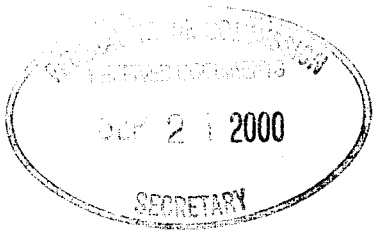
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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

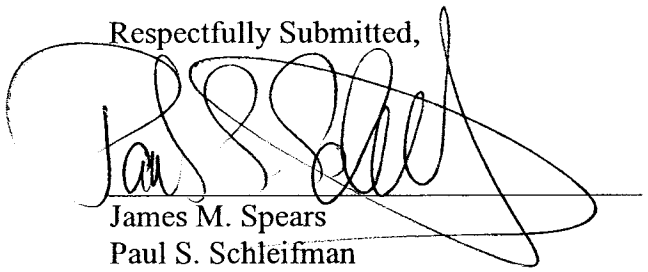
AVENTIS PHARMACEUTICALS, INC.'S
MOTION TO ENFORCE COMPLIANCE WITH THE
SUBPOENA SERVED ON AETNA U.S. HEALTHCARE, INC.

Pursuant to Rule 3.38(c) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.38(c), Respondent Aventis Pharmaceuticals, Inc. ("Aventis") respectfully moves for certification to the Commission of a request to enforce the subpoena *duces tecum* served on Aetna U.S. Healthcare ("Aetna"). As part of that certification, Aventis respectfully requests that this court stay any deposition of an Aetna official until two (2) weeks after Aetna has complied with the subpoena. In the alternative to certification and a stay, Aventis respectfully requests this court to prohibit any Aetna officer or employee from testifying or participating in this proceeding.

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

Dated: September 21, 2000

Respectfully Submitted,



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D. Edward Wilson, Jr.
Peter D. Bernstein
SHOOK HARDY & BACON, LLP
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Attorneys for Respondent
Aventis Pharmaceuticals, Inc.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

TO: The Honorable D. Michael Chappell
Administrative Law Judge

AVENTIS PHARMACEUTICALS, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO ENFORCE COMPLIANCE WITH THE SUBPOENA SERVED ON AETNA U.S. HEALTHCARE, INC.

Pursuant to Rule 3.38(c) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.38(c), Respondent Aventis Pharmaceuticals, Inc. ("Aventis") respectfully moves for certification to the Commission of a request to enforce the subpoena *duces tecum* served on Aetna U.S. Healthcare ("Aetna").

I. BACKGROUND

The primary thrust of the FTC's Complaint is that Respondents' alleged actions unreasonably restrained trade causing injury to competition and consumers in the relevant product market. (*Id.* ¶¶ 29-39). According to Complaint Counsel, the relevant product market is the market

for once-a-day diltiazem products and even narrower markets which "may be contained within" that market. (Complaint ¶ 12). Aventis disputes Complaint Counsel's arbitrarily narrow definition of the relevant product market. Aventis maintains and the evidence will clearly show that the relevant product market is, at a minimum, the market for a class of anti-hypertension products known as calcium channel blockers.

Accordingly, what constitutes the relevant product market is one of the primary issues that must be decided in this case. Information in the hands of third-party payor health insurance providers, such as Aetna, is essential in arriving at a proper relevant market definition. Materials in the possession of Aetna and other third-party payors, such as formularies, treatment and substitution studies, prescribing guidelines, reimbursement guidelines, and marketing contracts, are relevant indicators of the substitutability of pharmaceutical products, and of which products manufacturers view as being in direct competition.[1]

The subpoena *duces tecum* issued to Aetna was one of approximately 30 issued by the Commission on behalf of Aventis. In summary, the subpoena seeks documents relating to providers' drug classification studies and determinations, formularies, market-share incentive contracts with manufacturers, documents reflecting substitutability judgments and studies, and other information necessary to determine the proper scope of any relevant product market that includes Cardizem® CD or generic versions of Cardizem® CD.[2] Approximately half of the subpoenas were

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1. Third party payors also hold key sales, market-share, and other data relevant to the issues of harm to competition and consumers.

