice." As this last factor relates to the merits of Rambus's Application, it is more fully addressed in Section II, below. It is clear, however, that Judge Timony's Order reached the correct result, and certainly does not work a "manifest injustice."

Whether an order results in "manifest injustice" depends in part on the consequences of the ruling. United States v. Roberts, 987 F.2d 17, 21-22 (1st Cir. 1992) (district court should consider, among other things, the nature of the case and "the effect of granting (or denying) the motion on the administration of justice"). The cases cited by Rambus do not demonstrate that Judge Timony's ruling resulted in manifest injustice. For example, in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the issue before the Court was "whether a State may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure." 455 U.S. at 424 (emphasis added). The Court held that dismissal was improper because a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause, and "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." Id. at 428, 434. Judge Timony's ruling does not destroy a property right.

Similarly, in Greene v. Union Mutual Life Insurance Co. of America, 764 F.2d 19 (1st Cir. 1985), the order in question resulted in dismissal of the entire complaint, possibly as a result of clerical error or because the plaintiff's choice of words inadvertently led the judge into using the incorrect legal standard. That order caused far more drastic consequences than at issue here. The First Circuit held that the district court should consider whether its ruling resulted in an injustice. [FN9]

Finally, the ruling in School District No. 13 v. ADandS, Inc., 5 F.3d 1255, resulted in summary judgment in favor of defendants. The Ninth Circuit held that the district court's refusal to reconsider its ruling on the basis of 21,000 pages of documents not previously presented to the court "may have been harsh," but, under the circumstances, was not an abuse of discretion. 5 F.3d at 1263.

Simply put, Judge Timony's discovery order was not an abuse of discretion, and Rambus has presented nothing here that justifies reconsideration of Judge Timony's Order. To reconsider Judge Timony's ruling would be inefficient, and likely encourage Rambus to seek reconsideration of every order Judge Timony issued. "It is hard to imagine a less efficient means to expedite the resolution of cases than to allow the parties unlimited opportunities to seek the same relief simply by conjuring up a new reason to ask for it." Potter, 199 F.R.D. at 553. Should Your Honor grant Rambus's Application, "there would be no conclusion to motions practice, each motion becoming nothing more than the latest installment in a potentially endless serial that would exhaust the resources of the parties," as well as the time and "patience" of Your Honor. Id.

II. JUDGE TIMONY'S RULING REGARDING CRIME-FRAUD WAS CORRECT.

In order to make a prima facie showing that the crime-fraud exception to the attorney-client privilege applies, the moving party must demonstrate that there is "reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme." United States v. Martin, 278 F.3d 988, 1001 (9th Cir. 2002) (quoting In re Grand Jury Proceedings, 87 F,3d 377, 381 (9th Cir. 1996)); see also United States v. Zolin, 491 U.S. 554, 563 (1989).

A. Judge Timony Correctly Found That Complaint Counsel Made a Prima Facie Case for the Application of the Crime-Fraud Exception

Judge Timony had ample evidence at his disposal to support his ruling that a prima facie case for the application of the crime-fraud exception had been made. Indeed, while the documentary and testimonial evidence attached to Complaint Counsel's Motion To Compel Discovery Relating To Subject Matters As To Which Rambus's Privilege Claims Were Invalidated On Crime-Fraud Grounds And Subsequently Waived ("Waiver Motion") was sufficient, Complaint Counsel also submitted additional directly relevant evidence in support of its Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence ("Motion for Default Judgment") and Motion To Compel An Additional Day Of deposition Testimony of Richard Crisp ("Crisp Motion"). This evidence clearly establishes the two elements of the crime-fraud exception, that there be prima facie evidence of fraud and that the attorney-client communications or attorney work product in question be somehow related to the alleged fraud.

1. Rambus's Communications with Its Counsel Were in Furtherance of Its Unlawful Scheme to Monopolize By Withholding Relevant Information from JEDEC, Obtaining Patents Covering Technology Incorporated In JEDEC's Standards and Enforcing Those Patents Against Industry Members

Documents and testimony reviewed by Judge Timony establish that Rambus pursued a scheme, contrary to its obligations as a JEDEC member and to duties imposed under the patent and antitrust laws, to continue to prosecute existing patent applications containing claims covering, and to amend pending patent applications to add claims to cover, technologies under consideration by JEDEC, all without informing JEDEC, and later to enforce its patents against the industry in order to collect royalties.

At the time Rambus was a member of JEDEC, the EIA Legal Guides (which also applied to JEDEC) established a "basic rule" that standardization programs conducted by the organization "shall not be proposed for or indirectly result in ... restricting competition, giving a competitive advantage to any manufacturer, [or] excluding competitors from the market." EIA Legal Guides, March 14, 1983, JEDEC0009277-9285 at JEDEC0009282 **[Tab 1]** [quoted in Complaint, ¶ 19.] Consistent with this commitment, JEDEC has sought to avoid, where possible, use of patented technologies in its standards, and has imposed an obligation on all JEDEC participants that they "inform the meeting of any knowledge they may have of any patents, or pending patents, that might be involved in the work [JEDEC is] undertaking." JEDEC Manual of Organization and Procedure JEP21-I, October 1993, JEDEC0009323-9351 at JEDEC0009341 **[Tab 2]** [quoted in Complaint, ¶ 21; see also Complaint, ¶ 20]. Rambus representatives understood that participating in JEDEC, while failing to disclose the existence of relevant patent applications, created a risk that the patents might be rendered unenforceable. Lester Vincent, Handwritten Notes, March 27, 1992, R203254 **[Tab 3]**; May 4, 1993, Letter from Vincent to Crisp, Attaching Presentation Entitled "Patents and Industry Standards," V1231 at V1242 **[Tab** 4]**; ***** [Tab 5]**; Vincent Dep. (4/11/01) 320:6-321:5, Rambus v. Infineon and** Vincent Dep. (3/14/01) 191:3-192:16, 198:14-23, Rambus v. Infineon **[Tab 6]**; Diepenbrock Dep. (3/14/01) 147:22-148:25, Rambus v. Infineon and Diepenbrock Dep. (4/11/01) 262:8-263:12, Rambus v. Infineon **[Tab 7]**.

In February and April 1992, Billy Garrett and Richard Crisp respectively observed proposals at JEDEC to incorporate various technologies into the proposed SDRAM standard. Shortly thereafter, Richard Crisp apparently discussed with his boss, Allen Roberts, Rambus's Vice President responsible for intellectual property, a proposal to add claims to Rambus's pending patent applications covering certain of the technologies that had been presented at JEDEC. Mr. Roberts, in turn, met with outside patent counsel Lester Vincent to discuss adding claims covering these technologies to Rambus's pending patent applications. See Lester Vincent, Handwritten Notes, May 2 [or 12], 1992, R202989 **[Tab 8]**. Shortly thereafter, Rambus CEO Geoff Tate prepared a draft five year business plan, in which he wrote:

For about 2+ years a JEDEC committee has been working on the specifications for a Synchronous DRAM. No standard has yet been approved by JEDEC. Our expectation is a standard will not be reached until end of 1992 at the earliest ... [W]e believe that Sync DRAMs infringe on some claims in our filed patents; and that there are additional claims we can file for our patents that cover features of Sync DRAMs. Then we will be in position to request patent licensing (fees and royalties) from any manufacturer of Sync DRAMs.

June 1992 Draft of Rambus Business Plan, R46394 at R46408-410 **[Tab 9]**.

In the final version of the business plan, prepared in September 1992, Mr. Tate further explained:

Rambus expects the patents will be issued largely as filed and that companies will not be able to develop Rambus-compatible or Rambus-like technology without infringing on multiple fundamental claims of the patents .... Rambus' patents are likely to have significant applications other than for the Rambus Interface.

September 1992 Rambus Business Plan, R169923 at R169929 **[Tab 10]**. Shortly thereafter, Richard Crisp was asked to address Rambus's Board of Directors concerning "the SDRAM status at JEDEC, the Rambus patent strategy and system level difficulties with SDRAMs." See Rambus Board of Directors Minutes, October 22, 1992, R28106 at R28107 **[Tab 11]**.

While Richard Crisp and other Rambus representatives were attending JEDEC meetings on a regular basis, Mr. Crisp and others at Rambus were working to broaden Rambus's pending patent applications to cover the technologies discussed in JEDEC. Vincent Notes, September 25, 1992, R203940 **[Tab 12]** ("- What to include in divisional applications: ... 2) DRAM - programmable latency via control reg[ister] ... => so cause problem w/synch[ronous] DRAM ... 4) using phase lock loops on DRAM,"); Id. at R203943 ("Richard => will get me copy of the ... synch DRAM spec[ification]"); *** **[Tab 13]** ***; Fred Ware e-mail, June 18, 1993, R202996 [FN10] **[Tab 14]**. The effort to develop patent claims that could be enforced against synchronous DRAMs reached the highest levels of the company. See e.g., Handwritten Notes of Vincent, dated January 10, 1994 at R203314 **[Tab 16]** (reporting on conference with Tate and others concerning "Enforcement: Sync DRAMs ... - config registers, - programmable latency, - PLLs").

On multiple occasions, Richard Crisp observed discussions within JEDEC of technologies that he believed were covered by claims in Rambus's pending patent applications; although he promptly informed officers and employees of Rambus on each occasion, he did not inform JEDEC. Richard Crisp e-mail, September 14, 1994, at R69546 **[Tab 17]** ("NEC PROPOSES PLL ON SDRAM!!!"); Crisp e-mail, May 24, 1995, R69579 **[Tab 18]** ("As far as intellectual property issues go here are a few ideas: ... DRAM with programmable access latency"). Indeed, a number of documents written while Rambus was still participating in JEDEC reflect *** [Tab 19] *****; Crisp e-mail, May 24, 1995, R69579** [Tab 18] **("I think it makes** sense to review our current issued patents and see what we have that may work against them"). *** **[Tab 20]** *** **[Tab 21]** *** **[Tab 22]** ***; Tate Trial testimony. [FN11]

After it withdrew from JEDEC, Rambus continued with its scheme of developing and prosecuting patent applications in order to obtain issued patents containing claims covering the JEDEC standards. Rambus continued to prosecute its pending Application No. 07/847,692, for example; this application, which contained claims relating to on-chip PLL/DLL technology, issued as U.S. Patent No. 5,657,481 in August 1997. Rambus also filed new patent applications intended to cover the same technologies that had been the subject of earlier patent applications. For example, in February 1997, Rambus filed Application No. 08/798,525, specifically described as a continuation of Application Nos. 07/847,961 and 08/469,490, both of which were pending while Rambus was a member of JEDEC and which had been amended to add claims relating to technologies discussed at JEDEC. Following amendment, the '525 application issued as U.S. Patent No. 5,954,804, which Rambus asserted in its patent litigation against Hitachi, Infineon, Micron and Hynix. See Response of Complaint Counsel to Rambus Inc.'s Opposition to Complaint Counsel's Motion to Compel, January 28, 2003, at 8-10.

2. Rambus's Communications with Counsel Were Directly Related to Its Illegal Scheme to Monopolize and Maintain a Monopoly in the SDRAM Technology Markets

Throughout the period from 1992 to the present, Rambus communicated with its lawyers in furtherance of its illegal scheme. Documents and testimony reviewed by Judge Timony confirm that Rambus's lawyers were centrally involved in these events.

Rambus outside counsel Lester Vincent and in-house counsel Anthony Diepenbrock were fully aware that Rambus intended to enforce its patents against industry members in the future, *** **[Tab 24]** ***. They also provided legal advice with respect to Rambus's participation in JEDEC, and both recommended that Rambus not participate in JEDEC because of concerns about equitable estoppel. Lester Vincent, Handwritten Notes, March 27, 1992, R203254 **[Tab 3]**; May 4, 1993, Letter from Vincent to Crisp, Attaching Presentation Entitled "Patents and Industry Standards," V1231 at V1242 **[Tab 4]**; *** **[Tab 5]**; Lester Vincent, Handwritten Notes, undated, R203881 **[Tab 25]**; Vincent Dep. (4/11/01) 320:6- 321:5, Rambus v. Infineon and Vincent Dep. (3/14/01) 191:3-11, 198:14-28, Rambus v. Infineon **[Tab 6]**; Diepenbrock Dep. (3/14/01) 147:22-148:25, Rambus v. Infineon and Diepenbrock Dep. (4/11/01) 262:8-263:12, Rambus v. Infineon **[Tab** 7]**.**

Likewise, Lester Vincent and his law firm, whether with complete knowledge or not, were central to Rambus's efforts to broaden its pending patent applications to cover technologies that Rambus representatives had observed being presented at JEDEC meetings. Lester Vincent, Handwritten Notes, May 2 [or 12], 1992, R202989 **[Tab 8]**; Vincent Notes, September 25, 1992, R203940 **[Tab** 12]**; Fred Ware e-mail, June 18, 1993, R202996** [Tab 14]**; Letter from Vincent to** Farmwald, Roberts and Crisp, April 22, 1993 at R171671 **[Tab 26]**; Letter from Roberts to Barth, Ware and Dillon, attaching draft of '646 amendment, August 1, 1994 at R204436 **[Tab 27]** ("This is Lester's attempt to write claims for the MOST/SDRAM defense"); Amendment to 07/847,961 Patent Application, filed January 6, 1995 at R14454 **[Tab 28]**; Preliminary Amendment to 08/469,490'490, filed June 23, 1995 at R14496 **[Tab 29]**.

After Rambus withdrew from JEDEC, Lester Vincent and his firm continued to prosecute the previously filed patent applications, and also filed new continuation applications as well as amendments to the existing applications.

Lester Vincent's firm, for example, continued to prosecute pending Application No. 07/847,692, which resulted in the issuance of U.S. Patent No. 5,657,481 in August 1997. When Neil Steinberg arrived at Rambus in 1998, he took over prosecution of the existing patent applications and also drafted and filed new patent applications covering the same technologies that JEDEC representatives had seen discussed at JEDEC. Neil Steinberg took over prosecution of Application No. 08/798,525, for example, which resulted in the issuance of U.S. Patent No. 5,954,804, which Rambus asserted against Hitachi, Infineon, Micron and Hynix in their respective patent litigations. Indeed, Neil Steinberg was largely responsible for completing the efforts of Rambus to obtain issued patents containing claims covering the technologies at issue in this matter, patents which Rambus used to threaten multiple industry members and which it asserted against Hitachi, Infineon, Micron and Hynix in 2000.

When he arrived at Rambus, Neil Steinberg also took over responsibility for implementing Rambus's patent enforcement plan. Rambus's privilege log lists numerous communications among Neil Steinberg, Joel Karp, Lester Vincent and various foreign attorneys regarding amendment and prosecution of Rambus's U.S. and foreign patent applications, Rambus's "Strategic Patent Acquisition Program," and Rambus's IP strategy. Indeed, documents listed on Rambus's privilege log indicate that, in late 1998 and 1999 alone, Neil Steinberg made at least 7 presentations to Rambus's Board of Directors and 6 presentations to Rambus executives regarding Rambus's patent strategy, licensing, intellectual property and litigation strategies.

