

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

HOECHST MARION ROUSSEL, INC., a corporation,
CARDERM CAPITAL L.P., a limited partnership,

and

ANDRX CORPORATION, a corporation.

DOCKET NO. 9293

**RESPONDENT ANDRX CORPORATION'S MOTION FOR PROTECTIVE
ORDER PRECLUDING DUPLICATIVE DEPOSITIONS**

Pursuant to Section 3.31(c)(1) and (d) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.31(c)(1) and (d), respondent Andrx Corporation hereby moves for a protective order precluding Complaint Counsel from re-examining Andrx employees and agents who previously have been examined by the FTC staff in connection with this matter.

The bases of this motion are set forth in the accompanying Memorandum in Support of Motion for Protective Order Precluding Duplicative Depositions (dated September 15, 2000); and the accompanying Declaration of Hal S. Shaftel, executed on September 15, 2000.

Dated: New York, New York
September 15, 2000

Respectfully Submitted,

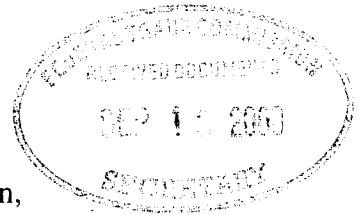
SOLOMON, ZAUDERER, ELLENHORN,
FRISCHER & SHARP

By: 

Louis M. Solomon
Hal S. Shaftel
Colin A. Underwood
Teresa A. Gonsalves

45 Rockefeller Plaza
New York, New York 10111
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Counsel for Respondent Andrx Corporation



**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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HOECHST MARION ROUSSEL, INC., a corporation,
CARDERM CAPITAL L.P., a limited partnership,

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ANDRX CORPORATION, a corporation.

Docket No. 9293

**RESPONDENT ANDRX CORPORATION'S
MEMORANDUM IN SUPPORT OF MOTION FOR
PROTECTIVE ORDER PRECLUDING DUPLICATIVE DEPOSITIONS**

Respondent Andrx Corporation ("Andrx") submits this memorandum, pursuant to Section 3.31(c)(1) and (d) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.31(c)(1) and (d), in support of a protective order precluding Complaint Counsel from re-examining certain Andrx employees and agents who previously have been examined by the FTC staff in connection with this matter.

Preliminary Statement

Before this proceeding commenced, the FTC staff obtained extensive factual discovery during a two-and-a-half-year pre-Complaint investigation. As part of that investigation, the FTC staff received not only all of Andrx's documents that it sought, but also took the pretrial examinations of all the Andrx employees and agents that it wanted to examine: Randy Glover, Scott Lodin, Karen Rice, Angelo Malahias, and Louis Solomon (collectively, the "Previously Questioned Witnesses").

Discovery in this proceeding is set to close approximately one month from now on October 20, 2000. Thus far, respondents have been stymied in their efforts to obtain crucial

discovery. Andrx has been unable to take the depositions of any of Complaint Counsel's witnesses -- including Complaint Counsel's "star witnesses" from Biovail Corporation International and other non-parties. Indeed, Complaint Counsel has collaborated in hindering such discovery by, among other things, refusing to provide discovery on topics subject to its motion to strike certain affirmative defenses (which now has been denied in significant respects) and joining in a motion to quash the subpoenas that Andrx served on Biovail.

With only approximately one month of discovery remaining, Complaint Counsel is seeking the depositions of a total of thirteen Andrx employees and agents, including each of the five Previously Questioned Witnesses. Andrx does not object to the examination of the eight Andrx witnesses who have not previously been questioned. However, Complaint Counsel does not -- and cannot -- provide a sufficient basis for re-doing examinations of the Previously Questioned Witnesses. Indeed, Complaint Counsel did not even bother to take the testimony of the eight Andrx witnesses not yet deposed before deciding it wanted to retake the prior examinations as well. Particularly as respondents struggle to complete first-time discovery in the short time remaining to do so, it would be extremely prejudicial to allow Complaint Counsel to pursue duplicative discovery.

What, in effect, Complaint Counsel seeks is the ability to depose witnesses twice, before respondents have had the opportunity to depose witnesses once. An order should be entered precluding such an outcome, which would not only be unduly burdensome but also patently unfair to respondents. In the alternative, Complaint Counsel, at the very least, should be required to make an affirmative showing of specific and substantial need for additional questioning, on a witness by witness basis, identify "new" areas of testimony not previously

known about during the previous questioning, and strictly limit additional questioning, if any, to such new areas.