2. The subpoena *duces tecum* was received by Aetna on June 7, 2000. (*See* Declaration of D.E. Wilson, Jr. at ¶ 2, hereinafter Wilson Declaration. The return date specified on the subpoena (continued...)

issued to third party payors such as Aetna, the other half to manufacturers of pharmaceutical products.

Recipients were selected following an analysis of cardiovascular prescriptions broken down by third party payors and manufacturers, respectively. This analysis was done in conjunction with Aventis' economic experts and was based on industry data provided by IS. Only those companies needed to provide a statistical sample large enough to support sound analysis were included. According to industry data, Aetna ranks second in share of total cardiovascular prescriptions (Oct. 1997 - Sept. 1999) behind only the many Blue Cross and Blue Shield organizations when those are aggregated. Under any analysis, Aetna is a dominant company with regard to cardiovascular prescriptions and, therefore, its information is very important in determining the market or markets for cardiovascular pharmaceutical products.

The subpoena was also issued to Aetna because Complaint Counsel's Preliminary and Revised Preliminary Witness Lists identify an Aetna officer as a potential witness for Complaint Counsel in this case. According to Complaint Counsel's Revised Preliminary Witness List, Bob Jackson, Aetna's Vice President of Pharmacy and Head of Clinical Pharmaceutical Management for Aetna U.S. Healthcare, is expected to testify about "Aetna's prescription drug coverage program, including contracting, cost containment strategies, and, in particular, Aetna's selection of

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2. (...continued)
was June 26, 2000. (Wilson Declaration, Tabs A & B).

prescription cardiovascular agents for its formulary."[3] (*See* Complaint Counsel's Revised Preliminary Witness List).

Aventis' counsel has had numerous discussions with Aetna's counsel in order to cause Aetna to voluntarily comply with the subpoena. A document produced to Aventis' counsel entitled "Plaintiff Aetna U.S. Healthcare, Inc's Responses and Objections to HMRI's Subpoena *Duces Tecum* Directed to HMRI's First Document Production Request to Aetna U.S. Healthcare" was alternately disclaimed and asserted as Aetna's position. (Wilson Declaration, ¶ 3). On August 22, 2000, Aventis counsel and counsel for Aetna conducted another meet and confer with regard to the subpoena. (*See* Wilson Declaration at ¶ 4). That conference, held telephonically, ended with Aetna counsel informing Aventis that the documents produced by Aetna in the related class action litigation now pending in the Eastern District of Michigan[4] (the "class action") were completely responsive to the subpoena served on Aetna in this proceeding. (*Id.*). Aetna's counsel wrote a confirming letter and conveyed Aetna's agreement that the documents produced in the class action litigation were available for use in this proceeding.

Aetna had produced over four banker's boxes of documents in the class action litigation. (Wilson Declaration at ¶ 5). A review of these documents revealed they related to class certification issues and only one document (a contract between Aetna and Aventis' predecessor, Hoechst Marion Roussel, Inc.) would be responsive to the subpoena issued in this case. (Wilson

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3. A formulary is generally a schedule setting forth which products will be reimbursed under a particular health insurance plan.

4. *In re Cardizem CD Antitrust Litigation*, 99-MD-1278, MDL No. 1278 (E.D. Mich., Edmunds, J.).

Declaration at ¶ 6).[5] In view of Aetna's insistence that the "class action documents" are fully responsive to this subpoena, the meet and confer process was concluded, leading to this motion.

II. ARGUMENT

A. Aetna has Failed to Comply with its Basic Discovery Obligations and Aetna' s General Objections to the Subpoena Are Wholly Inadequate.

The Commission's Rules of Practice provide that "in instances where a nonparty fails to comply with a subpoena," this tribunal "shall certify to the Commission a request that court enforcement of the subpoena . . . be sought." 16 C.F.R. § 3.38(c) (emphases added). Aetna has clearly failed to comply with the subpoena *duces tecum* served upon it by Aventis.