In total, Rambus's privilege log lists over 1600 documents that Rambus has not produced. See In the Matter of Rambus Inc. Privilege Log **[Tab 30]**. The vast majority of these documents relate to Rambus's patent or IP strategy or the prosecution of U.S. or foreign patent applications. The entries on this privilege log highlight the central role played by Rambus's lawyers in Rambus's scheme to broaden the claims contained in its patent applications and in Rambus's planning of its "patent strategy" and the ultimate enforcement of its patents. [FN12] Likewise, this privilege log demonstrates the continuity of both Rambus's patent prosecution efforts and its strategic planning from the early 1990's through the present. [FN13]

3. Rambus Misinterprets the Federal Circuit Ruling

Rambus attempts to argue that there can be no prima facie showing of fraud because of the Federal Circuit ruling. This misinterprets the Federal Circuit decision on two grounds. The Federal Circuit ruling was limited to the theory of fraud advanced by Infineon in that case as well as by the facts contained in the record in that case. In the present matter, both the allegations of the Complaint and the facts developed to date support a prima facie finding of fraud.

First, as explained at pages 1-2 above, the Complaint in this matter does not allege mere silence, but an on-going pattern of conduct intended to mislead and deceive JEDEC members. As a result, Rambus's arguments with respect to the strict need to find a specific duty, while they may have been appropriate in the Infineon litigation, are misplaced here. Precedent clearly establishes that there is no need to search for a strict duty to disclose if the conduct at issue goes beyond silence, and includes conduct such as statement of half-truths or concealment of material information. See United States v. Keplinger, 776 F.2d 678, 697 (7th Cir. 1985) ("Omissions or concealment of material information can constitute fraud ... without proof of a duty to disclose the information pursuant to a specific statute or regulation."); see also Meade v. Cedarapids, Inc., 164 F.3d 1218, 1222 (9th Cir. 1999) ("One who makes a representation that is misleading because it is in the nature of a 'half-truth' assumes the obligation to make a full and fair disclosure of the whole truth.") (quoting Gregory v. Novak, 121 Ore. App. 651, 855 P.2d 1142, 1144 (Or. Ct. App. 1993)). [FN14] Thus, Rambus's arguments about the need to find a strict duty, partially based on the Federal Circuit ruling, do not apply to the allegations set forth in the Complaint in this matter.

Even if it were necessary to find a strict duty to speak, the Federal Circuit ruling is not relevant to the factual record of this case. First, Complaint Counsel expects to have a large volume of evidence regarding the JEDEC duty to disclose that was not part of the Infineon record, and thus not available to the Federal Circuit. Second, even if Your Honor were to find, based on the full factual record of this case, that the duty found by the Federal Circuit based on the Infineon record is also consistent with all of the evidence in this matter, Complaint Counsel expects to present evidence (which was not presented in the Infineon litigation) that Rambus had patent applications pending at the time it was a member of JEDEC that would satisfy the federal Circuit's standard.

For these reasons, the Federal Circuit ruling is not applicable to the question of whether there is prima facie evidence, for purposes of the crime-fraud exception, that Rambus engaged in a fraudulent scheme and that its attorneys' communications were related to that scheme.

B. Rambus's Requests For A Hearing And In Camera Review Are Inapposite Where Rambus Has Had Full And Fair Opportunity For Briefing, The Evidence Has Been Carefully Reviewed And The Elements of the Crime-Fraud Exception Are Clearly Satisfied

In its motion, Rambus relies heavily on the absence of certain formalities, namely a hearing and an in camera review of documents. Rambus incorrectly implies that these are somehow necessary steps, and in doing so, misstates the procedure for determining whether the crime-fraud exception applies. The moving party must establish a prima facie showing that the communications with the lawyer were "'in furtherance of an intended or present illegality and that there is some relationship between the communications and the illegality.'" United States v. Bauer, 132 F.3d 504, 509 (9th Cir. 1997) (quoting United States v. Chen, 99 F.3d 1495, 1503 (9th Cir. 1996)). As discussed in detail above in Section II., Complaint Counsel has clearly made the prima facie showing that Rambus was engaged in a fraud and that it had and continues to have communications with its attorneys in furtherance of that fraud.

Thus, the crime-fraud exception requires prima facie evidence of a fraudulent scheme and a connection between the attorney communications or other privileged material and that fraudulent scheme. The crime-fraud exception does not, however, require that this prima facie showing be made in any particular manner. Specifically, there is no requirement of an oral hearing; so long as the requisite prima facie showing is made, a showing based on documentary evidence and sworn testimony is sufficient. In re Vargas, 723 F.2d 1461, 1467 (10th Cir. 1983); Zolin, 491 U.S. at n.7 (quoting Gardner, The Crime or Fraud Exception to the Attorney Client Privilege, 47 A.B.A.J. 708, 710-711 (1961)("In the context of the fraud exception, however, the standard is used to dispel the privilege altogether without affording the client an opportunity to rebut the prima facie showing.")); In re September 1975 Grand Jury Term, 532 F.2d 734, 737-738 (10th Cir. 1976).

Rambus's insistence on an oral hearing elevates form over substance. Rambus has had more than ample opportunity to be heard on this issue. In addition to two rounds of briefing before Judge Timony, Rambus had full opportunity to brief and argue the issue of whether the crime-fraud exception was satisfied in both the Infineon and Micron litigations, and in fact attached portions of the relevant transcripts in these two cases to its filings in this matter. In short, Rambus has been heard on this issue; Rambus has not established that oral argument would add anything to the consideration that has already been given to this issue.

Rambus's insistence on in camera review is similarly misplaced. If a moving party is able to show some evidence of a fraudulent scheme and a connection between the attorney communications at issue and the fraudulent scheme, but is unable fully to establish a prima facie case, in camera review of certain materials may be appropriate. This permits the court to determine, based on a review of all the evidence, whether there is in fact prima facie evidence of a fraudulent scheme and a connection between the attorney communications and that scheme. See, e.g., Zolin, 491 U.S. at 574-75 (1989) (an in camera review of documents to a party unable to establish a prima facie case is appropriate if the party shows facts adequate to support a good-faith belief by a reasonable person that such a review may reveal evidence to establish that the crime-fraud exception applies); Haines v. Liggett, 975 F.2d 81, 96 (3rd Cir. 1992) ("For in camera inspection, it would be sufficient for the district court, in its discretion, to consider only the presentation made by the party challenging the privilege. The court may decide on this submission alone whether a factual basis is present to support a good faith belief by a reasonable person that the materials may reveal evidence of a crime or fraud.") United States v. de la Jara, 973 F.2d 746, 748 (9th Cir. 1992).

Here, there is no need for such a review. As explained above, there is ample evidence to support Judge Timony's ruling that Complaint Counsel have established a prima facie case of the existence of a fraudulent scheme, that this on-going fraud continued post-June 1996 with respect to the RAM patents it held and had applied for, and that discovery of Rambus's attorneys' involvement in this scheme is appropriate. Even if, however, Rambus were correct that some form of judicial or in camera review of certain discovery materials were appropriate to confirm, for example, that there was a relationship between attorney communications and the fraudulent scheme at issue, such review has already occurred. Judge Timony reviewed numerous examples of formerly privileged materials, including handwritten notes of Rambus's outside patent attorney, Lester Vincent, communications between Mr. Vincent and representatives of Rambus, internal communications within Rambus reflecting conversations with Mr. Vincent, and testimony of Mr. Vincent, in-house counsel Mr. Anthony Diepenbrock, and others concerning legal advice provided by Messrs. Vincent and Diepenbrock. These materials establish beyond doubt that Mr. Vincent and his law firm, whether knowingly or not, were integrally involved in Rambus's scheme to broaden its patents to cover technologies under consideration by JEDEC for inclusion in its standards, and that Messrs. Vincent and Diepenbrock provided advice relating to the potential enforceability of Rambus's patents with respect to JEDEC members. Furthermore, the combination of the formerly privileged material from before June 1996, non-privileged materials from post-June 1996 and Rambus's privilege log clearly establish that Mr. Vincent and in-house attorney Neil Steinberg were involved in continuing efforts after June 1996 to broaden Rambus's patents to cover technologies under consideration by JEDEC. Thus, the safeguards provided by an in camera review have already been satisfied here.

III. JUDGE TIMONY'S RULING SHOULD ALSO BE UPHELD ON GROUNDS OF WAIVER.

Independently of the discussion of the crime-fraud exception above, Judge Timony's ruling can, and should, be upheld because Rambus waived any attorney-client privilege it may have had by voluntarily turning over documents to Hynix. [FN15] Rambus did not, and does not, dispute that it provided to Hynix, its adversary in civil litigation, documents and testimony as to which it once claimed privilege. Judge Timony found that Rambus's disclosure to Hynix was voluntary. In his February 28, 2003 Order, Judge Timony stated:

While disclosures by Rambus in Hynix apparently tracked the judicially compelled disclosures of Infineon and Micron, Rambus's disclosures to an adversary in Hynix are nonetheless voluntary. (citations omitted). While the confidentiality agreement between Rambus and Hynix eliminated the need for judicial intervention, the bottom line is that through the agreement in Hynix Rambus tactically attempted to have its cake and eat it too by: (1) producing the discovery materials sought by Hynix without incurring (based on the results in Infineon and Micron) a probably third adverse ruling by the Hynix court; and (2) attempting to preserve the privileged nature of the documents it produced to Hynix without judicial compulsion." p. 1-2, fn. 1.

Rambus has not challenged that finding. This undisputed finding by Judge Timony establishes that Rambus has waived any privilege that it once might have sought to assert.

As explained in Complaint Counsel's January 28, 2003 Response, [FN16] a waiver of the privilege in an attorney-client communication extends "to all other communications relating to the same subject matter." [FN17] The scope of Rambus's waiver of attorney-client privilege extends not just to the specific documents that were disclosed, but to the subject matter of what was disclosed.

As noted above, Rambus's fraudulent monopolization scheme continued long after its departure from JEDEC. The success of Rambus's scheme depended upon Rambus continuing to prosecute patent applications before the Patent and Trademark Office and obtaining issued patents covering technologies incorporated in the JEDEC standards. Only after successfully prosecuting these patent applications and obtaining these patents could Rambus monopolize the technology markets in question and collect monopolistic royalties, or threaten to sue or in fact sue SDRAM and DDR-SDRAM manufacturers for patent infringement. Therefore, Rambus's waiver of the privilege extends to the entire subject matter of Rambus's efforts to broaden its patents to cover technologies used in JEDEC standards.

In the documents Rambus produced to Hynix, Rambus detailed its efforts to broaden its patents to cover the technologies used by JEDEC. See supra pp. 12-15. Rambus officers and employees, as well as its in-house and outside counsel, testified regarding communications involving in-house and outside counsel. Id. Rambus's waiver of privilege extends to all communications on the subject, regardless of whether specific consultations took place before or after Rambus left JEDEC. Thus, Judge Timony's ruling should also be upheld on the ground of waiver of privilege as well as on the ground of the crime-fraud exception.

2003 WL 1866415 (F.T.C.)

V. CONCLUSION.

For the reasons stated herein, Respondent's Application for Review of the February 28, 2003 Order Granting Counsel's Motion to Compel Discovery Relating to Subject Matters as to Which Rambus's Privilege Claims Were Invalidated on Crime-fraud Grounds and Subsequently Waived, Pursuant to Rule 3.23(b) Or, in the Alternative, Request for Reconsideration of That Order, should be denied.

Respectfully Submitted,
Of Counsel:

Malcolm L. Catt

Robert P. Davis

Suzanne T. Michel

Jerome Swindell

John C. Webber

Cary E. Zuk

M. Sean Royall

Geoffrey D. Oliver

Bureau of Competition

Federal Trade Commission

Washington, D.C. 20580

(202) 326-3663

(202) 326-3496 (Facsimile)

Counsel Supporting the Complaint

FN1. In re Rambus Inc., Dkt. No. 9302, 2002 WL 31840363 (F.T.C.), Rambus Inc.'s Answer to Non-Party Mitsubishi Electric & Electronics USA, Inc.'s Interlocutory Appeal of Order Denying Motion to Quash Subpoena or in the Alternative for Protective Order (Nov. 24, 2002), at 1, (quoting In re Automotive Breakthrough Sciences, Inc., Dkt. No. 9275, 1996 FTC LEXIS 367 *5 (Aug. 16 1996)); see also In re Gillette Co., 98 F.T.C. 875, 875 (Dec. 1, 1981); In re Schering-Plough Corp., Dkt. No. 9297, 2002 WL 31433937 (F.T.C.), Order Denying Motion of American Home Products Corporation to Stay Order, for Certification for Interlocutory Appeal and Application for Full Commission Review (Feb. 12, 2002)(citing Gillette). Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. Bristol- Meyers Co., 90 F.T.C. 273 (1977); Schering-Plough, supra; In re Int'l Assoc. of Conf. Interpreters, Dkt. No. 9270, 1995 WL 17003147 (F.T.C.), 1995 FTC LEXIS 452, Order Denying Motion to Certify Interlocutory Appeal (Feb. 15, 1995).

FN2. In re Thompson Medical Co., 101 F.T.C. 385 (Mar. 11, 1983); see also In re Ford Motor Co., Dkt.

No. 9073, Order Denying Application for Review, 91 F.T.C. 502 (Mar. 16, 1978) (even if order denying respondent's motion to stay the proceedings and to consider other motions were subject to interlocutory review under Section 3.23, "it would be reversible only if there had been a clear abuse of discretion by the ALJ.").

FN3. See also Schering-Plough, supra (quoting Breakthrough Sciences); In re Hoechst Marion Roussel, Inc., Dkt. No. 9293, 2000 FTC LEXIS 155, *16, Order Denying Motion for Interlocutory Appeal (Oct. 25, 2000) (quoting Breakthrough Sciences).

FN4. See, e,g, In re Atlantic Richfield Co., 1978 FTC LEXIS 568, *1 (Oct. 3, 1978) (order requiring Complaint Counsel to return documents to respondent which respondent had inadvertently produced would not involve a controlling question of law or policy); In re R.J. Reynolds Tobacco Co., 1998 WL 34060098 (F.T.C.) (Sept. 24, 1998) (Order Denying Respondents' Motion to Compel Complaint Counsel to Provide a More Complete Privilege Log did not involve a controlling question of law or policy as to which there is substantial ground for difference of opinion).

FN5. The court in Pritchard-Keang did not find a controlling question of law, and the opinion does not discuss why interlocutory review was proper under § 1292(b).