Background¹

In contrast to Andrx's immediate need to conduct and complete crucial discovery in the remaining month allotted for discovery, Complaint Counsel enjoys the benefit of having had two and a half years of discovery during the pre-Complaint phase of this matter. As part of that process, the FTC staff obtained a massive amount of discovery, including, in addition to all the documents it requested from Andrx, testimony from five Andrx agents and employees. Specifically, on April 21 and 22, 1999, Complaint Counsel examined Randy Glover, Karen Rice, and Angelo Malahias. On April 27 and 28, 1999, Scott Lodin was examined. On August 31, 1999, Louis Solomon was examined. Throughout the pre-Complaint investigation, Andrx fully cooperated with the FTC staff and was advised that it had wholly satisfied the various extensive requests for information made on it. At no time did the FTC staff complain about any insufficiency in Andrx's responses.²

Indeed, Complaint Counsel's satisfaction with the information that the FTC staff obtained is demonstrated not only by the fact it was able to prepare its pleading but, during the scheduling conference before Your Honor on April 24, 2000, Complaint Counsel refused to take a position on the scheduling of a trial date because it did not claim to have a need for any substantial additional discovery.

¹ The background below is based in part on the accompanying Declaration of Hal S. Shaftel, executed on September 15, 2000 (the "Shaftel Decl.>").

² Plus, we have learned that the FTC staff, during the pre-Complaint investigation, obtained discovery from well in excess of 50 different entities (not counting individuals).

By Notice of Deposition dated August 22, 2000, Complaint Counsel purported to notice the depositions of thirteen Andrx employees and agents -- including the five Andrx witnesses previously examined. See Shaftel Decl., Ex. A. Andrx has not objected to making the eight witnesses available who have not already provided testimony. During discussions, Complaint Counsel refused to explain the basis for re-doing the depositions of the Previously Questioned Witnesses. When each of the prior depositions was taken, the Stipulation at issue was in effect and the subject of extensive testimony. The Stipulation, by its terms, terminated in June 1999, which was before Mr. Solomon's testimony was taken. Even, however, with respect to the other four of the Previously Questioned Witnesses, no explanation has been provided by Complaint Counsel as to why any of them -- let alone all of them -- need to provide any additional testimony on issues not covered in their prior testimony.

Taking advantage of the disparity in the discovery it already has obtained, Complaint Counsel has stonewalled in providing discovery. In turn, that approach has had the effect of encouraging third parties to do the same. With only about a month remaining for discovery, only limited non-party document and no deposition discovery noticed by respondents has occurred. Given these circumstances, there is no basis for permitting Complaint Counsel the benefit of duplicative discovery.

Argument

I.

COMPLAINT COUNSEL SHOULD BE PRECLUDED FROM TAKING REPEAT DEPOSITIONS OF PREVIOUSLY QUESTIONED WITNESSES

The Commission's Rule of Practice 3.31(c)(1) states:

The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the Administrative

Law Judge if he determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking the discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden and expense of the proposed discovery outweigh its likely benefit. (emphasis added)

Rule of Practice 3.31(d) further states:

The Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.

Here, permitting Complaint Counsel to take a second round of pretrial testimony from the Previously Questioned Witnesses would be contrary to both the letter and spirit of the rules. Such discovery would be "unreasonably cumulative and duplicative" and otherwise unduly burdensome and prejudicial to Andrx. Federal courts, which routinely are cited for guidance in FTC proceedings, routinely hold that "[r]epeat depositions are disfavored." Lobb v. United Air Lines, Inc., No. 92-15846, 1993 WL 259470, at *1 (9th Cir. July 8, 1993) (quoting Graebner v. James River Corp., 130 F.R.D. 440, 441 (N.D. Cal. 1989); see also Siegman v. Columbia Pictures Entertainment, Civ. A. No. 11,152, 1993 WL 133068, at *2 (Del. Ch. 1993) (granting protective order where plaintiff offered insufficient reason why witness should be re-deposed). Moreover, it would be "unfair and uneconomical" to permit Complaint Counsel to depose the Previously Questioned Witnesses twice, even if Complaint Counsel claims that such questioning would be for a different purpose. Lobb, 1993 WL 259470, at *1 (precluding second round of questioning where party sought second deposition for alleged different purpose -- "for trial" -- after completion of earlier deposition "for settlement purposes").

In addition, it would be particularly prejudicial to distract Andrx, given the short time remaining for discovery, from taking first-time depositions and other crucial discovery on

account that it also must participate in repeat depositions of the Previously Questioned Witnesses. Duplicative discovery of that kind would obviously burden and cause delay in Andrx's trial preparation. Here, like in Graebner, counsel "are in the midst of preparation for trial." Graebner, 130 F.R.D. at 441. Given that "trial [is] less than [three] months away, it would be unjust to require [Andrx] to set aside [its] own pre-trial preparation to accommodate" Complaint Counsel's request to retake pretrial testimony of individuals who have previously been questioned. Id.