Aetna has produced only one responsive document pursuant to a subpoena served over three months ago. Not only has Aetna refused to produce relevant documents, but Aetna has also failed to comply with its basic discovery obligations under the Commission Rules of Practice. Moreover, Aetna has engaged in dilatory tactics designed to frustrate the subpoena compliance process. Among these is Aetna's groundless insistence that document produced in another litigation are fully responsive to the subpoena.

Rule 3.34(c) requires Aetna to set forth all factual and legal objections to the subpoena in a motion to quash or limit the subpoena, filed within 10 days of service of the subpoena. *See* 16 C.F.R. § 3.34(c). Rule 3.38A required that any objection on privilege grounds be

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5. The overwhelming majority of the documents Aetna produced in the class action litigation were copies of contracts between Aetna and individual pharmacies in the State of Michigan. These documents are neither responsive to the subpoena in this case nor relevant to this proceeding.

accompanied by a schedule containing specified information regarding each item withheld. 16 C.F.R. § 3.38A(a).

Aetna ignored these obligations under the Commission's Rules of Practice, and instead untimely served its "Responses and Objections," dated July 21, 2000, 45 days after Aetna received the subpoena. (*See* Wilson Declaration at ¶ 3 & Tab C). Aetna's Responses and Objections to the subpoena consists of a laundry list of blanket objections covering almost every conceivable ground imaginable. Aetna made no attempt to associate each objection to specific documents or categories of documents responsive to requests in the subpoena. In fact, in its Responses and Objections, Aetna refused even to admit that Aetna has in its custody or control any documents responsive to the subpoena, or indeed that documents responsive to the requests even exist. (*Id.* at 2).

Aetna begins its Responses and Objections by invoking ten "General Objections," purported to be applicable "insofar as" they apply to each and every document request in the subpoena. (*See* Tab C). For example, Aetna objects to all of the requests "insofar as they are vague, overbroad, and unduly burdensome, call for irrelevant material, and are intended primarily to harass, oppress and annoy Aetna. . . ." (*See id.*). Aetna utterly fails, however, to disclose any facts necessary to support these broad assertions.

Aetna also objects to each request "insofar" as it seeks materials that are protected by the attorney-client privilege and the work product doctrine. Aetna fails, however, to provide the privilege log required by 16 C.F.R. § 3.38A.[6] Apparently, Aetna even felt it necessary to object to

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6. Under Commission Rule of Practice 3.38A, any person withholding responsive materials on (continued...)

the subpoena requests "to the extent that they purport to seek the disclosure of information or documents, which information or documents are not now and never have been in the possession, custody or control of Aetna." (*See id.* at 4).

In failing to satisfy its basic obligation to make specific and concrete objections, Aetna has denied Aventis and this tribunal the facts necessary to permit an independent evaluation of the merits of Aetna's objections, and instead has impermissibly expropriated to itself the decision of what is and is not discoverable. It is impossible to determine from Aetna's Responses and Objections what responsive documents it has in its possession and whether Aetna's objections have any merit with respect to particular documents or categories of documents.

These general objections asserted by Aetna are inadequate and wholly inconsistent with the letter and spirit of the Commission's Rules of Practice. While Aetna is not a party to this proceeding, an Aetna's Vice President has been listed as one of Complaint Counsel's witnesses in this proceeding and the principles of party discovery are equally applicable here. Commission Rule 3.37(b), requires a party to produce responsive documents "unless the request is objected to, in which event the reasons for the objection shall be stated." 16 C.F.R. § 3.37(b). "If objection is made

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6. (...continued)
the basis of privilege "shall" submit a schedule which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, organization of all authors and recipients of the item; and the specific grounds for claiming the item is privileged. 16 C.F.R. § 3.38A(a). A privilege log prevents the party claiming privilege from "decid[ing] the limits of [its] own entitlement," and "provide[s] a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified." Fed.R.Civ.P. 45 (advisory committee notes, 1991 Amendment); *see also Tuite v. Henry,* 98 F.3d 1411, 1416 (D.C. Cir. 1996). Aetna failed to provide a privilege log, and its blanket invocations of attorney-client and work product privileges are entirely improper.

to part of an item or category, the part shall be specified and inspection permitted of the remaining parts." *Id.* Aetna has failed to present properly cabined objections, tailored to the actual document requests. Instead, Aetna's apparent position, as reflected in its Responses and Objections, is that because it has some objections to the breadth and burden associated with some of the document requests, and because it wishes to claim that some responsive materials are privileged or confidential, Aetna need not comply with the subpoena, and can merely rest on its broad, generic objections.