FN6. The mandamus cases cited by Rambus likewise are inapposite. The issuance of a writ of mandamus requires a showing "(1) that petitioner have no other 'adequate means to attain the [desired] relief,' and (2) that petitioner meet its burden of showing that its right to the writ is 'clear and indisputable.'" Haines v. Liggett Group Inc., 975 F.2d 81, 89 (3rd Cir. 1992), quoting Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976)). Further, once these two prerequisites are met, "the court's decision whether to issue the writ is largely one of discretion." Haines v. Liggett, 975 F.2d at 89, citing Kerr, 426 U.S. at 403. Thus, a petition for a writ of mandamus does not require any showing that the issue involves a "controlling question of law." Nevertheless, Rambus fails to satisfy even the standards for a writ of mandamus. See, e.g., In re Rambus Inc., 7 Fed.Appx. 925, 2001 WL 392085 (Fed. Cir. 2001) (cited by Rambus in its motion) (holding that Rambus had not shown entitlement to a writ of mandamus).

FN7. In Gibson, respondents filed a direct appeal to the Commission after the ALJ refused to certify the matter; and the Commission accepted the appeal because the ALJ did not have authority to rule on the motion in question (to dismiss for lack of public interest).

FN8. We also note the recent observation of Judge Posner, then sitting by designation as a trial judge, that a judge succeeding another trial judge midstream during a case "may not reconsider his predecessor's rulings with the same freedom that he may reconsider his own rulings." SmithKline Beecham Corp. v. Apotex Corp., No. 98 C 3952 (N.D. Ill. Mar. 3, 2002), Slip Op. at 3. The law of the case doctrine in these circumstances "reflects the rightful expectation of litigants that a change of judges mid-way through a case will not mean going back to square one." Id. Thus, the successor judge "is not free to [alter rulings of the previous judge] merely because he has a different view of the law or facts from the first judge." Id., quoting Williams v. C.I.R., 1 F.3d 502, 503 (7th Cir. 1993).

FN9. See also United States v. Roberts, 978 F.2d 17. Roberts (cited by respondent) was a criminal case in which the ruling in question called for the suppression of evidence that the defendant manufactured a controlled substance with intent to distribute.

FN10. Crisp testified at the Infineon Trial:

Q And the ideas that you had to add claims to the Rambus patent applications for the mode register and for programmable CAS latency, those were ideas that were spurred on by your attendance at the JEDEC meeting in April and May and participating in this SDRAM standardization effort, right?

A Yeah. Those were our inventions. We had invented those for the RDRAM ....

THE COURT: I think the question, Mr. Crisp, is was it your objective in meeting with the lawyer to add those claims if they weren't already there?

THE WITNESS: That's correct.

Testimony of Richard Crisp, Infineon Trial, May 2, 2001 at 132-134 **[Tab 15]**.

FN11. At the recent Infineon trial, Mr. Tate testified:

Q '91, '92, '93, '94, '95, Richmond Crisp and the other representatives of Rambus are sitting at JEDEC meetings, they were watching standardization proposals, they are reporting back to you and everybody else at Rambus about the futures of the SDRAM standardization effort, and it is those features that Rambus was trying to cover in the claims that it was filing; don't you know that, sir? ...

A: Okay. Yes.

4/25/01 Infineon (Tate) Trial Tr. 143:15-144:1 **[Tab 23]**.

FN12. As described in detail in Complaint Counsel's Motion for Default Judgment, Rambus engaged in the indiscriminate destruction of a large volume of documents in order to mitigate the risks of its failure to disclose relevant information while it was a member of JEDEC. As described in that motion, various communications involving Rambus's counsel also related to Rambus's implementation of its willful, bad faith document destruction policy. See generally, Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus, Inc.'s Willful, Bad-Faith Destruction of Material Evidence.

FN13. Rambus has refused to produce not only all communications involving attorneys dated after June 1996, but also almost all communications involving foreign counsel or relating to foreign patent applications between 1991 and June 1996. Nothing in Judge Payne's or Judge McKelvie's orders requiring Rambus to produce attorney-related materials regarding Rambus's efforts to broaden its patent applications excluded foreign patent applications. Complaint Counsel informed counsel for Rambus in a meet-and-confer conference held shortly after Judge Timony's ruling was issued that it believes there are no legitimate grounds to withhold these materials and it expects these materials to be produced promptly. Rambus subsequently filed the subject Motion for Reconsideration, but has yet to inform Complaint Counsel whether it will produce these materials.

FN14. See also United States v. Autuori, 212 F.3d 105, 119 (2d Cir. 2000) (citing Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V., 68 F.3d 1478, 1484 (2d Cir. 1995)) ("A duty to disclose can also arise in a situation where a defendant makes partial or ambiguous statements that require further disclosure in order to avoid being misleading.").

FN15. While Judge Timony did not explicitly address whether or not Rambus waived its attorney-client privilege in voluntarily submitting certain documents to Hynix, Your Honor may uphold his ruling based on any ground supported in the record, even if it is different from Judge Timony's grounds. See, e.g. Ruiz v. Estelle, 161 F.3d 814 (5th Cir. 1998) (citing United States ex rel Thompson v. Columbia/HCA Health Care Corp., 125 F.3d 899 (5th Cir. 1997) (appeals court may uphold judgment on any proper ground, even though ground was not relied upon by district court)); United States v. Martinez, 76 F.3d 1145 (10th Cir. 1996) (citing United States v. Willie, 941 F.2d 1384, 1396 n.9 (10th Cir. 1991) (court may uphold evidentiary rulings on any ground supported by the record, even if not relied upon by the district court); United States v. Sandoval, 29 F.3d 537, 542 n.6 (10th Cir. 1994) (court may uphold district court's decision on any ground legally supported by the record); Garcia v. Bunnell, 33 F.3d 1193, 1195 (9th Cir. 1994); United States v. Lewis, 991 F.2d 524, 526 n.2 (9th Cir. 1993).

FN16. These arguments are explained at great length in Response of Complaint Counsel to Rambus Inc.'s Opposition to Complaint Counsel's Motion to Compel (January 28, 2003).

FN17. In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989) (quoting In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982)); see also Chubb Integrated Sys., 103 F.R.D. 52, 63 (D.D.C. 1984) ("Actual disclosure of each specific document in issue is not the only means by which a waiver can occur. Voluntary production of certain privileged documents implies a waiver of all communications on the same subject.") (emphasis added).

FTC

END OF DOCUMENT

LEXSEE 2003 FTC LEXIS 49

In the Matter of RAMBUS INC., a corporation

Docket No. 9302

Federal Trade Commission

2003 FTC LEXIS 49

ORDER DENYING RESPONDENT'S APPLICATIONS FOR REVIEW OF FEBRUARY 26, 2003, ORDER (GRANTING COMPLAINT COUNSEL'S MOTION FOR COLLATERAL ESTOPPEL) AND FEBRUARY 28, 2003, ORDER (GRANTING COMPLAINT COUNSEL'S MOTION TO COMPEL DISCOVERY RELATING TO SUBJECT MATTERS AS TO WHICH RESPONDENT'S PRIVILEGE CLAIMS WERE INVALIDATED ON CRIME-FRAUD GROUNDS AND SUBSEQUENTLY WAIVED); DENYING RESPONDENT'S REQUEST FOR RECONSIDERATION OF THE FEBRUARY 26 ORDER; AND GRANTING RESPONDENT'S REQUEST FOR RECONSIDERATION OF THE FEBRUARY 28 ORDER

March 26, 2003

ALJ: [*1]

Stephen J. McGuire, Chief Administrative Law Judge

ORDER:

On February 26, 2003, the Hon. James P. Timony, presiding in the above-captioned proceeding, entered an Order granting Complaint Counsel's Motion for Collateral Estoppel ("February 26 Order"). Thereafter, on February 28, 2003, Judge Timony entered an Order granting Complaint Counsel's Motion to Compel Discovery Relating to Subject Matters as to which Respondent's (Rambus, Inc.), privilege claims were invalidated on crime-fraud grounds and subsequently waived ("February 28 Order"). Respondent subsequently filed separate Applications for Review that the Court certify the February 26 and 28 Orders for immediate interlocutory review by the Commission pursuant to Commission Rule 3.23(b), 16 C.F.R. § 3.23(b). In the alternative, Respondent filed Requests for Reconsideration of both the February 26 and 28 Orders seeking reversal. Respondent argues that Judge Timony "made grievous errors" while "trying hard to 'clear the decks'" of open motions in this matter prior to his retirement in late February. Complaint Counsel asserts that Judge Timony's initial rulings were correct and that Respondent has failed to provide sufficient reason why the **[*2]** Court should reconsider those rulings or permit an interlocutory appeal of these issues to the Commission. For the reasons set forth below, Respondent's: Applications for Review are **DENIED**; Request for Reconsideration of the February 26 Order is **DENIED**; and Request for Reconsideration of the February 28 Order is **GRANTED**.

I. Background

A. Collateral Estoppel Motion

On February 12, 2003, Complaint Counsel filed a Motion Seeking Recognition of the Collateral Estoppel Effect of Prior Factual Findings that Respondent Rambus Inc. Destroyed Material Evidence in Anticipation of Future Litigation. Complaint Counsel asserted that, based on the decisions of the District Court for the Eastern District of Virginia in Rambus Inc. v. Infineon Technologies AG, 155 F.Supp.2d 668 (E.D. Va. 2001)(Infineon I), the Federal Circuit in Rambus Inc. v. Infineon Technologies AG, 318 F.3d 1081 (4th Cir. 2003)(Infineon II), and the principle of collateral estoppel, it was established definitively that Respondent's document retention policy was created in anticipation of patent infringement litigation concerning patents relating to Respondent's participation, from 1991-96, in an **[*3]** industry standard-setting organization, the Joint Electronics Device Engineering Council ("JEDEC"), and was intended to destroy documents that would be harmful in such litigation. Respondent, in its Opposition, asserted that the Federal Circuit's decision in Infineon II fully vacated Infineon I and, therefore, all findings from Infineon I were a nullity and without any collateral estoppel effect in the instant matter. The February 26 Order by Judge Timony granted Complaint Counsel's motion and gave collateral estoppel effect to three findings of fact made by the district court in Infineon I. n1

n1 The three findings of fact held to be subject to collateral estoppel are:

1. When "Rambus instituted its document retention policy in 1998," it did so, "in part, for the purpose of getting rid of documents that might be harmful in litigation."

2. Rambus, at the time it implemented its "document retention policy," "clearly . . . contemplated that it might be bringing patent infringement suits during this timeframe" if its efforts to persuade semi-conductor manufacturers to license "its JEDEC-related patents" "were not successful."

3. Rambus's "document destruction" was done "in anticipation of litigation."

[*4]

In Infineon I, Respondent alleged Infineon infringed on various patents relating to computer random access memory ("RAM") held by Respondent. Infineon counter-claimed alleging that Respondent committed fraud under Virginia state law by not disclosing various RAM-related patents held or applied for by Respondent while it participated in JEDEC.

During trial, the district court entered a judgment as a matter of law ("JMOL") in favor of infineon, holding infineon did not infringe on any of Respondent's patents. The court permitted the fraud counter-claims to go to the jury and the jury returned a verdict that Respondent committed fraud as to two types of RAM technology, SDRAM and DDRAM. Following post-trial motions, the district court permitted the jury verdict to stand against Rambus as to fraud concerning SDRAM. The district court granted Respondent's motion for a JMOL as to DDRAM but denied Respondent's motions for a JMOL or new trial concerning SDRAM. In sum, the district court ultimately entered a judgment holding that: (1) Infineon did not infringe any patents held by Respondent; (2) Respondent did not commit fraud with regard to DDRAM; and (3) that Respondent did commit fraud with **[*5]** regard to SDRAM.

The district court also awarded over $ 7.1 million in attorney fees to Infineon as the prevailing party in a patent infringement suit pursuant to the authority of 35 U.S.C. § 285. The district court based the award of attorney fees on three independent grounds: (1) Respondent's claim construction and infringement positions; (2) fraud as inequitable conduct; and (3) litigation misconduct by Respondent.

On appeal, the Federal Circuit, in Infineon II, affirmed-in-part, reversed-in-part, vacated-in-part, and remanded the case to the district court. The Federal Circuit reversed and vacated the JMOL on infringment claims. It also reversed the district court's denial of the Respondent's post-trial JMOL on the SDRAM fraud verdict. It affirmed the post-trial JMOL grant on the DDRAM claims.

While the district court awarded attorney fees on the three independent grounds noted above, on appeal Respondent only challenged the claim construction and fraud grounds for the award and did "not contest the district court's holding of litigation misconduct" or make a showing that the holding on this point was "clearly erroneous." Infineon II, 318 F.3d at 1106. In remanding the attorney **[*6]** fee award issue to the district court, the Federal Circuit held that while litigation misconduct could alone justify the award of attorney fees by the district court under § 285 where attorney fees are awarded solely on the basis of litigation misconduct, "the amount of the award must bear some relation to the extent of the misconduct." Id. The Federal Circuit summarized its position on the award of attorney fees and litigation misconduct by Respondent as follows:

> In sum, given this court's holdings on claim construction and fraud and the lack of the apportionment between the award and the misconduct, this court vacates the attorney fees award and remands to the district court. On remand, the district court may consider whether Infineon remains a prevailing a party, and if so, whether an award is warranted. If the court determines that an award is warranted, it will have the opportunity to set the amount of the award to redress the litigation misconduct.

Id.

B. Crime-Fraud Exception Motion

On January 7, 2003, Complaint Counsel filed a Motion to Compel Discovery Relating to Subject Matters as to Which Rambus's Privilege Claims were Invalidated on Crime-Fraud Grounds **[*7]** and Subsequently Waived. In the motion, Complaint Counsel sought to obtain documents for which Respondent asserted privilege for the time period after Rambus dropped out of JEDEC in 1996. Complaint Counsel's motion focused on the doctrine of waiver, arguing that Respondent opened the door to post -1996 documents by voluntarily producing pre-1996 documents in litigation involving Hynix. n2

n2 Rambus produced pre-1996 documents without judicial compulsion to Hynix after losing litigation on the identical issues in litigation involving Infineon and Micron. February 28 Order at n. 1.

Respondent filed its Opposition on January 21, 2003. In it, Respondent claimed that the doctrine of waiver could not serve as a basis for requiring it to produce documents after it dropped out of JEDEC in 1996. Respondent claimed it had never voluntarily produced documents for which it claimed privilege so no waiver could exist, stating that its production of documents in prior litigation involving Hynix was a "de facto" compelled production **[*8]** and that the production agreement between Respondent and Hynix preserved the privileged nature of the documents.