II.

TO THE EXTENT THAT ANY REPEAT DEPOSITIONS ARE PERMITTED, COMPLAINT COUNSEL MUST MAKE A SPECIFIC SHOWING OF SUBSTANTIAL NEED AND STRICT RESTRICTIONS SHOULD BE IMPOSED

If any repeat depositions are permitted, such depositions at the very least must be based on a specific showing by Complaint Counsel, on a witness-by-witness basis, of the substantial need for further testimony from the Previously Questioned Witnesses. Here, Complaint Counsel cannot make such a showing of particularized need as to any of the witnesses at issue -- certainly not as to all of them. Even assuming, however, any such showing can be made, stringent restrictions should be placed on any repeat depositions, and additional testimony, if any, should be strictly limited to new areas not known about at the time of the prior testimony.

First, Complaint Counsel must bear the burden of identifying the "new" areas about which it seeks to ask questions and must establish that it previously was unable to inquire about those areas because it had no basis to know about them. Complaint Counsel has not -- and cannot -- establish or identify new areas of significance that have arisen since the Previously Questioned Witnesses were questioned. Conceivably, the only possible argument that Complaint Counsel might make is that the Stipulation terminated after certain Andrx witnesses were

questioned. However, the Stipulation was in place when all of the Previously Questioned Witnesses gave their testimony, and it was terminated in June of 1999, before the pretrial examination of Louis Solomon on August 31, 1999, and only approximately a month after the examinations of the other four Previously Questioned Witnesses in late April of 1999. As to those witnesses who gave testimony prior to the termination, there is no specific information indicating that any of those witnesses have special, discoverable knowledge regarding the termination of the Stipulation that the eight witnesses still to be deposed -- and who Andrx makes no objection to producing -- cannot provide.

Second, in the unlikely event that Complaint Counsel is able to sustain its burden of specifically identifying areas which it could not have covered previously and link such areas to the witnesses (and we do not believe that can be done), questions should be strictly confined to those new topics. See, e.g., Tri-Star Pictures, Inc. v. Unger, 171 F.R.D. 94, 102-103 (S.D.N.Y. 1997) ("strictly confin[ing]" second deposition to new issues and forbidding re-questioning on topics covered in previous testimony); Christy v. Pennsylvania Turnpike Comm'n, 160 F.R.D. 51, 53 (E.D. Pa. 1995) (limiting second deposition to areas not covered in first deposition); Tram v. Porter Mem. Hosp., 128 F.R.D. 666, 668 (N.D. Ind. 1989) (restricting re-examination by substituted lawyer to areas previously uncovered); Perry v. Kelly-Springfield Tire Co., 117 F.R.D. 425, 426 (N.D. Ind. 1987) (limiting second deposition to "areas not covered at first deposition" because there was "no logical reason why [newly added defendant] should duplicate the same material covered at the first deposition").

In any event, Complaint Counsel must be precluded from re-plowing old ground and from posing questions that could have been explored earlier. See, e.g., Bonnie & Company Fashions, Inc. v. Bankers Trust Co., 945 F. Supp. 693, 733 (S.D.N.Y. 1996) (denying request to

take re-take pretrial testimony where plaintiff "intend[ed] simply to re-hash old testimony"); Keck v. Union Bank of Switzerland, No. 94 CIV. 4912, 1997 WL 411931, at *3 (S.D.N.Y. July 22, 1997) (refusing to permit re-questioning where "allegations do not raise new matters beyond those that could have explored earlier had . . . a more wide-ranging deposition" been sought).


Obviously, Andrx does not have the luxury of re-deposing people already deposed. And clearly, given time constraints, Andrx cannot repeat a deposition of a witness because of its failure to ask questions the first time around. Therefore, at the very least, Complaint Counsel should be required to identify new facts uncovered since it first took pretrial testimony and to connect those facts to each proposed deponent, prior to receiving permission to take any repeat pretrial examinations.

Conclusion

For the foregoing reasons, Andrx respectfully requests that this Court grant its motion for a protective order precluding repeat pretrial examinations by Complaint Counsel of certain Andrx employees and agents who previously have been examined by the FTC staff in connection with this matter.

Dated: New York, New York
September 15, 2000

SOLOMON, ZAUDERER, ELLENHORN,
FRISCHER & SHARP

By: 

Louis M. Solomon
Hal S. Shaftel
Colin A. Underwood
Teresa A. Gonsalves

45 Rockefeller Plaza
New York, New York 10111
(212) 956-3700

Attorneys for Respondent Andrx Corporation

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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and

ANDRX CORPORATION, a corporation.