The case law refutes any such position. Aetna "cannot spill forth a laundry list of objections and expect this court to pick and choose among them to determine which will save [Aetna] from having to respond." *Swarthmore Radiation Oncology, Inc. v. Lapes*, 1993-2 Trade Cases P 70,443, 1993 WL 517734 (E.D. Pa. 1993). Instead, Aetna, as the party resisting discovery, bears the burden of showing specifically how each request for production is overly broad, burdensome, or oppressive. *See, e.g., McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990). Simply to state that a production request is overbroad, burdensome, oppressive, or irrelevant, is not adequate to voice a successful objection to a request for production. *See id.*; *see also Josephs v. Harris Corp.*, 677 F.2d 985, 991-92 (3rd Cir. 1982) (concerning interrogatories).

Aetna's blanket invocation of attorney-client and work product privileges is also wholly inadequate. Aetna, as the party asserting the privilege, bore the burden of establishing the privilege by presenting underlying facts sufficient to demonstrate the applicability of the privilege to each document. *See, e.g., Jenny Craig, Inc.*, 1994 FTC LEXIS 68 at *6-*7 (May 16, 1994). Assertions of attorney-client and work product privileges "must be claimed with some particularity,"

because the validity and boundaries of any privilege asserted can only be determined for each document considered on a case-by-case basis. *See Jenny Craig, Inc.*, at *7 (citing *FTC v. Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980)); *see also Eureka Financial Corp. v. Hartford Accident and Indemnity Co.*, 136 F.R.D. 179, 182 (E.D. Cal. 1991) (collecting cases).

Not only are Aetna's blanket objections and invocations of privilege improper and untimely, many of Aetna's objections are frivolous on their face. For example, in its Responses and Objections, Aetna objects to several document specifications in the subpoena "to the extent that it is designed to, or does circumvent court rulings limiting discovery, including all such rulings in *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE)." Of course, discovery rulings in the class action litigation have no effect on discovery in this independent proceeding. *See, e.g., Riddell Sports, Inc. v. Brooks*, 158 F.R.D. 555, 561 (S.D.N.Y. 1994). In any event, the practical and legal considerations presented by discovery regarding class certification issues, in a case with multiple plaintiffs (including Aetna), are wholly different from those presented here. To the extent that there is a legitimate basis for pursuing discovery in this case, any discovery rulings in the class action case are irrelevant. *See id.*

In addition to its general objections, Aetna did make several specific objections to Aventis' subpoena. According to Aetna, document request numbers 2-6, 9, 11, and 13 were "unreasonably duplicative" of other document requests set forth in the subpoena. (*See* Declaration, Tab A). As Aetna has produced only one document pursuant to any of the requests in the subpoena, it is difficult to see how Aetna can reasonably object on the grounds that the requests are "duplicative." (Wilson Declaration at ¶ 6).

Finally, Aventis' negotiations with Aetna demonstrate Aetna's clear intent to delay and impede production of any of the relevant documents sought in the subpoena. Aetna delayed responding to the subpoena, responded only after Aventis' counsel initiated contact, presented improper blanket objections, and, finally, spuriously insists that fully responsive documents have been produced in the class action litigation. (*Id.* ¶ 4-7). To date, almost all of the other subpoenaed third-party payors, similarly situated to Aetna, have produced requested documents pursuant to reasonable arrangements between counsel and under the safeguards provided by the Protective Order governing this case. By contrast, Aetna has repeatedly stonewalled, reneged on its agreements, misled Aventis' counsel, and generally demonstrated a strong desire not to produce the type of document already produced by other, similar companies.