The February 28 Order issued by Judge Timony granted Complaint Counsel's motion and permitted the requested discovery. The Order was not based on the waiver theory advanced by Complaint Counsel. Rather, Judge Timony sua sponte based his ruling on the evidence of record on Respondent's conduct, and in particular on the resulting factual presumptions contained in the February 26, 2003 Order on Complaint Counsel's Motion for Default Judgment. The February 28 Order concluded that this evidence and these factual presumptions were a prima facie basis for concluding that Respondent was involved in fraudulent conduct after June 1996 (when Respondent dropped out of JEDEC), and, therefore, the crime-fraud exception permitted discovery by Complaint Counsel of post-June 1996 materials otherwise protected by the attorney-client or attorney work product privileges.

II. Analysis and Discussion

A. Certification for Interlocutory Appeal

Respondent seeks certification of the February 26 and 28 Orders for interlocutory review by the Commission pursuant to Commission Rule **[*9]** 3.23(b), 16 C.F.R. § 3.23(b). Applications for review of a ruling by the Administrative Law Judge may be made only if the applicant meets both prongs of a two prong test. The first prong is that the ruling must involve "a controlling question of law or policy as to which there is substantial ground for difference of opinion." 16 C.F.R. § 3.23(b). Controlling questions are "not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." In re Automotive Breakthrough Sciences, Inc., 1996 FTC LEXIS 478 at *1 (Nov. 5 1996).

The second prong is that the Administrative Law Judge must determine "that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or [that] subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b) (emphasis added). In addition, for discovery orders such as the February 28 Order, the Commission "generally disfavor[s] interlocutory appeals, particularly those seeking Commission review of an ALJ's discovery rulings." In re Gillette Co., 98 **[*10]** F.T.C. 875, 875, 1981 FTC LEXIS 2, *1 (Dec. 1, 1981). "Interlocutory appeals from discovery rulings merit a particularly skeptical reception, because [they are] particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay." In re Bristol-Myers Co., 90 F.T.C. 273, 273, 1977 FTC LEXIS 83, *1 (Oct. 7, 1977). Accord In re Gillette Co., 98 F.T.C. at 875 ("resolution of discovery issues, as a general matter, should be left to the discretion of the ALJ").

A review of the February 26 Order indicates that it does not involve "a controlling question of law or policy." On its face, the Order only involves factual questions, not ones of law or policy. Since the three factual issues given collateral estoppel effect are not dispositive of this matter, an immediate interlocutory appeal would not materially advance the ultimate termination of this dispute. Similarly, the non-dispositive nature of these three factual issues means that Respondent will not be harmed by delaying review of the February 26 Order, or any findings thereunder, until a plenary review by the Commission.

Since the Court grants Respondent's Request for Reconsideration **[*11]** of the February 28 Order, even considering certification of the Order until after the Court's reconsideration is inappropriate. However, even after the reconsideration, consistent with the Commission rulings in Bristol-Myers and Gillette, the resolution of what is ultimately a discovery issue is best left to the "administrative law judge on the scene." Moreover, an interlocutory appeal on this issue would not materially advance the ultimate termination of this dispute.

For these reasons, Respondent's Applications for Review for interlocutory appeal of the February 26 and February 28 Orders are DENIED.

B. Reconsideration

In the alternative, Respondent requests the Court to reconsider and reverse the Orders in question. Motions for reconsideration should be granted only sparingly. Karr v. Castle, 768 F. Supp. 1087, 1090 (D. Del. 1991). Such motions should be granted only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest injustice. Regency Communications, Inc. v. Cleartel Communications, Inc., 212 F.Supp.2d 1, 3 (D.D.C. 2002). Reconsideration motions are not intended to **[*12]** be opportunities "to take a second bite at the apple" and relitigate previously decided matters. Greenwald v. Orb Communications & Marketing, Inc., 2003 WL 660844 at *1 (S.D.N.Y. Feb. 27, 2003).

In this matter, there have been no intervening changes in controlling law or new evidence since the filing of the February 26 and February 28 Orders. Rather, the sole change is the reassignment of this case to the current presiding judge which occurred due to Judge Timony's retirement on February 28, 2003. As a result, this review is not to determine whether the Court agrees with the conclusions reached in these Orders or whether it might have reached a different result, but rather is specifically limited to the issue of whether either the February 26 or February 28 Order is in "clear error" or results in a "manifest injustice".

1. Collateral Estoppel Order

As stated in the February 26 Order:

> Collateral estoppel may be used to bar a party from relitigating an issue on which it has been fully heard and lost. "[A] party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merit of that claim a second **[*13]** time." Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 324-325 (1971). The purpose of the doctrine is to "protect[] adversaries from, the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and, foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. United States, 440 U.S. 147, 153 (1979), accord Blonder-Tongue, 402 U.S. at 324-25 ("Both orderliness and reasonable time saving in judicial administration require this to be so unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of the particular case.").

February 26 Order at 2.

Respondent's memorandum in support of its motion for reconsideration cites numerous cases for the general principle that where the mandate of a circuit court vacates the decision of a district court in its entirely, the prior actions of the district court are a nullity and not a foundation for a finding of collateral estoppel. Respondent's Memorandum at pp. 7-10. This general principle is inapposite to the instant situation, however. Where a circuit court's mandate does not fully vacate **[*14]** a decision of a district court, the portions of the district court decision not vacated by the appellate court remain in effect. Molinary v. Powell Mountain Coal Co., Inc., 173 F.3d 920, 923 (4th Cir. 1999)(where a specific issue is not vacated on appeal, that issue may not be relitigated on remand and the district court judgment remains final as to that issue -- "entire mandate [to be] read in toto" to determine circuit court's intent concerning extent of vacatur); Cowgill v. Raymark Industries, Inc., 832 F.2d 798, 802 (3d Cir. 1987)("When a court of appeals reverses a judgment and remands for further consideration of a particular issue, leaving other determinations of the trial court intact, the unreversed determinations of the trial court normally continue to work as an estoppel."); Solomon v. Liberty County, 957 F.Supp. 1522, 1554-55 (N.D. Fla. 1997)(a mandate only vacating part of a district court's decision is limited in nature and does not nullify all prior proceedings); GAF Corp. v. Eastman Kodak Co., 519 F.Supp. 1203, 1212-13 (S.D.N.Y. 1981)(finality sufficient for law of the case is a sufficient basis for collateral estoppel). See also Restatement (2d) of Judgments § 13 **[*15]** ("For purposes of issue preclusion . . . 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.").

Particularly instructive on the principle that a partial vacatur leaves the non-vacated portions of the trial court decision in effect is The University of Colorado Foundation, Inc. v. American Cyanimid Co., 105 F.Supp.2d 1164, 1173 (D. Col. 2000)("Colorado Foundation"), which analyzes a decision by the Federal Circuit using language in its mandate similar to Infineon II. n3 In Colorado Foundation, the district court considered a situation where the appellant did not challenge certain factual findings by the district court on appeal. The Federal Circuit expressly noted that it did not, therefore review (or vacate) those factual findings. Rather, "such a mandate . . . does not 'extinguish' the underlying trial or deprive the proceedings of their 'standing' for the purposes of res judicata. It simply requires the trial court on remand to apply the correct law to the facts already determined to be sufficient to meet the correct legal standard." Colorado Foundation, 105 F.Supp.2d at 1173.

n3 The University of Colorado Foundation, Inc. v. American Cyanimid Co., 196 F.3d 1366 (Fed. Cir. 1999).

[*16]

The mandate of the Federal Circuit in Infineon II can be read as being less than a full vacatur of the district court's factual findings as to litigation misconduct by Respondent. It is clear that where an order is not fully vacated by a circuit court's mandate, those portions which are not specifically vacated are not extinguished and remain valid. Therefore, Infineon II could well be read as the Federal Circuit accepting the district court's factual findings on Respondent's litigation misconduct and issuing a mandate directing the district court on remand to determine if the litigation misconduct alone was sufficient to justify any or all of the initial $ 7.1 million attorney fee award. Given this reading, this Court cannot conclusively determine that the findings of the February 26 Order were clearly in error or represents a manifest injustice. Having failed to meet the applicable standard for review, the Respondent's Motion for Reconsideration as to the February 26 Order is DENIED.

2. Crime-Fraud Exception Discovery Order

a. The Crime-Fraud Exception Defined

In order to foster free and unfettered communications between a client and an attorney (including full disclosure **[*17]** of past wrongdoings), those communications are "zealously protected." Haines v. Liggett Group Inc., 975 F.2d 81, 90 (3d Cir. 1992). An exception to this principle is the crime-fraud exception. This protection "ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." Haines, 975 F.2d 81 at 84 (emphasis in original) quoting 8 Wigmore, § 2298.

b. The February 28 Order is Not Clearly Erroneous

The foundation of the February 28 Order is comprised of four factual presumptions set out in the February 26, 2003 Order on Complaint Counsel's Motion for Default Judgment. These presumptions arose as a result of the evidence of record in this matter as determined by Judge Timony. The presumptions include:

a. Rambus participated in JEDEC through June 1996;

b. Through this participation, Rambus knew or should have known the JEDEC standards for RAM, as developed through June 1996, would infringe on patents held or applied for by Rambus;

c. Rambus knew or should have known that these infringements could potentially lead to substantial licensing fees or damages for Rambus; and

d. Rambus, before it ceased participation **[*18]** in JEDEC in June 1996, failed to disclose the existence of the patents it either held or had applied for that could be infringed by the proposed JEDEC standards to the other JEDEC participants.

Additionally, the February 28 Order found that Respondent, after 1996, continued the process of prosecuting patents applied for prior to its dropping out of JEDEC in June 1996 that Respondent knew or should have known from its participation in JEDEC could be of significant value to it. Beyond these factual predicates, the February 28 Order relied upon the legal standard for establishing the crime-fraud exception set out in In re Vargas, 723 F.2d 1461 (10th Cir. 1983). Decided in the context of a grand jury proceeding, Vargas held that neither a hearing nor an in camera inspection of documents is mandatory prior to requiring the production of documents under the crime-fraud exception once prima facie evidence of fraud is established by the party seeking discovery. Vargas did not direct that its holding is limited only to the grand jury context and inapplicable to civil proceedings. Since Judge Timony, relying on the standard in Vargas and the factual presumptions in the February 26 Order on **[*19]** Complaint Counsel's Motion for Default Judgment, found that Complaint Counsel sufficiently established a prima facie case that Respondent used its attorneys after 1996 to prosecute patents and thereby continue fraudulent conduct that began before Respondent dropped out of JEDEC in 1996, this Court cannot conclude that the February 28 Order is clearly erroneous.

c. The February 28 Order Appears Manifestly Unjust

While Vargas remains valid, n4 the Court is persuaded by cases such as Haines and Laser Industries, Ltd. v. Reliant Technologies, Inc., 167 F.R.D. 417 (N.D. Cal. 1996), that a different procedural standard controls access to the crime-fraud exception in a purely civil context. As a result, to permit Complaint Counsel to establish a prima facie case and then to compel production of documents without providing Respondent with an adequate opportunity to reply, would represent a manifest injustice since it irrevocably could "break the seal of a highly protected privilege," Haines 975 F.2d at 96.

n4 The decision cited by Respondent, In re M&L Business Machine Co., Inc., 167 BR 937 (D. Colo. 1994), does not establish that Vargas does not apply to civil proceedings even within the Tenth Circuit. It fails on this point because M&L simply follows the reasoning of the Third Circuit in Haines without considering the import of its own Circuit Court's decision in Vargas. Though the Court might agree with the reasoning of M&L, it is unable to determine if the M&L court ignored Vargas, believed it inapplicable, or simply was unaware of it.

[*20]

In the context of a grand jury proceeding, there is a substantial societal interest in maintaining the secrecy of the grand jury's investigation. In this regard, to permit an entity the opportunity to rebut a prosecutor's unchallenged presentation of evidence sufficient to establish a prima facie basis for the crime fraud exception could prohibit the "effective detection, punishment, and deterrence of criminal acts." Laser Industries, 167 F.R.D. at 426. In contrast, in the civil context there is no conflict between the need for secrecy presented by a criminal investigation and the due process rights of the party from whom discovery is sought. As a result, once a party seeking discovery in a civil matter establishes a prima facie case that the crime-fraud exception may apply, 'the importance of the privilege . . . as well as fundamental concepts of due process require that the party defending the privilege he given the opportunity to be heard, by evidence and argument, at the hearing seeking the exception to the privilege." Haines, 975 F.2d at 97. Put another way, where a judge "undertakes to weigh evidence in a proceeding seeking an exception to the privilege, the party invoking the **[*21]** privilege has the absolute right to be heard." Id.

Here, Respondent did not have an adequate opportunity to rebut the prima facie case for invoking the crime-fraud exception that the February 28 Order found exists. This lack of an opportunity for rebuttal by Respondent was compounded by the fact that while Complaint Counsel's underlying Motion to Compel was based solely on a waiver theory, the February 28 Order was based not on the waiver issue, but rather directly on the merits of whether Respondent engaged in conduct that justifies invocation of the crime-fraud exception. n5 Assuming that Judge Timony believed, under Vargas, that Respondent had any right to be heard on the alternative theory that he used to resolve the February 28 Order, he may have determined that the evidence and argument put forward by Respondent in opposition to Complaint Counsel's Motion for Default Judgment amounted to an indirect rebuttal of the prima facie case found in the February 28 Order. Such indirect rebuttal however, does not provide the procedural due process accorded to Respondent. "The privilege [can] be given adequate protection . . . only when the [judge] undertakes a thorough consideration of **[*22]** the issue, with the assistance of counsel on both sides of the dispute." Laser Industries, 167 F.R.D. at 428.

n5 In fact, the February 28 Order never ultimately resolved the waiver issue put forward by Complaint Counsel, February 28 Order at n. 1.

d. Proceeding on the Crime-Fraud Exception Issue

In theory, the Court could resolve this issue by looking solely at the waiver theory initially advanced by Complaint Counsel in the underlying Motion to Compel. If, based on the memoranda previously submitted by the parties, the Court decides to deny the motion based on the waiver theory, it could issue an order and nothing further would be required. In re General Motors Corp., 153 F.3d 714, 716 (8th Cir. 1998). Only if the Court were inclined to grant the motion and compel production would it need to go through a Haines-type procedure. Id. Realistically, however, the genie is out of the bottle on the issue of whether Respondent's actual conduct (waiver issue aside) amounts to a basis for invoking the crime-fraud exception **[*23]** and permitting the discovery sought by Complaint Counsel. In its Opposition to the Respondent's Motion for Reconsideration of the February 28 Order, Complaint Counsel avidly advocated and adopted this theory as its own.

It would be highly inefficient to go through an entire Haines-type proceeding on a waiver theory and then potentially have to go through it a second time on another substantive theory. Rather, to promote judicial economy, the Court intends to address all potential theories in support of invoking the crime-fraud exception in a single proceeding. As a result, if Complaint Counsel wishes to advance substantive facts or other theories in support of its once more outstanding Motion to Compel, it must file a supplemental memorandum, not to exceed twenty-five (25) pages, within ten (10) days of this Order. If Complaint Counsel files a supplemental memorandum, Respondent will then have ten (10) days to file a supplemental opposition memorandum, also not to exceed twenty-five (25) pages. Replies will not be entertained.