Docket No. 9293

DECLARATION OF HAL S. SHAFTEL

HAL S. SHAFTEL, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a member of Solomon, Zauderer, Ellenhorn, Frischer & Sharp, counsel for respondent Andrx Corporation ("Andrx"). I submit this declaration in support of Andrx Corporation's Motion for Protective Order Precluding Duplicative Depositions pursuant to the FTC's Rule of Practice Section 3.31(c)(1) and (d), 16 C.F.R. § 3.31(c)(1) and (d).

2. By Notice of Deposition dated August 22, 2000 (the "August 22 Notice"), Complaint Counsel purported to notice the depositions of thirteen Andrx employees and agents. However, five of the individuals identified provided testimony previously in connection with the pre-Complaint investigation. Specifically, those individuals are Randy Glover, Scott Lodin, Karen Rice, Angelo Malahias, and Louis Solomon (collectively, the "Previously Questioned Witnesses"). A copy of the August 22

Notice is annexed hereto as Exhibit A. The August 22 Notice supplemented a prior Notice of Deposition dated July 21, 2000, which is annexed hereto as Exhibit B.

3. Andrx is not objecting to making the eight Andrx-related witnesses not yet examined available for depositions.

4. Beginning even before the deposition notice for Andrx employees and agents was served, counsel for Andrx had engaged in discussions with Complaint Counsel, including Markus Meier and Bradley S. Albert, in a good faith effort to resolve by agreement the dispute concerning Complaint Counsel's request to retake the depositions of the Previously Questioned Witnesses. During our discussions, the parties were unable to reach an agreement resolving the dispute. Complaint Counsel was unwilling to state the new areas, if any, about which it sought additional pre-trial testimony from the Previously Questioned Witnesses, or to limit further questioning of those witnesses solely to those new areas. Additionally, Complaint Counsel has been unwilling to agree to refrain from using the transcripts of the pre-Complaint testimony of the Previously Questioned Witnesses in exchange for Andrx agreeing to make witnesses available for repeat depositions.

5. Therefore, Andrx and Complaint Counsel agreed, on consent, that by September 15, 2000, Andrx would bring a motion for a protective order precluding repeat depositions of the Previously Questioned Witnesses.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in New York, New York, on September 15, 2000.



HAL S. SHAFTEL

EXHIBIT A

8/30

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

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a corporation,**

**CARDERM CAPITAL L.P.,
a limited partnership,**

and

**ANDRX CORPORATION,
a corporation.**

Docket No. 9293

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE, that pursuant to Rule 3.33(a) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, complaint counsel will take the deposition of the following persons at the designated time.

Deponent

Date

Ms. Diane Servello
Director -Regulatory Affairs
Andrx Pharmaceuticals, Inc.

August 30, 2000 at 9:30 a.m.

Mr. Louis Solomon
Solomon, Zauderer, Ellenhorn,
Frischer, & Sharp
45 Rockefeller Plaza
New York, NY 10111

September 1, 2000 at 9:30 a.m.

Dat Trieu, Ph.D.
Andrx Corporation

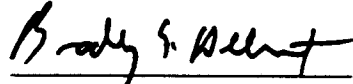
September 5, 2000 at 9:30 a.m.

Mr. Herschel Sparks Legal Counsel Andrx Corporation	September 6, 2000 at 9:30 a.m.
Xiu-Xiu Cheng Andrx Corporation	September 7, 2000 at 9:30 a.m.
Mr. David Gardner Former VP-Regulatory Affairs Andrx Corporation	September 8, 2000 at 9:30 a.m.
Randy Glover Former VP - Manufacturing Andrx Corporation	September 11, 2000 at 9:30 a.m.
Karen Rice Product Manager Andrx Corporation	September 12, 2000 at 9:30 a.m.
Scott Lodin VP- General Counsel Andrx Corporation	September 13, 2000 at 9:30 a.m.
Larry Rosenthal Executive Vice President Andrx Corporation	September 14, 2000 at 9:30 a.m.
Chih-Ming-Chen Co-Chairman Andrx Corporation	September 15, 2000 at 9:30 a.m.
Angelo Malahias VP - Chief Financial Officer Andrx Corporation	September 18, 2000 at 9:30 a.m.
Eliot Hahn President Andrx Corporation	September 19, 2000 at 9:30 a.m.

The depositions will be conducted before some person authorized by law to administer oaths, and will continue from day to day until completed. The testimony will be recorded

by stenographic means. The depositions will be taken at the offices of the Federal Trade Commission, 601 Pennsylvania Avenue, N.W.