In sum, Aetna has failed to comply with the subpoena and with its basic obligations under the Commission's Rules of Practice, and has exhibited no apparent intent to do so. Under these circumstances, it is respectfully submitted that an order be requested requiring Aetna to fully comply with the subpoena well before any deposition of an Aetna officer or employee, or in the alternative, that no witness from Aetna be allowed to testify in this proceeding.

B. <u>The Materials Sought are Essential to Aventis' Defense of the Case</u>

There can be no doubt that the materials sought from Aetna are highly relevant to key issues in this case. Aetna is one of the largest providers of health insurance coverage in the United States. As noted earlier, third-party payors such as Aetna hold documents and other information that are essential to the determination of the relevant product market in this case.

Third-party payors study and make judgments with respect to the substitutability of various pharmaceutical products, including products for the treatment of hypertension, angina, and

related medical conditions. These entities establish guidelines, or "formularies," that determine which pharmaceutical products will be reimbursed under a particular health insurance plan. The third-party payors' substitutability studies, internal marketing materials, formulary decisions, and other documents relating to the classification and use of pharmaceutical products, reflect and help define the various categories of pharmaceutical products offered in the marketplace, as well as which products are considered suitable substitutes for each other under particular sets of medical circumstances. These materials will show which products are in competition with Cardizem CD® and which products are substitutable in the calcium channel blocker market.

Similarly, contracts between the manufacturers of pharmaceutical products and third-party payors typically contain market-share incentive provisions by which manufacturers reward third-party payors such as Aetna for market-share gains their products achieve with respect to other products deemed to be in competition. Materials relating to these contracts, including marketing and sales strategy materials, reflect health care providers' and manufacturers' business judgments as to which pharmaceutical products are in competition with each other. This information is also highly relevant to the determination of the relevant product market in this case.

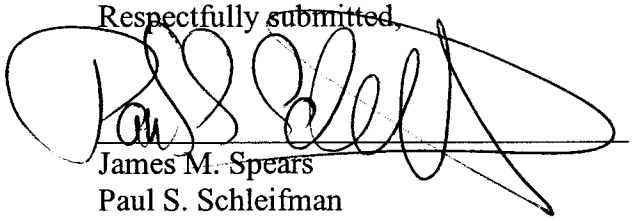
This and other information in the hands of Aetna is essential to: (1) allow Aventis to defend this case; (2) demonstrate that the relevant product market allegations set forth in the Complaint are overly narrow and cannot be supported; and (3) permit Aventis to prove that the relevant product market in this case is, at a minimum, the market for calcium channel blockers. Moreover, without the requested documentation from Aetna, Aventis will be denied an adequate opportunity to test Complaint Counsel's presentation of testimony from Mr. Jackson regarding Aetna's formularies and contract practices.

III. CONCLUSION

The information requested from Aetna is critical to one of the key disputed issues in this case. Aetna's unreasonable and generic objections, its improper assertions of privilege, and its bad faith and dilatory tactics in negotiations with Aventis' counsel, all confirm that a court order is required to enforce the subpoena. Aetna's stonewalling tactics should not be countenanced by this tribunal.

WHEREFORE, pursuant to Commission Rule of Practice 3.38(c), 16 C.F.R. § 3.38(c), Aventis Pharmaceuticals, Inc. respectfully requests that this tribunal certify to the Commission a request that court enforcement of the subpoena be sought. In conjunction with that request, Aventis requests that this court stay any deposition of an Aetna officer as employee until two weeks after Aetna has complied with the subpoena. In the alternative, Aventis respectfully requests an order from this tribunal that no witness from Aetna be allowed to testify in this proceeding.

Respectfully submitted,



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600 Fourteenth Street, N.W., Suite 800
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(202) 783-8400

Dated: September 21, 2000

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

ORDER GRANTING RESPONDENT AVENTIS PHARMACEUTICALS, INC. MOTION FOR STAY OF OR TO PROHIBIT TESTIMONY BY AETNA U.S. HEALTHCARE, INC.