If, after consideration of the parties' original memoranda and any supplemental briefing, the Court decides to deny Complaint Counsel's motion, an order will **[*24]** issue accordingly. If, after consideration of the parties' original memoranda and any supplemental briefing, the Court is inclined to grant Complaint Counsel's motion, it will proceed using any additional appropriate procedural safeguards it deems necessary to assure due process.

IV. Conclusion

For the reasons set forth above:

1. Respondent's Applications for Review for certification of the February 26 and February 28 Orders for interlocutory review by the Commission are **DENIED**;

2. Respondents's Motion for Reconsideration of the February 26 Order is **DENIED**; and

3. Respondent's Motion for Reconsideration of the February 28 Order is **GRANTED**.

ORDERED:

Stephen J. McGuire

Chief Administrative Law Judge

LEXSEE 1999 FTC LEXIS 14

In the Matter of R.J. REYNOLDS TOBACCO COMPANY, a corporation

Docket No. 9285

Federal Trade Commission

1999 FTC LEXIS 14

ORDER DISMISSING COMPLAINT

January 26, 1999

ORDER:
[*1]

ORDER DISMISSING COMPLAINT

On November 24, 1998, Complaint Counsel filed a motion to dismiss this matter on the grounds that the relief sought in this proceeding has now been achieved through a recent settlement between the major tobacco companies (including Respondent) and the attorneys general for 46 state and 5 other jurisdictions n1 and a modification of the annual survey on tobacco, alcohol, and drug use that is conducted by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services. The Administrative Law Judge, by order dated December 2, 1998, certified this motion to the Commission, and, by order dated December 7, 1998, stayed further action in the adjudication before him, pending the Commission's review of Complaint Counsel's motion to dismiss. Respondent's answer, directed to the ALJ on December 4, states that it agrees that this matter should be dismissed but urges the ALJ to recommend that the Commission dismiss with prejudice. n2 Respondent also asked the ALJ to take action respecting placement on the public record of certain materials received in discovery from the Robert Wood Johnson Foundation ("Foundation") **[*2]** and Dr. John P. Pierce. In a statement filed with the Commission, the Foundation requested the Commission to order in camera treatment for its submissions and to order related relief.

n1 Master Settlement Agreement Between Settling State Officials and Participating Manufacturers (Nov. 23, 1998)(available as of December 15, 1998 at http://www.naag.org/settle.html)(hereafter the "November 23 Master Settlement Agreement").n2 Respondent attached to its response its Motion to Dismiss on the grounds that Complaint Counsel failed to satisfy its evidentiary burden, filed November 23, 1998. This motion was not certified to the Commission by the ALJ and is, accordingly, not before the Commission.

Upon consideration of the submission of the parties, the Commission hereby dismisses the complaint without prejudice and denies the Foundation's request for relief respecting materials it submitted in discovery. By Order dated December 29, 1998, the ALJ has denied Respondent's motion for action respecting discovery materials.

DISCUSSION

Complaint Counsel's Motion to Dismiss

The Commission's notice order accompanying the complaint set out three key areas of relief: (1) a prohibition **[*3]** of advertisements to children of Camel brand cigarettes through the use of themes or images relating to "Joe Camel" or associated figures; (2) dissemination of public education messages discouraging persons under 18 from smoking; and (3) collection, maintenance, and making data available to the Commission concerning sales of each brand of Respondent's cigarettes to persons under 18 and each brand's share of smokers under 18.

With respect to the first area of relief, the November 23 Master Settlement Agreement specifically bans the use of all cartoon characters, including Joe Camel, in the advertising, promotion, packaging, and labeling of any tobacco product.

As for the second, the settlement requires the tobacco companies to help finance a national public education fund designed to carry out on a nationwide basis sustained advertising and education programs to counter underage usage of tobacco products and to educate consumers about the causes and prevention of diseases associated with the use of tobacco products. n3 Finally, the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services is revising the protocol for its annual **[*4]** national household survey on drug abuse to add specific questions to elicit brand share of smokers under 18. n4

n3 The November 23 Master Settlement Agreement anticipates that each state will seek state court approval of the settlement.n4 See Department of Health & Human Servs., Substance Abuse & Mental Health Servs., Agency Information Collection Activities: Submission for OMB Review; Comment Request, 63 Fed. Reg. 44,866 (1998) (noting that annual survey will be revised to include information on usual brands, including Reynolds' brands, smoked by persons 12 and over). In the past, this survey has been used to determine the prevalence of use of tobacco, alcohol, and illegal drugs among persons 12 and over.

Accordingly, the most important elements of the relief set out in the Commission's notice order should be accomplished without the need for further litigation in this case. Therefore, the public interest warrants dismissal of the complaint.

Respondent's Request for Dismissal with Prejudice

In its response, which was filed after the ALJ certified Complaint Counsel's motion to dismiss to the Commission, Respondent requested that the ALJ make certain recommendations **[*5]** to the Commission to the effect that the complaint should be dismissed with prejudice. n5 Respondent also asked the ALJ to forward to the Commission the motion to dismiss that Respondent filed with the ALJ at the close of Complaint Counsel's case-in-chief. That motion asked the ALJ to determine that Complaint Counsel had failed to meet its evidentiary burden on causation. Respondent claimed that forwarding its motion to the Commission would "inform it of the strong nature of Reynolds' defenses -- and the concomitant advisability of a public interest dismissal" and thus would support Respondent's request for a dismissal with prejudice. Respondent's Response to Complaint Counsel's Motion to Dismiss, at 4.

n5 Respondent requested that the ALJ recommend, among others, that "[t]his dismissal should be with prejudice. Subjecting Reynolds to the continued specter of litigation in this matter in light of the termination of the [Joe Camel] campaign, the length of the investigation and adjudication, and Complaint Counsel's failure to establish causation would be unreasonable and unfair." Recommendations Concerning Complaint Counsel's Motion to Dismiss, R.J. Reynolds Co., Docket No. 9285 (Dec. 4, 1998) (attached to Respondent's Response to Complaint Counsel's Motion to Dismiss).

[*6]

Rule 3.22(a) of the Commission's Rules of Practice contemplates that the ALJ will rule in the first instance on most motions; Rule 3.22(e) also authorizes the ALJ to defer ruling on a motion to dismiss for failure to meet an evidentiary burden until immediately after all evidence has been received and the hearing record is closed. The ALJ is also required to certify a motion to dismiss on public interest grounds to the Commission. n6 Finally, Rule 3.22(a) authorizes the ALJ to accompany such a certification with "any recommendation that he or she may deem appropriate."

n6 See Rule 3.22(a); Century 21 Commodore Plaza, Inc., 95 F.T.C. 808, 818 (1980); Herbert R. Gibson, Sr., 90 F.T.C. 275 (1977).

Here, consistent with his authority under Rule 3.22(e), the ALJ has not ruled on Respondent's motion to dismiss. As for Complaint Counsel's motion to dismiss, the ALJ has properly certified this motion to the Commission and has declined to make the recommendations requested by Respondent. The ALJ did, however, state in his December 7 Order Staying Proceedings that:

[t]o recommend . . . that the complaint be dismissed on the merits would require more than a quick decision on the submitted **[*7]** papers. I am not convinced that the link between the Camel advertising campaign and increased smoking among children must be demonstrated, as argued by respondent, only by a definitive, statistically significant scientific study. Furthermore, there may well be reliable evidence in the record of this case on this issue, in the 2,000 exhibits that have been received thus far, or in the testimony of the expert witnesses. n7

n7 (Emphasis in original) (footnote omitted). We decline to provide an advisory opinion on what is legally required to prove that the Joe Camel campaign caused or was likely to have caused children to begin or continue smoking. However, we do agree with the ALJ that proving a link between advertising and youth smoking might be accomplished by means other than a definitive, statistically significant scientific study. Because we are not ruling on the merits of this matter, we express no opinion on whether the record does or does not contain the necessary, relevant evidence.

Further, in dismissing this complaint, the Commission is not reaching a decision on the merits. Respondent's motion to dismiss is not before the Commission for decision, and Respondent does **[*8]** not appear to ask the Commission to enter a ruling on the merits. n8 Indeed, a ruling on the merits would require the Commission to remand this matter to the ALJ, resulting in a possible resumption of the trial. n9 We understand that neither Complaint Counsel nor Respondent intends that result.

n8 Respondent does argue that closure to the prosecution of Reynolds "can be accomplished by recognizing the arguments advanced in Reynolds' pending Motion for Dismissal as additional rationales for terminating this proceeding," Respondent's Response to Complaint Counsel's Motion to Dismiss, at 2. We view this discussion of possible outcomes to fall short of a request for an explicit ruling on the merits of Reynolds' motion.n9 We view the ALJ's Order Staying Proceedings as indicative of his lack of willingness to decide Respondent's Motion to Dismiss at this time and, as discussed supra, the ALJ is authorized by Rule 3.22 (e) to defer ruling on such a motion to dismiss until immediately after all evidence has been received and the hearing record is closed.

The Commission has consistently refrained from dismissing a complaint with prejudice absent a substantive ruling. Without **[*9]** such a ruling by the ALJ or the Commission, it is not appropriate to foreclose the possibility of further litigation where unanticipated problems might develop with one or more of the relevant remedies. n10

n10 The Commission is not persuaded that any future litigation challenging the Joe Camel campaign would violate any of Respondent's Due Process or other legal rights. The doctrine of res judicata, which bars a subsequent action only if there is a final judgment on the merits in the earlier action, would not apply. As described above, no such judgment was rendered here by the ALJ or the Commission. See, e.g., United States v. Cunan, 156 F.3d 110 (1st Cir. 1998). In addition, the Double Jeopardy Clause of the Fifth Amendment "protects only against the imposition of multiple criminal punishments for the same offense." Hudson v. United States, 118 S. Ct. 488, 493 (1997)(emphasis in the original). Nor can we conclude that any passage of time between the dismissal of the instant complaint and the possible commencement of a new proceeding would deprive Respondent of an opportunity to present an effective defense. In any event, a future Commission would undoubtedly give careful consideration, as part of its determination that a case is in the public interest, to any claims Respondent might make that it was unfairly prejudiced by the passage of time.

[*10]

We, therefore, conclude that the complaint should be dismissed without prejudice.

Requests Relating to Third Party Submissions

Respondent's Response to Complaint Counsel's Motion to Dismiss initially requested that the ALJ hold open the public record to permit Respondent "to place in evidence certain documents submitted in discovery from" the Foundation and Dr. Pierce. After opposing statements were filed by the Foundation and Dr. Pierce, n11 Respondent filed a submission with the ALJ explaining that its response had only requested (and, notwithstanding the stay, continued to request) that the ALJ issue an order establishing a schedule for a briefing and hearing on the disclosure issue. By order dated December 29, 1998, the ALJ declined to issue such an order.

n11 The Foundation and Dr. Pierce, along with the Commonwealth of Massachusetts, had previously filed oppositions before the ALJ to Respondent's Notice of Disclosure of confidential documents submitted by the Foundation and Dr. Pierce.

The Foundation's statement in opposition to Respondent's request, which was filed with the Commission, asked the Commission to rule on its prior motion to the ALJ. That motion sought **[*11]** in camera treatment for Foundation documents. The statement also asked, as related relief, that Respondent "be required to (i) submit a certification that it has fully complied with the terms of the protective order with regard to the Foundation's peer review materials [and] (ii) provide to the Foundation all copies of all agreements executed in accordance with paragraph 11 of the protective order." n12 n12 The Paragraph 11 agreements are those executed by certain recipients of confidential materials obtained by RJR.

The Foundation also sought other related relief, including a requirement that Respondent ". . . (iii) identify all persons to whom the Foundation's peer review materials have been disseminated or disclosed; (iv) describe with particularity any dissemination or disclosure of the peer review materials not authorized by or in accordance with the terms of the protective order; and (v) retrieve and return to the Foundation all copies of the peer review materials disseminated or disclosed contrary to the protective order's terms."

Rather than delaying the disposition of this matter by remanding the Foundation's requests to the ALJ, the Commission has considered and **[*12]** hereby denies them. There is no basis for granting the Foundation's request for in camera treatment because, in light of this Order dismissing the complaint, the documents are not to be used in litigation. In addition, Paragraph 11 of the ALJ's July 18, 1997 protective order prohibits Respondent from disclosing the documents outside of this litigation and Paragraph 14 requires Respondent to return the documents upon dismissal of the proceeding. Paragraph 11 itself already entitles the Foundation to copies of the Paragraph 11 agreements at issue here. n13 The Foundation has not offered sufficient justification for the other related relief sought by its motion.

n13 The protective order, by its own terms, continues to bind the parties' communication and use of confidential materials after conclusion of the action. See Paragraph 16.

Accordingly, IT IS ORDERED that the Complaint is dismissed without prejudice. IT IS FURTHER ORDERED that the Foundation's motion for in camera treatment and related relief is denied.

LEXSEE 2001 FTC LEXIS 198

In the Matter of Schering-Plough Corporation, a corporation, Upsher-Smith Laboratories, a corporation, and American Home Products Corporation, a corporation

Docket No. 9297

Federal Trade Commission

2001 FTC LEXIS 198

ORDER DENYING MOTIONS OF RESPONDENTS SCHERING-PLOUGH AND UPSHER-SMITH TO DISMISS THE COMPLAINT

October 31, 2001

ALJ: [*1]

D. Michael Chappell, Administrative Law Judge

ORDER:

I. PROCEDURAL BACKGROUND

On June 7, 2001, Respondent Schering-Plough Corporation ("Schering") filed a motion for partial dismissal of the Complaint for failure to state a claim upon which relief could be granted. Complaint Counsel filed an opposition on June 25, 2001. Schering filed a reply in support of its motion on July 6, 2001. Oral arguments of counsel were heard on July 25, 2001.

On July 20, 2001, Respondent Upsher-Smith Laboratories, Inc. ("Upsher-Smith") filed a motion to dismiss the Complaint in its entirety as deficient as a matter of law. Complaint Counsel filed an opposition on August 8, 2001. Upsher-Smith filed a reply in support of its motion on August 15, 2001.

For the reasons set forth below, Schering's and Upsher-Smith's motions are DENIED.

II. STATUTORY AND REGULATORY FRAMEWORK STATED IN THE COMPLAINT

The Complaint contains the following allegations regarding federal regulation of prescription drugs:

. Under the Federal Food, Drug, and Cosmetic Act ("FFDCA"), 21 U.S.C. § 301 et seq., approval by the Food and Drug Administration ("FDA") is required before a company may market or sell a prescription drug **[*2]** in the United States. Complaint at P 9. Newly developed prescription drugs are often protected by patents and marketed under proprietary brand names and are commonly referred to as "brand name drugs" or "branded drugs." Id. at P 10. FDA approval for a branded drug is generally sought by filing a New Drug Application ("NDA") with the FDA. Id.