Respectfully Submitted,



Markus H. Meier
Bradley S. Albert

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: August 22, 2000

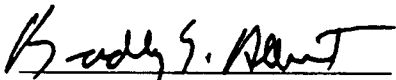
CERTIFICATE OF SERVICE

I, Bradley S. Albert, hereby certify that on August 22, 2000, I caused a copy of the Notice of Deposition to be served upon the following persons via facsimile and first-class mail.

James M. Spears, Esq.
Shook, Hardy & Bacon, L.L.P
600 14th Street, N.W.
Suite 800
Washington, DC 20005-2004

Peter O. Safir, Esq.
Kleinfeld, Kaplan, and Becker
1140 19th Street, N.W.
9th Floor
Washington, DC 20036

Louis M. Solomon
Solomon, Zauderer, Ellenhorn,
Frischer, & Sharp
45 Rockefeller Plaza
New York, NY 10111



Bradley S. Albert
Counsel Supporting the Complaint

EXHIBIT B

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

HOECHST MARION ROUSSEL, INC.,
a corporation,

CARDERM CAPITAL L.P.,
a limited partnership,

and

ANDRX CORPORATION,
a corporation.

Docket No. 9293

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE, that pursuant to Rule 3.33(a) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, complaint counsel will take the deposition of the following persons at the designated time.

Deponent

Date

Ms. Diane Servello
Director -Regulatory Affairs
Andrx Pharmaceuticals, Inc.

August 7, 2000 at 9:30 a.m.

Mr. James M. Spears
Shook, Hardy & Bacon
600 14th Street, N.W.
Suite 800
Washington, DC 20005-2004

August 9, 2000 at 9:30 a.m.

Mr. Herschel Sparks
Legal Counsel
Andrx Corporation

August 10, 2000 at 9:30 a.m.

Mr. David Gardner
Former VP-Regulatory Affairs
Andrx Corporation

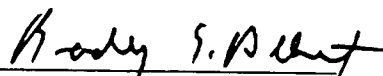
August 11, 2000 at 9:30 a.m.

Mr. Louis Solomon
Solomon, Zauderer, Ellenhorn,
Frischer, & Sharp
45 Rockefeller Plaza
New York, NY 10111

August 14, 2000 at 9:30 a.m.

The depositions will be conducted before some person authorized by law to administer oaths, and will continue from day to day until completed. The testimony will be recorded by stenographic means. The depositions will be taken at the offices of the Federal Trade Commission, 601 Pennsylvania Avenue, N.W.

Respectfully Submitted,



Markus H. Meier
Bradley S. Albert

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: July 21, 2000

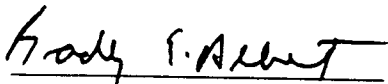
CERTIFICATE OF SERVICE

I, Bradley S. Albert, hereby certify that on July 21, 2000, I caused a copy of the Notice of Deposition to be served upon the following persons via facsimile and first-class mail.

James M. Spears, Esq.
Shook, Hardy & Bacon, L.L.P
600 14th Street, N.W.
Suite 800
Washington, DC 20005-2004

Peter O. Safir, Esq.
Kleinfeld, Kaplan, and Becker
1140 19th Street, N.W.
9th Floor
Washington, DC 20036

Louis M. Solomon
Solomon, Zauderer, Ellenhorn,
Frischer, & Sharp
45 Rockefeller Plaza
New York, NY 10111



Bradley S. Albert
Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I, Teresa A. Gonsalves, hereby certify that on September 15, 2000, I caused to be served upon the following persons, by overnight mail, next business day delivery, the following documents: Respondent Andrx Corporation's Motion for Protective Order Precluding Duplicative Depositions (dated September 15, 2000), Memorandum in Support of Motion for Protective Order Precluding Duplicative Depositions (dated September 15, 2000), and the Declaration of Hal S. Shaftel (executed September 15, 2000):

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

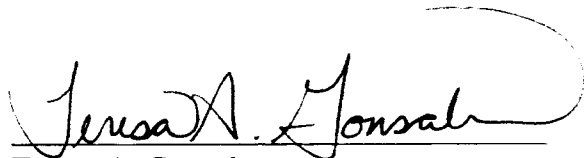
Donald S. Clark, Secretary
Federal Trade Commission
Room 172
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Washington, D.C. 20580

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

James M. Spears, Esq.
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801 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004

Peter O. Safir, Esq.
Kleinfeld, Kaplan and Becker
1140 19th St., N.W.
Washington, D.C. 20036

Dated: September 15, 2000


Teresa A. Gonsalves