On September 20, 2000, pursuant to Commission Rule 3.36, Respondent Aventis Pharmaceuticals, Inc. ("Aventis") filed a motion for an order requesting judicial enforcement of a subpoena *duces tecum* served by it on nonparty Aetna U.S. Health Care, Inc. ("Aetna"). Pending decision by the Commission on the Certification of it of Aventis' request and any subsequent proceedings, it is hereby

ORDERED, that no official of Aetna may testify or provide any evidence in this proceeding until two (2) weeks after Aetna has complied with the subpoena *duces tecum*.

ORDERED:

D. Michael Chappell
Administrative Law Judge

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

CERTIFICATION TO COMMISSION OF REQUEST FOR ENFORCEMENT OF SUBPOENA DUCES TECUM SERVED ON NON-PARTY AETNA U.S. HEALTHCARE, INC.

Non-Party Aetna U.S. Healthcare, Inc. ("Aetna"), has refused to comply with an FTC subpoena served by Aventis Pharmaceuticals, Inc. ("Aventis"). Accordingly, the Commission should direct the General Counsel's office to enforce this subpoena in court. *See* 16 C.F.R. § 3.38(c) ("in instances where a nonparty fails to comply with a subpoena or order, [the ALJ] shall certify to the Commission a request that court enforcement of the subpoena or order be sought.")

On May 17, 2000, the Commission issued a subpoena *duces tecum* to Aventis, which Aventis served on Aetna. The subpoena sought the production of documents relevant to Aventis' defense against Complaint Counsel's claim that Aventis engaged in monopoly and anti-competitive practices.

Despite numerous requests, Aetna has refused to produce responsive documents to Aventis. The Commission should therefore direct the Office of the General Counsel to seek court enforcement of the subpoena *duces tecum* issued May 17, 2000, to Aventis.

D. Michael Chappell
Administrative Law Judge

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

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

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

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

2. On June 5, 2000, I caused a subpoena *duces tecum* (copy attached at Tab A) to be delivered to Aetna U.S. Healthcare, Inc. ("Aetna") by mailing it, registered mail, return receipt requested, to the company's address for service of process, 930 Jolly Road, Blue Bell, Pa., 19422. The return receipt, dated June 7, 2000, was subsequently delivered to our offices. (Copy at Tab B).

3. Thereafter, and for over the past two months, I had a series of communications with Peter D. St. Phillip, Jr., of the law firm of Lowey Dannenberg Bemporad & Selinger, P.C., and Jennifer Abrams of Berman, DeValerio, Pease & Tabacco, P.C., concerning narrowing and complying with the subpoena. Both have written letters purporting to state "agreements" or disputing the accuracy of various statements supposedly made by me. During the course of these conversations, I was provided with a document dated July 21, 2000, entitled "Plaintiff Aetna U.S. Healthcare, Inc.'s Responses and Objections to HMRI's Subpoena Duces Tecum Directed to HMRI's First Document Production Request to Aetna U.S. Healthcare." I was told, alternately, that this document is not, and then is Aetna's position with regard to the subpoena served on it in this matter. A copy is attached at Tab C.

4. On August 22, 2000, Aetna informed me that the documents produced by Aetna in *In re Cardizem CD Antitrust Litigation* (the "class action") were completely responsive to the subpoena issued to Aetna on behalf of Aventis in this proceeding.

5. This law firm conducted a review of the over four bankers' boxes of documents produced by Aetna in the class action litigation. The review revealed only one document responsive to any of the requests made to Aetna with regard to this case. In overwhelming majority, the class action documents are copies of contracts between Aetna and individual pharmacies in the State of Michigan. The only responsive document contained in the over four bankers boxes is one contract, and that contract is between Aetna and HMRI, Aventis' predecessor.

6. In view of Aetna's insistence that the class action documents are completely responsive to the subpoena in this case, I informed counsel for Aetna that I considered our meet and confer obligation satisfied.

Executed in Washington, D.C., on September 21, 2000.