. In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act, known as the Hatch-Waxman Act, which simplified the procedure for obtaining approval of generic drugs. Id. at P 11. Under the Hatch-Waxman Act, manufacturers of generic drugs are required to submit an Abbreviated New Drug Application ("ANDA"). Id. at P 12. An ANDA applicant has to demonstrate that the generic drug is bioequivalent to the brand name drug that it references. Id.

. When a brand name drug is protected by one or more patents, an ANDA applicant that intends to market its generic product prior to expiration of any patent must certify that the patent on the brand name drug is invalid or will not be infringed by the manufacture, use, or sale of the drug for which the ANDA applicant seeks approval. Id. at P 13. This is called a "Paragraph IV Certification." **[*3]** Id.

. If the ANDA contains a Paragraph IV Certification, the ANDA applicant must provide notice to each owner of the patent that is the subject of the certification and to the holder of the approved NDA to which the ANDA refers. Id. at P 14. Upon receiving notice of a Paragraph IV Certification, the patent holder has 45 days in which to file a patent infringement suit against the generic manufacturer. Id. If a patent infringement suit is initiated against the ANDA applicant, the FDA must stay its final approval of the ANDA for the generic drug until the earliest of (1) the patent expiration, (2) a judicial determination of the patent litigation, or (3) the expiration of a 30-month waiting period. Id.

. The Hatch-Waxman Act provides that the first to file a Paragraph IV certified ANDA ("the first filer") is eligible for a 180-day period of exclusivity ("the 180-day exclusivity period"). Id. at P 15. That is, during those 180 days, the FDA will not approve any other ANDA for the same generic product until the earlier of the date on which (1) the first firm begins commercial marketing of its generic version of the drug, or (2) a court finds the patents claiming the brand name drug **[*4]** are invalid or not infringed. Id.

III. RELEVANT ALLEGATIONS OF THE COMPLAINT

The Complaint contains the following allegations:

. Respondents entered into unlawful horizontal agreements to delay entry of low-cost generic competition to Schering's prescription drug K-Dur 20. Complaint at P 1. These agreements have cost consumers in excess of $ 100 million. Id. at P 2.

. Schering has monopoly power in the market that includes K-Dur 20 and that entry of generic competition would significantly erode Schering's market share and profits. Id. at PP 17, 26-30, 37. To protect the profits of K-Dur 20 from the threat of generic competition, Schering conspired with two manufacturers of generic pharmaceuticals, Upsher-Smith and American Home Products Corporation ("AHP"), by paying each millions of dollars to delay their products' entry into the marketplace. Id. at PP 44-45, 55, 57, 63-64.

. Schering manufactures and markets two extended-release microencapsulated potassium chloride products: K-Dur 20 and K-Dur 10, both of which are marketed as brand name drugs. Id. at P 31. Schering's K-Dur 20 and K-Dur 10 are covered by a formulation patent owned by Schering, patent number 4,863,743 **[*5]** (the "'743 patent"), which expires on September 5, 2006. Id. at P 34.

. On August 6, 1995, Upsher-Smith filed an ANDA with the FDA to market Klor Con M20, a generic version of Schering's K-Dur 20. Id. at P 38. Upsher-Smith's ANDA was the first for a generic version of K-Dur 20. Id. Upsher-Smith submitted a Paragraph IV Certification with this ANDA and, on November 3, 1995, Upsher-Smith notified Schering of its Paragraph IV Certification and ANDA. Id.

. As the first ANDA filer with a Paragraph IV Certification for a generic version of Schering's K-Dur 20, Upsher-Smith is eligible for the 180-day exclusivity period. Id. at P 41. Because Upsher-Smith is eligible for the 180-day exclusivity period, no other generic manufacturer can obtain final FDA approval to market a generic version of K-Dur 20 until after the exclusivity period has expired. Id. at P 42.

. Schering sued Upsher-Smith for patent infringement in the United States District Court for the District of New Jersey on December 15, 1995, alleging that Upsher-Smith's Klor Con M20 infringed Schering's '743 patent. Id. at P 39. On June 17, 1997, Schering and Upsher-Smith agreed to settle their patent litigation. Id. at P 44. **[*6]** Under the settlement agreement, Schering agreed to make unconditional payments of $ 60 million to Upsher-Smith; Upsher-Smith agreed not to enter the market, either with the allegedly infringing generic version of K-Dur 20 or with any other generic version of K-Dur 20, regardless of whether such product would infringe Schering's patents, until September 2001; both parties agreed to stipulate to the dismissal of the litigation without prejudice; and Schering received licenses to market five Upsher-Smith products. Id. at P 44.

. On December 29, 1995, ESI Lederle, Incorporated ("EST"), a division of AHP, submitted an ANDA to the FDA to market a generic version of Schering's K-Dur 20. Id. at P 51. ESI submitted a Paragraph IV Certification with this filing and notified Schering of its Paragraph IV Certification and ANDA. Id. Schering sued ESI for patent infringement in the United States District Court for the Eastern District of Pennsylvania on February 16, 1996, alleging that ESI's generic version of Schering's K-Dur 20 infringed Schering's '743 patent. Id. at P 53.

. On June 19, 1998, Schering and ESI executed a settlement agreement to their patent litigation whereby, inter alia, **[*7]** Schering agreed to pay ESI up to $ 30 million; AHP and ESI agreed to refrain from marketing the allegedly infringing generic version of K-Dur 20 or any other generic version of K-Dur 20, regardless of whether such product would infringe Schering's patents, until January 2004. Id. at P 54-55.

III. **ARGUMENTS OF THE PARTIES**

The Complaint alleges that Schering's settlement agreements with Upsher-Smith and with ESI violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 ("FTC Act") because they delayed the entry of Upsher-Smith's and ESI's generic versions of K-Dur 20. The Complaint also alleges that Schering's agreement with Upsher-Smith violates the FTC Act because it has the effect of keeping off the market other generic drugs manufactured by third parties.

Schering and Upsher-Smith urge dismissal or partial dismissal on the grounds that the Complaint fails to state a claim upon which relief could be granted. Schering asserts, first, that the Complaint's allegations that Schering's agreements with Upsher-Smith and ESI violate Section 5 of the FTC Act because they allegedly delayed entry of Upsher-Smith's and AHP's generics fail to state a claim because: (a) the **[*8]** Complaint fails to allege patent invalidity or non-infringement; and (b) the Complaint fails to allege that the patent suit was not bona fide or that the settlement was more anticompetitive than the probable outcome of the litigation. Schering asserts, second, that the Complaint's allegations that Schering's agreement with Upsher-Smith violates Section 5 of the FTC Act because it allegedly has the effect of blocking generics manufactured by third parties fails to state a claim because: (a) the Complaint misstates the FDA law; and (b) any effect the agreement had was by operation of federal law and thus immune from antitrust liability under the Noerr-Pennington doctrine.

Upsher-Smith asserts that the Complaint is deficient as a matter of law because it does not dispute that: (a) the patent suit was not bona fide; (b) the settlement resolved that dispute by compromise; or (c) the settlement was more anticompetitive than the probable outcome of the litigation.

Complaint Counsel responds to Schering's first argument and Upsher-Smith's argument by asserting that the allegations of the Complaint that Schering paid Upsher-Smith and AHP to delay their entry and withdraw their challenges to **[*9]** Schering's patent state an antitrust claim and provide a clear basis for that claim. Complaint Counsel asserts that, to state a claim, the Complaint need not contain allegations that Schering's patent is invalid or is not infringed. In Complaint Counsel's view, a patent settlement violates the antitrust laws, regardless of invalidity or infringement issues, when the patent-holder entices its competitors to delay entry or withdraw its challenges to the patent in exchange for a share of the monopoly profits. Complaint Counsel next asserts that proof of the parties' probabilities of winning the patent litigation is not necessary for proving an antitrust violation. Complaint Counsel asserts that all that is required - and is alleged - is that the settlements harmed competition.

Complaint Counsel responds to Schering's second argument by asserting that "the current state of the [FDA] law . . . in no way contradicts complaint allegations concerning the 180-day exclusivity period or the exclusionary effect of Schering's agreement with Upsher-Smith." Complaint Counsel's Response to Schering's Motion for Partial Dismissal of the Complaint at p. 24. Complaint Counsel next asserts that the Noerr-Pennington **[*10]** doctrine does not provide antitrust immunity where competitors enter into an agreement that manipulates the regulatory scheme and triggers the exclusionary effect identified in the Complaint.

IV. **MOTION TO DISMISS STANDARD**

Schering's and Upsher-Smith's motions are filed pursuant to Section 3.22(e) of the Commission's Rules of Practice which authorizes the filing of a motion to dismiss a complaint. 16 C.F.R. § 3.22(e). Although the Commission's Rules of Practice do not have a rule identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Commission has acknowledged a party's right to file, and the Administrative Law Judge's authority to rule on, a motion to dismiss for failure to state a claim upon which relief could be granted. E.g., Times Mirror Co., 92 F.T.C. 230 (July 25, 1978); Florida Citrus Mutual, 50 F.T.C. 959, 961 (May 10, 1954) (ALJ may "dismiss a complaint if in his opinion the facts alleged do not state a cause of action.").

Section 3.11(b)(2) of the Commission's Rules of Practice sets forth that the Commission's complaint shall contain a "clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the **[*11]** type of acts or practices alleged to be in violation of the law." 16 C.F.R. § 3.11(b)(2). This rule requires only that the complaint contain "a factual statement sufficiently clear and concise to inform respondent with reasonable definiteness of the types of acts or practices alleged to be in violation of law, and to enable respondent to frame a responsive answer." New England Motor Rate Bureau, Inc., 1986 FTC LEXIS 5, *114 (Dec. 12, 1986). "Commission complaints, like those in the federal courts, are designed only to give a respondent 'fair notice of what . . . the claim is and the grounds upon which it rests.'" Id. (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

A motion to dismiss for failure to state a claim upon which relief can be granted is judged by whether a review of the complaint allegations clearly shows that the allegations, if proven, are sufficient to make out a violation of Section 5. TK-7 Corp., 1989 FTC LEXIS 32, *3 (May 3, 1989). For purposes of a motion to dismiss, the factual allegations of the complaint are presumed to be true and all reasonable inferences are to be made in favor of complaint counsel. TK-7 Corp., 1989 FTC LEXIS 32, *3 (citing Miree **[*12]** v. DeKalb County, 433 U.S. 25, 27 n.2 (1977); Jenkins v. McKeitchen, 395 U.S. 411, 421-22 (1969)).

If the motion to dismiss raises issues of fact which are in dispute, dismissal is not appropriate. Herbert R. Gibson, 1976 FTC LEXIS 378, *1 (April 23, 1976); Jewell Companies, Inc. 81 F.T.C. 1034, 1972 FTC LEXIS 277, *4 (Nov. 10, 1972) (denying motion to dismiss where there was a substantial dispute on questions of fact). See also College Football Assoc., 1990 FTC LEXIS 485 (Dec. 27, 1990) (Where facts are needed to make determination on a "close question," the motion to dismiss will be denied.).

This standard used in Commission proceedings mirrors the standard used for evaluating motions to dismiss raised in federal courts under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Supreme Court has held that it "is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" McClain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 246 (1980) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Moreover, it is well established that, **[*13]** in ruling on a motion to dismiss, allegations in the complaint must be accepted as true and construed favorably to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "In antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746 (1976) (quoting Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (1962)).

V. ANALYSIS

A. Allegations That Schering's Agreements with Upsher-Smith and with AHP Delayed the Entry of Upsher-Smith and AHP

The Complaint alleges that Schering entered into two separate agreements whereby Schering paid Upsher-Smith and ESI to delay the entry of Upsher-Smith's and ESI's generic versions of K-Dur 20. Complaint P P 44, 55. Complaint Counsel asserts that an evaluation of whether Schering's patent was valid or not infringed or of whether the settlement was more anticompetitive than the probable outcome of the patent litigation is not necessary for a determination of whether the agreements delayed entry.

The dispositive issue is whether, under **[*14]** any alleged factual scenario, the Complaint's allegations demonstrate a violation of Section 5 of the FTC Act. In any given case, there may be many different scenarios or facts, which are not alleged, that also support a violation of the law. Hypothetical fact patterns or scenarios which contradict facts alleged in the Complaint are not dispositive when considering a motion to dismiss.

Respondents, by arguing that the Complaint fails to allege patent invalidity or non-infringement and fails to allege the patent suit was not bona fide or that the settlements were more anticompetitive than the probable outcome of the patent litigation, urge the Court to accept a different set of facts than alleged in the Complaint. In essence, Respondents argue that if Schering's patent was valid and was infringed by Upsher-Smith's and AHP's products, then Schering has a legal right to exclude those proposed products from the market until September 2006. Memorandum in Support of Respondent Schering-Plough Corporation's Motion for Partial Dismissal of the Complaint at p. 7. Under this scenario, Respondents assert, the agreements which allow Upsher-Smith and AHP to bring their generics to market prior **[*15]** to September 2006 are legal and indeed are procompetitive because the agreements allow the generics to enter the market sooner than the products otherwise would have.

As Complaint Counsel has pled the facts, Schering combined with Upsher-Smith and with AHP to delay entry into the market. On a motion to dismiss, a court cannot consider facts that contradict those pled in the complaint and must accept the allegations pled in the complaint as true. See In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 653 (E.D. Mich. 2000) ("The mere fact that Defendant Andrx can come up with other plausible and legally permissible explanations as to why it prolonged its entry into the market is to no avail."); Biovail Corp. Int'l v. Hoechst Aktiengesellschaft, 49 F. Supp. 2d 750, 767-68 (D. N.J. 1999) (refusing to dismiss antitrust claims under Rule 12(b)(6) and reasoning "while it is possible that Andrx is not marketing its generic product because it does not want to risk potential patent infringement damages, it is also certainly possible that Andrx is not marketing its generic product -- and hence stalling the exclusivity period -- because defendants are paying it forty million dollars **[*16]** a year not to do so. This court simply cannot make this call on the pleadings.").

Agreements not to compete that unreasonably restrain trade have been found to violate the antitrust laws. National Collegiate Athletic Assoc. v. Board of Regents, 468 U.S. 85, 100 (1984); Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co., 472 U.S. 284, 289-90 (1985). "Antitrust law looks at entry into the market as one mechanism to limit and deter exploitation of market power by those who may temporarily possess it." Andrx Pharmaceuticals, Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 814 (D.C. Cir. 2001).

At least one court has held that a party challenging an agreement similar to Schering's agreements with Upsher-Smith and AHP could state a claim for antitrust injury without first demonstrating that the brand name drug company's patent was invalid. In re Ciprofloxacin Hydrochloride Antitrust Litig., 2001 U.S. Dist. LEXIS 15386, *29 (E.D.N.Y. Oct. 1, 2001). If Complaint Counsel's allegations that the agreements delayed Upsher-Smith's and AHP's entry into the market and harmed consumers are taken as true, the Complaint need not allege that Schering's patent was invalid or not infringed **[*17]** and need not allege that the patent suits were not bona fide or that the settlements were more anticompetitive than the probable outcome of the litigation in order to state a cause of action under the motion to dismiss standard. Similarly, it is not necessary for the Complaint to dispute that the settlement of the patent litigation between Schering and Upsher-Smith resolved the patent dispute by compromise. Accordingly, the allegations of the Complaint will not be dismissed.

B. Allegations That Schering's Agreement with Upsher-Smith Delayed the Entry of Other Potential Generic Entrants

1. Upsher-Smith's 180 day exclusivity period

The Complaint alleges that, absent Schering's cash payments under its agreement with Upsher-Smith, Upsher-Smith would not have agreed to delay the launch of its generic product for as long as it did. Complaint P 64. The Complaint further alleges that the delay of the launch of Upsher-Smith's generic product had the effect of delaying other potential generic manufacturers from entering the market. Complaint P 47, 66.

The Complaint states that, as the first ANDA filer with a Paragraph IV Certification, Upsher-Smith is eligible for the 180-day exclusivity **[*18]** period. Complaint P 41. Although it is the Hatch-Waxman Act that makes Upsher-Smith eligible for the 180-day exclusivity period, the Complaint alleges that it is the agreement between Schering and Upsher-Smith that preserves the exclusivity period or delays the start of it. Complaint P 47, 66. But for the agreement, according to the Complaint, the 180-day exclusivity period would have been triggered earlier, either by Upsher-Smith prevailing in the patent litigation and entering the market earlier than September 2001, or by Schering prevailing in the patent litigation, resulting in the forfeiture of the 180-day exclusivity period. Id. This concerted action to preserve the exclusivity period is alleged to have delayed entry by other potential generic competitors. Id.

Schering asserts, first, that it is unclear whether the Hatch-Waxman Act grants the 180-day exclusivity period to a first filer who settles a patent suit. Schering asserts, second, that if the first filer is entitled to the 180-day exclusivity period, it is by operation of federal law with no resulting antitrust liability.

Although eligibility for the 180-day exclusivity period is by operation of federal law, the start **[*19]** date for triggering the exclusivity period is alleged to have been manipulated by the parties. It is the concerted action to manipulate the trigger date and preserve the exclusivity period that is alleged to violate the FTC Act. Actions taken to subvert a regulatory scheme for anticompetitive purposes are subject to the antitrust laws. Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1303 (5th Cir. 1972) (cited in Biovail Corp. Int'l v. Hoechst Aktiengesellschaft, 49 F. Supp. 2d at 768). Further, "a reasonable trier of fact could conclude that an agreement between two competitors to delay the applicability of an exclusivity period for the purpose of keeping another competitor out of the market is an unreasonable restraint of trade or a wilful attempt to maintain or obtain a monopoly." Biovail, 49 F.

Supp. 2d at 767. See also Key Pharmaceuticals, Inc. v. ESI-Lederle, Inc., 1997 U.S. Dist. LEXIS 13328, *12 (E.D. Pa. 1997) (agreement to delay others' entry into market may be an illegal restraint on trade).

The Court of Appeals for the District of Columbia recently held that allegations that a settlement agreement to a patent dispute between a brand name **[*20]** drug manufacturer and a generic manufacturer to delay the start of the 180-day exclusivity period states a cause of action. Andrx Pharmaceuticals, Inc. v. Biovail Corp. Int'l, 256 F.3d at 809 ("Although it is true that the first to file an ANDA is permitted to delay marketing as long as it likes, the statutory scheme does not envision the first applicant's agreeing with the patent holder of the pioneer drug to delay the start of the 180-day exclusivity period.").

Respondents may well be able to show at trial that there was no concerted agreement to preserve the exclusivity period or manipulate the start date, that Upsher-Smith's eligibility for the 180-day exclusivity period was a consequence of Upsher-Smith's unilateral action in attaining first filer status, and that the exclusionary effect was by operation of federal law. Or, Complaint Counsel may be able to prove that, by purely private conduct and agreement, the parties intended to delay other generic manufacturers' entry into the market by delaying the start of the 180-day exclusivity period. Such acts would not be immune from antitrust liability under Noerr-Pennington. The facts alleged in the Complaint, if taken as true, and **[*21]** the reasonable inferences therefrom sufficiently allege concerted action which states a claim for which relief may be granted. Accordingly, these allegations will not be dismissed.

2. Status of law on the 180 day exclusivity period

Schering also argues that the Complaint misstates the governing FDA regulations as it alleges that "at all time relevant herein, FDA final approval of an ANDA for a generic version of K-Dur 20 for anyone other than Upsher-Smith was blocked." Schering argues that under the FDA regularions in effect at the time of the settlement, Upsher-Smith may have lost all exclusivity rights and all rights to block third party generics when it settled its case.

Complaint Counsel admits that "FDA's implementation of this exclusivity has varied over the course of time covered by the complaint." Complaint Counsel's Response to Schering's Motion for Partial Dismissal of the Complaint at p. 20. Complaint Counsel asserts: (1) at the time of Schering's agreement, there was uncertainty about whether Upsher-Smith would retain its right to 180 days of market exclusivity after the settlement; (2) this lack of certainty - and the possibility that Upsher-Smith might not be entitled **[*22]** to the exclusivity unless it successfully defended the patent suit - created an incentive for Schering to enter its January 1998 agreement with AHP; and (3) subsequent court decisions eliminated the uncertainty and confirmed Upsher-Smith's right to the 180-day exclusivity period.

Although it is apparent, based on the court decisions and FDA rulings referred to in the parties' pleadings, that the law on the 180 day exclusivity period has been in flux, whether or not FDA approval of an ANDA for a generic version of K-Dur 20 for anyone other than Upsher-Smith was blocked is a disputed factual question which will not be resolved through a motion to dismiss.

VI. CONCLUSION

For the above stated reasons, Schering's and Upsher-Smith's motions to dismiss the Complaint are DENIED.

ORDERED:

D. Michael Chappell

Administrative Law Judge

In the Matter of Schering-Plough Corporation, a corporation, Upsher-Smith Laboratories, a corporation, and American Home Products Corporation, a corporation.
Docket No. 9297
February 12, 2002

ORDER DENYING MOTION OF AMERICAN HOME PRODUCTS CORPORATION TO STAY ORDER, FOR
CERTIFICATION FOR INTERLOCUTORY APPEAL AND APPLICATION FOR FULL COMMISSION REVIEW

I. PROCEDURAL HISTORY

On January 15, 2002, an Order Denying American Home Products Corporation's Motion for Protective Order and to Compel Return of Materials ("January 15th Order") was issued. American Home Products Corporation ("AHP") is no longer a respondent in this matter. AHP was a respondent at the time it filed the Motion for Protective Order and to Compel Return of Privileged and Work Product Material ("Motion for Protective Order"), on September 27, 2001.

On January 16, 2002, AHP filed an Emergency Motion to Stay Order, for Certification for Interlocutory Appeal and Application for Full Commission Review ("AHP Motion"). AHP's motion sought the following relief: (1) the stay of the order denying AHP's motion for protective order and to prohibit Complaint Counsel or Respondents from using the disputed documents in any manner pending appeal; (2) in the alternative, AHP seeks in camera treatment for each of the contested documents Complaint Counsel or Respondents intend to use as exhibits at the administrative hearing; (3) certification of the January 15, 2002 Order to the Commission for interlocutory review; (4) shortening of Complaint Counsel's time to respond to AHP's Motion; and (5) a ruling on AHP's request to stay or request for in camera treatment of AHP's documents by January 18, 2002.

By Order dated January 18, 2002, AHP's request for a stay of the order denying AHP's motion of protective order and to prohibit Complaint Counsel or Respondents from using the disputed documents was denied without prejudice, pending a determination on AHP's motion for in camera treatment. AHP's request in the alternative, for in camera treatment for the contested documents and testimony thereto was provisionally granted, pursuant to 16 C.F.R. § 3.45(g), in the Order of January 18, 2002. AHP was ordered to file a motion for in camera treatment of the documents within twenty days and instructed that the contested documents would be treated as in camera until a final ruling on whether in camera treatment of the material is appropriate, pursuant to Commission Rule 3.45(b).

Complaint Counsel was allowed five days to respond to AHP's Motion, pursuant to Commission Rule 3.23(b). Complaint Counsel filed its opposition on January 23, 2002. AHP then filed a reply in support of its motion on January 25, 2002.

On February 7, 2002, AHP filed a motion for in camera treatment, seeking indefinite in camera treatment for the documents that were the subject of the January 15th Order. The declaration of AHP's Litigation Counsel adequately established that the documents were privileged for purposes of AHP's motion for in camera treatment. Accordingly, by Order dated February 8, 2002, AHP's motion for indefinite in camera treatment was granted in part and denied in part. The motion was granted with respect to those documents that the parties have offered into evidence or have listed as potential exhibits. The motion was denied with respect to those documents that no party has offered into evidence.

For the reasons set forth below, AHP's motion for certification to the Commission for interlocutory review of the January 15, 2002 Order is DENIED.

In the January 18th Order, AHP's motion for the stay of the January 15th Order, to prohibit Complaint Counsel or Respondents from using the disputed documents in any manner pending appeal, was denied without prejudice. As set forth below, AHP has not demonstrated it will suffer irreparable harm because AHP does not face public disclosure of its documents. The provisional grant of in camera treatment in the January 18, 2002 Order and the indefinite grant of in camera treatment in the February 8, 2002 Order obviate AHP's need for a stay. Accordingly, AHP's request for a stay is DENIED.

II. THE ORDER FOR WHICH INTERLOCUTORY REVIEW IS SOUGHT

AHP seeks interlocutory review pursuant to Commission Rule 3.23(b), which allows review of a ruling by the Administrative Law Judge only upon a determination by the Administrative Law Judge: (1) that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion; and (2) that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation; or (3) subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b).

The January 15th Order, for which appeal is sought, held:

> AHP has not met its burden of showing that, under the totality of these circumstances, AHP did not waive any privileges. Accordingly, AHP has waived its right to assert the work product or attorney-client privileges as to these nine documents and to Dey's testimony regarding five of the documents.

In re Schering-Plough Corp., Dkt. No. 9297, slip op. at 7 (FTC Jan. 15, 2002).

In support of its motion for interlocutory appeal, AHP asserts that the determination that AHP waived any privileges it may have held with respect to these nine documents, and Dey's related testimony, should be certified to the full Commission for interlocutory review. AHP asserts first, that the issue of whether a party waives privilege as to documents it does not know to be privileged at the time of production constitutes a controlling question of law. AHP next asserts that there is a substantial ground for difference of opinion as to whether AHP waived any privileges attached to the nine documents, as courts have diverged as to the proper methodology for determining whether inadvertent production constitutes waiver. Finally, AHP asserts that subsequent review of the January 15th Order will be an inadequate remedy because AHP, as a non-party, does not have standing to appeal an initial decision to the Commission and because the documents AHP claims are privileged will have already been used at trial.

Complaint Counsel states that the issues do not present a controlling question of law on which there is a substantial ground for difference of opinion. Although Complaint Counsel takes the position of supporting the January 15th Order, it has not opposed AHP's request for certification or AHP's request for Commission review, nor has it briefed the issue.

III. APPLICATION OF THE STANDARDS FOR INTERLOCUTORY APPEAL

AHP's request for certification fails to meet the requirements of Commission Rule 3.23(b) for granting a request for interlocutory appeal. Applications for review of a ruling by the Administrative Law Judge may be made only if the applicant meets both prongs of a two prong test. First, the ruling must involve "a controlling question of law or policy as to which there is substantial ground for difference of opinion." 16 C.F.R. § 3.23(b). Second, the Administrative Law Judge must determine "that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or [that] subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b) (emphasis added).

A. Controlling Question of Law or Policy to Which There Is Substantial Ground for Difference of Opinion

The first prong of Commission Rule 3.23(b) contains two requirements that must be met. First, the ruling must involve a controlling question of law or policy. Second, there must also be a substantial ground for difference of opinion. The January 15th Order, which held that AHP waived privileges it may have had to nine documents and related deposition testimony when AHP inadvertently produced the documents and failed to take reasonable precautions to protect any privileges, satisfies neither of these requirements.

1. Controlling question of law or policy

AHP asserts that the issue of whether a party waives privileges as to documents it does not know to be privileged at the time of production constitutes a controlling question of law. AHP states that a question of law is "controlling" if the determination may importantly affect the conduct of an action. However, AHP cites no Commission case that defines a controlling question of law as a determination that may importantly affect the conduct of an action. Simply because an issue is "important" does not qualify it as "controlling." In re Dillard Department Stores, Inc., 1995 FTC LEXIS 149, * 21 (June 8, 1995) ("'important' questions of law or policy may not constitute 'controlling questions as to which there is a substantial ground for differences of opinion'"). Instead, a controlling question of law or policy has been defined in Commission cases as "not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." In re Automotive Breakthrough Sciences, Inc., 1996 FTC LEXIS 478, *1 (Nov. 5, 1996); In re BASF Wyandotte Corp., 1979 FTC LEXIS 77, *2 (Nov. 20, 1979) (citations omitted) ("The question is not whether interlocutory review would resolve an 'intellectually intriguing' issue, the early determination of which 'would save ... considerable trouble and expense.'").

AHP criticizes the definition of a controlling question of law as stated in Automotive Breakthrough Sciences on the grounds that federal courts have explicitly rejected this standard. AHP Motion at 12 n.12 (citing Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 24 (2nd Cir. 1990) (a controlling question need not affect a wide range of cases)). However, Automotive Breakthrough Sciences, Inc., 1996 FTC LEXIS 478, *1 (Nov. 5, 1996), was issued subsequent to Klinghoffer. Commission Rule 3.23(b) is modeled after 28 U.S.C. § 1292. Other circuit courts interpreting 28 U.S.C. § 1292 have held that to be a controlling question of law, the issue must affect the course of the litigation. Ahrenholz v. University of Illinois, 219 F.3d 674, 677 (7th Cir. 2000) (certification appropriate only where decision turns on a pure question of law, the resolution of which could head off other litigation). See also Clark-Dietz and Assoc. Engineers, Inc. v. Basic Construction Co., 702 F.2d 67, 69 (5th Cir. 1983) ("fact-review questions inappropriate for § 1292(b) review"); In re Int'l Assoc. of Conf. Interpreters, 1995 FTC LEXIS 452, *4 (decisions that are "fact specific" are not subject to interlocutory appeal). Indeed, in White v. Nix, 43 F.3d 374, 378 (8th Cir. 1994), where the district court certified an order requiring the production of confidential investigative files, the court of appeals held that "the discretionary resolution of discovery issues precludes the requisite controlling question of law." Thus, under federal precedent, the evaluation of the circumstances under which AHP waived any privileges does not present a controlling question.