Respectfully Submitted,

D. E. Wilson, Jr.

TAB A

SUBPOENA DUCES TECUM

Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b)(1997)

1. TO Custodian of Records for:
Aetna U.S. Healthcare
980 Jolly Road
Blue Bell, PA 19422-0000
c/o Aetna U.S. Healthcare
980 Jolly Road
Blue Bell, PA 19422-0000

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION OR INSPECTION

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

4. MATERIAL WILL BE PRODUCED TO

Shook, Hardy & Bacon L.L.P.
Attn: D. Edward Wilson, Counsel for Hoechst Marion Roussel, Inc.

5. DATE AND TIME OF PRODUCTION OR INSPECTION

June 26, 2000 at 10:00 a.m.

6. SUBJECT OF PROCEEDING

In the matter of Hoechst Marion Roussel, Inc., et al.

7. MATERIAL TO BE PRODUCED

See Exhibit "A" attached hereto

8. ADMINISTRATIVE LAW JUDGE

The Honorable D. Michael Chappell

Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL REQUESTING SUBPOENA

Shook, Hardy & Bacon L.L.P
James M. Spears
D. Edward Wilson
Peter D. Bernstein
Counsel for Hoechst Marion Roussel

DATE ISSUED

MAY 17 2000

SECRETARY'S SIGNATURE

Donald S. Clark

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served (check the method used)

- ○ *in person.*
- ● *by registered mail.*
- ○ *by leaving copy at principal office or place of business, to wit:*

_____

_____

_____

_____

on the person named herein on:

06/07/2000
(Month, day, and year)

D. E. WILSON, JR.
(Name of person making service)

OF COUNSEL
(Official title)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

Exhibit A to Subpoena Duces Tecum

In the Matter of	)	
	)	Docket No. 9293
Hoechst Marion Roussel, Inc., et al.,	)	
	)	
Respondents	)	

HMRI'S FIRST DOCUMENT PRODUCTION REQUEST TO AETNA US HEALTHCARE

Respondent Hoechst Marion Roussel, Inc. ("HMRI"), pursuant to the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.34(b), requests that Aetna US Healthcare (hereinafter referred to as "the company") produce documents and other things for inspection and copying, within 20 days, in response to the Document Requests set forth below, and in accordance with the Definitions and Instructions following thereafter, at the offices of Shook, Hardy & Bacon, L.L.P., 600 14th Street, N.W., Washington, D.C. 20005, or such location as may be mutually agreed upon.

DOCUMENT REQUESTS

Request No. 1.: All documents that reflect or relate to determining pharmaceutical products for inclusion in, or exclusion from, formularies, including but not limited to contract manuals, contract training manuals, account training manuals, standard form contracts, discount grids, market share tiers, and market segment listings.

Request No. 2.: All documents comprising pharmaceutical product formularies used in connection with any health benefit plan or prescription benefit plan through which you reimburse pharmacies and/or individuals for pharmaceutical products dispensed pursuant to doctors' prescriptions.

Request No. 3.: All documents that reflect or relate in any manner to the classification of prescription pharmaceutical products in formularies, including the classification of pharmaceutical products for treatment purposes and for determining co-payments or reimbursement amounts for individual participants and/or payments to pharmacies.

Request No. 4.: All documents that reflect or relate to any process or criteria, whether clinical or economic, including those documents relating to any internal organization such as a Pharmacy Quality Advisory Committee ("PQAC" or "QC") or Pharmacy and Therapeutics Committee ("P & T"), used to determine the cardiovascular pharmaceutical products to be included in, or excluded from, any formulary.

Request No. 5.: All documents that reflect or relate to the policies or criteria for making any initial classification in formularies as well as any reclassification of any previously classified pharmaceutical product in subsequent formulary listings.

Request No. 6.: All documents that reflect or relate to the formularies in which Cardizem® CD has been listed, including but not limited to documents identifying all classifications or categories in which Cardizem® CD has been listed in each formulary, as well as the other pharmaceutical products included in each category so described.

Request No. 7.: All documents that reflect or relate to standards of care for the treatment of hypertension and/or angina through the use of cardiovascular pharmaceutical products.