Also, under Commission precedent, determinations regarding privileges have been found not to involve a controlling question of law or policy. E.g. In re Atlantic Richfield Co., 1978 FTC LEXIS 568, *1 (Oct. 3, 1978) (order requiring complaint counsel to return documents to respondent which respondent had inadvertently produced did not involve a controlling question of law or policy); In re R.J. Reynolds Tobacco Co., 1998 FTC LEXIS 179, *4 (Sept. 24, 1998) (order denying respondents' motion to compel complaint counsel to provide a more complete privilege log did not involve a controlling question of law or policy as to which there is substantial ground for difference of opinion). Accordingly, under Commission precedent, a determination of waiver does not present a controlling question of law.

AHP next asserts, without citing any legal authority, that whether it waived privileges is a controlling question of law because, according to Complaint Counsel, the forecasts contained in these documents speak directly to the core question of Complaint Counsel's case, that is, the ability of generic entrants to threaten Schering's power in the K-

Dur product line. Simply because the documents may be important to Complaint Counsel does not elevate the determination that privileges were waived to a controlling, or even important, question of law.

AHP further asserts that whether it waived privileges is a controlling question because AHP may be irreparably injured in the absence of immediate Commission review because the January 15th Order has the practical effect of letting the parties use AHP's contested documents at a public trial. This argument fails for two reasons. First, the provisional grant of in camera treatment by the January 18, 2002 Order and the indefinite grant of in camera treatment by the February 8, 2002 Order, as well as the Protective Order Governing Discovery Material, entered on May 10, 2002, prevent public disclosure of the documents. Second, an inquiry into whether AHP faces irreparable harm has no bearing on whether the issue presents a controlling question of law or policy. Instead, this argument goes to whether AHP can satisfy the second requirement of Commission Rule 3.23(b), that subsequent review would be an inadequate remedy. Moreover, the case AHP cites to support its theory that the prospect of harm presents a controlling question of law, Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3rd Cir. 1974), provides no support because the harm sought to be avoided was in no way comparable to the harm AHP asserts it may suffer in the instant case. There, the order of the district court granting class certification included "the possibility of prejudice to a party pendente lite." Id. at 755. Thus, even if AHP had demonstrated some harm, this does not present a controlling question.

Since a determination that the factual circumstances surrounding the creation, production, related deposition testimony, use by experts of, and belated assertion of privilege for the documents resulted in a waiver of privileges does not involve a controlling question of law or policy, AHP has not satisfied the first requirement of the first prong of Commission Rule 3.23(b).

2. Substantial ground for difference of opinion

The January 15th Order does not present an issue for which there is a "substantial ground for difference of opinion," the second requirement of the first prong of Commission Rule 3.23(b). "The phrase 'substantial ground for difference of opinion' requires a finding that the question presents a novel or difficult legal issue. It is this unsettled state of the law that creates a 'substantial ground for difference of opinion' and triggers certification." Int'l Assoc. of Conf. Interpreters, 1995 FTC LEXIS 452, *4-5 (Feb. 15, 1995). The January 15, 2002 Order relies on settled precedent, not on a novel theory. Although no previous Administrative Law Judge has formally delineated the standards used in determining whether inadvertent production of a privileged document waived the privileges attached to it, it is clear that similar analysis has been undertaken. For example, in In re Atlantic Richfield Co., 1978 FTC LEXIS 560, *1-2 (Sept. 12, 1978), where respondents sought the return of 25 privileged documents which they claimed had been inadvertently produced in response to an investigative subpoena, the Administrative Law Judge reviewed the scope of production, the time constraints that respondent was under, and the fact that respondents did have reasonable screening procedures in place to find that respondent had not waived its privileges.

Further, the January 15, 2002 Order is consistent with settled precedent from federal cases. 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 (Oct. 5, 1962). Although, as AHP asserts, courts have diverged as to the proper methodology for determining whether inadvertent production constitutes waiver, the "majority of courts" determine whether disclosure waives privilege by utilizing "an approach which takes into account the facts surrounding a particular disclosure." Alldread v. Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993). "In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered." United States v. De Lajara, 973 F.2d 746, 749 (9th Cir. 1992). Under this "middle of the road," balancing test, courts consider the following factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overreaching issue of fairness and the protection of an appropriate privilege. Gray v. GeneBicknell, 86 F.3d 1472, 1484 (8th Cir. 1996); Alldread, 988 F.2d at 1434-35. This precedent was adopted in In re Hoechst Marion Roussel, Inc., 2000 FTC LEXIS 155, 4-8 (Oct. 17, 2000) and utilized in the January 15, 2002 Order.

Commission precedent also holds that to establish a "'substantial ground' for difference of opinion under Rule 3.23(b), a party seeking certification must make a showing of a likelihood of success on the merits." Int'l Assoc. of Conf. Interpreters, 1995 FTC LEXIS 452, *4-5 (Feb. 15, 1995); BASF Wyandotte Corp., 1979 FTC LEXIS 77, *3 (Nov. 20, 1979) (The substantial ground for difference of opinion test "has been held to mean that appellant must show a probability of success on appeal of the issue."). AHP cannot demonstrate a probability of success on appeal of the issue.

AHP argues that the holding of Advertising to Women, Inc. v. Gianni Versace, 1999 U.S. Dist. LEXIS 12263 (N.D. Ill. Aug. 4, 1999), an unpublished opinion of a federal district court, compels a different result than the one reached in the January 15th Order. The January 15th Order relies on several contrary cases which compel a finding that AHP waived any privileges it may have held. Simply because AHP can cite to one, unpublished district court case that AHP believes supports its position that it did not waive any privileges does not compel certification. See Oyster v. Johns-Manville Corp., 568 F. Supp. 83, 88 (E.D. Pa. 1983) (party who produces a single case supporting particular legal doctrine, as opposed to plethora of orders and decisions rejecting that doctrine fails to demonstrate substantial ground for difference of opinion as required by 28 U.S.C. § 1292(b)).

The facts of Versace, a case which AHP cited in its reply brief in support of its Motion for Protective Order, are quite unusual and thus do not provide compelling authority. Versace involved the disclosure of two letters in Italian that the putative privilege holder argued were not privileged. The dispute arose when plaintiffs attempted to use the production of these two letters as a basis to compel production of a broad category of other material - privileged documents and testimony relating to advice of counsel on a trademark. Versace asserted that the documents were not privileged because they contained no legal advice and thus no privilege was waived. Since the plaintiffs failed to prove that the letters were privileged (and did not provide the court with an English translation), the court denied the motion to compel. Versace, 1999 U.S. Dist. LEXIS 12263, *2-15. The court held that the balancing test consisting of five factors (which was applied in the January 15th Order) "does not fit well here, because the facts of this case do not fall within a traditional 'inadvertent production' analysis." Id. at *15-16. Thus, Versace does not compel a finding contrary to the January 15th Order, which reviewed a more typical situation of inadvertent disclosure.

Because it is well settled that courts evaluate the circumstances surrounding disclosure to determine if there has been waiver and because AHP cannot demonstrate a probability of success on appeal of the issue, AHP has not presented an issue for which there is substantial ground for difference of opinion. Thus, AHP has not satisfied the second requirement of the first prong of Commission Rule 3.23(b).

For the above stated reasons, the issue for which AHP seeks review does not involve "a controlling question of law or policy as to which there is substantial ground for difference of opinion." 16 C.F.R. § 3.23(b). Therefore, the first prong of Commission Rule 3.23(b) has not been met.

B. Whether Subsequent Review Would Be An Inadequate Remedy

Even if AHP's request for certification did meet the first prong of Commission Rule 3.23(b), AHP's request for certification fails to meet the second prong as well. The second prong of Commission Rule 3.23(b) requires a determination by the Administrative Law Judge that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or that subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b).

A review of the determination that AHP waived any privileges with respect to nine documents unquestionably would not materially advance the ultimate termination of the litigation, and AHP does not attempt to make this argument. AHP does, however, argue that subsequent review of the January 15th Order would be an inadequate remedy. AHP argues that, without Commission review, the right sought to be protected will have already been destroyed through the further disclosure of the nine documents at the trial in this matter. Further, AHP argues, that since it is no longer a party, it does not have standing to appeal from the Initial Decision to be entered in this matter.

AHP's arguments that subsequent review would be an inadequate remedy do not withstand scrutiny for two reasons.

First, AHP will not suffer any additional harm if the Commission does not immediately review its request because it does not face further disclosure of the contested documents. Second, the cases on which AHP relies arise in federal courts which lack the Commission's procedure for allowing parties and non-parties to move for in camera treatment of their most sensitive materials.

First, by Order dated January 18, 2002, AHP was granted provisional in camera treatment for the nine documents and deposition testimony thereto. AHP was ordered to file a motion for in camera treatment within twenty days and was informed that its documents would be treated as in camera until a final ruling on whether in camera treatment of the material is appropriate pursuant to 16 C.F.R. § 3.45(b). AHP did file its motion for in camera treatment on February 7, 2002. By Order dated February 8, 2002, AHP was granted indefinite in camera treatment for those documents that any party has offered into evidence or listed as a potential exhibit to be offered into evidence. Because AHP has in camera protection for the contested documents offered into evidence, only persons subject to the Protective Order Governing Discovery Material - persons who have already seen the contested documents during discovery - have been permitted to remain in the courtroom when the contested documents are discussed at trial. All other members of the public, including FTC staff who are not subject to the Protective Order, have been instructed to leave the courtroom and have left the courtroom when AHP's contested documents have been discussed. For those documents which did not receive in camera status in the February 8, 2002 Order on the grounds that no party had listed them on their exhibit lists, AHP was directed that in the event that any party did offer such documents into evidence, provisional in camera treatment would be granted at that time pursuant to Commission Rule 3.45(g), in order to prevent public disclosure. In addition, the Protective Order Governing Discovery Material prevents public disclosure of the contested documents which have not received in camera treatment. Because AHP has the protection of the February 8, 2002 in camera order and the May 10, 2001 Protective Order Governing Discovery Material, AHP has not demonstrated that subsequent review would be inadequate and the second prong of Rule 3.23(b) is not met.

Second, the cases which AHP relies upon to argue that further disclosure of its documents will further erode any privileges it may have are not Commission cases, but from federal courts which lack the Commission's in camera treatment practice. For example, In re Ford Motor Co., 110 F.3d 954, 963 (3rd Cir. 1997) held that "once putatively protected material is disclosed, the very 'right sought to be protected' has been destroyed." Here, however, the documents have previously been disclosed to Complaint Counsel, Respondents' counsel, and Complaint Counsel's expert. There is no further erosion as the only persons allowed to remain in the courtroom under the in camera procedures in place in Commission proceedings are those who have already viewed the documents. Hence, AHP's claim of further erosion of its privileges does not support a finding that subsequent review would be an inadequate remedy.

A review of the determination that AHP waived any privileges with respect to nine documents would not materially advance the ultimate termination of the litigation. Subsequent review of the January 15th Order would not be an inadequate remedy because the February 8, 2002 in camera order and May 10, 2001 Protective Order adequately prevent further disclosure of AHP's documents. Accordingly, AHP also has not met the second prong of Rule 3.23(b).

C. Commission Precedent Does Not Support Interlocutory Review

The two cases AHP relies upon to argue that the January 15th Order are appropriate for interlocutory review also do not compel certification for the January 15th Order. In the first case, In re General Foods, Corp., 96 F.T.C. 168 (Aug. 19, 1980), the Commission reviewed on interlocutory appeal the Administrative Law Judge's order denying continued in camera treatment of certain exhibits and related testimony. The Commission held that if the administrative law judge had properly interpreted the Commission's in camera standards and applied them clearly to the facts in issue, the Commission would be reluctant to question his conclusions. Id. at 170. "At the interlocutory stage, we are neither familiar with the broad contours of the case below or the specifics of the information in question, and we are therefore ill-equipped to second-guess an ALJ's factual findings on in camera motions." Id. The reasoning of General Foods, in fact, precludes interlocutory appeal of this issue: the January 15th Order examined carefully the factual circumstances surrounding the creation, production, deposition testimony of, use by experts of and belated assertion of privilege of the nine documents. It is inappropriate to ask the Commission to examine these factual circumstances and reach a different result.

In the second Commission case AHP relies upon, In re Thompson Medical Co., 101 F.T.C. 385 (Mar. 11, 1983), the Commission decided to grant review of an order by the Administrative Law Judge which held that prior statements of respondent's expert witnesses were "Jencks-type" statements and required respondent to produce them. At the time, there was a division among the courts as to the appropriate scope of discovery from experts. The Commission enunciated the standard for discovery from experts and held that, although the ALJ had analyzed the issue under a different standard, his analysis was appropriate. Id. at 389. "An ALJ has broad discretion to rule on discovery requests, and his determinations will be reversed only on a showing of clear abuse." Id.

The overwhelming majority of decisions by Administrative Law Judges deny requests for certification. Requests for certification by non-parties have not received special consideration. E.g., In re R.R. Donnelley & Sons Co., 1991 FTC LEXIS 478 (Oct. 30, 1991); In re American Medical Assoc., 1977 FTC LEXIS 89 (Sept. 30, 1977). Furthermore, Commission precedent makes it abundantly clear that interlocutory appeals from discovery rulings are disfavored. In re Gillette Co., 98 F.T.C. 875, 875 (Dec. 1, 1981). Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. Interlocutory appeals from discovery rulings merit a particularly skeptical reception because they are particularly suited for resolution by the Administrative Law Judge on the scene and particularly conducive to repetitive delay. In re Bristol Myers Co., 90 F.T.C. 273, 273 (Oct. 7, 1977). In the instant case, a determination that the circumstances surrounding the creation of, production of, deposition testimony about, and belated assertion of privilege for nine documents constitutes a ruling on discovery. See Power Conversion, Inc. v. Saft America, Inc., 1985 U.S. Dist. LEXIS 20219, *2 (May 1, 1985) (determination of waiver of privilege described as a discovery ruling); In re Atlantic Richfield Co., 1978 FTC LEXIS 562, * 7-8 (July 20, 1978) (review of withheld documents by ALJ to determine whether privilege applies constitutes a discovery ruling). The fact that the ruling for which AHP seeks appeal is a discovery ruling further supports denial of AHP's motion for interlocutory appeal.

IV. CONCLUSION

For the above stated reasons, AHP's motion for certification to the Commission for interlocutory review is DENIED.

In addition, because the February 8, 2002 Order granting in camera treatment prevents public disclosure of AHP's documents, AHP faces no irreparable harm. Accordingly, AHP's motion for a stay of the January 15, 2002 Order is DENIED.

ORDERED:

D. Michael Chappell

Administrative Law Judge

FTC

END OF DOCUMENT