Request No. 8.: All documents that reflect or relate, in any way, the substitutability of any cardiovascular pharmaceutical product for any other cardiovascular pharmaceutical product.

Request No. 9.: All documents that reflect or relate in any way to programs, campaigns or activities undertaken by you which are designed to encourage the use or substitution of any cardiovascular pharmaceutical product for any other cardiovascular pharmaceutical product.

Request No. 10.: All documents that reflect or relate to agreements or contracts between you and any of the entities listed on Attachment 1 with regard to cardiovascular pharmaceutical products.

Request No. 11.: All documents that reflect or relate in any way to the negotiation of contracts or other agreements regarding discounts, rebates, credits, allowances, charge backs and other price adjustments between you and any of the entities listed on Attachment 1 with regard to cardiovascular pharmaceutical products.

Request No. 12.: All data and reports, including but not limited to data and reports provided by third-party vendors such as IMS, that reflect or relate to the sales of any cardiovascular pharmaceutical product and any analysis that might consider: (1) the extent to which these products compete against each other and compete against Cardizem® CD and other sustained release diltiazem products; (2) the extent to which sales of the products respond to/or are affected by variations in price or manufacturer discounts, rebates, credits or other price adjustments; and (3) the extent to which sales of the products respond to changes in the formulary classifications maintained by third-party payors, insurers and other health care providers.

Request No. 13.: All documents sufficient to identify the individual(s) (by name, address, position and date) who supervise the negotiation of contracts and/or agreements between you and any entity listed on Attachment 1 with regard to cardiovascular pharmaceutical products.

DEFINITIONS AND INSTRUCTIONS

1. Unless otherwise stated, the requests herein refer to the time period of January 1, 1992 through present and to information relating to the

2. As used herein, the words "you" or "your" shall mean Aetna, and each of its predecessors, successors, groups, divisions, subsidiaries and affiliates, including Prudential HealthCare.

3. As used herein, "HMRI" shall mean the Respondent Hoechst Marion Roussel, Inc. and each of its predecessors, successors, groups, divisions, subsidiaries and affiliates.

4. As used herein, the term "formulary" means a list of prescription pharmaceutical products generally covered under a health or prescription benefit plan subject to applicable limits and conditions. For the purposes of this document request, the term "formulary" excludes pharmaceutical products in classifications other than "cardiovascular pharmaceutical products" but includes all descriptive material, including but not limited to operating guidelines, definitions and lists of abbreviations.

5. As used herein, "cardiovascular pharmaceutical products" means the products within code 31000 of the IMS Uniform System of Classification.

6. As used herein, "Cardizem® CD" means the diltiazem formulation sold under this name.

7. As used herein, "person" means all employees, individuals, and entities, including but not limited to corporations, associations, companies, partnerships, joint ventures, trusts and estates.

8. As used herein, the terms "document" or "documents" or "documentation" include these terms as defined by 16 C.F.R. § 3.34(b) and, in addition, the original or drafts or any kind of written, printed, recorded or graphic matter or sound reproduction, however produced or reproduced, whether sent or received or neither, and all copies thereof which are different in any way from the original (whether by notation, indication of copies sent or received or otherwise) regardless of whether designated "Confidential," "Privileged" or otherwise and including, but not limited to, any correspondence, paper, book, account, drawing, agreement, contract, e-mail, handwritten notes, invoice, memorandum, telegram, object, opinion, purchase order, report, records, transcript, summary, study, survey recording of any telephone or other conversation, interviews or notes of any conference. The terms "document" or "documents" shall also include data stored, maintained or organized electronically or magnetically or through computer equipment, translated, if necessary, by you into reasonably usable form, and film impressions, magnetic tape and sound or mechanical productions of any kind or nature whatsoever.

9. Except for privileged materials, produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. Submit any appendix, table, or other attachment by either physically attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, do not mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.

10. As used herein, the words "describe", "relates to", "relating to", "reflects", "regarding", or equivalent language shall mean constituting, reflecting, respecting, supporting, contradicting, referring to, stating, describing, recording, noting, containing, monitoring, studying, analyzing, discussing, evaluating or relevant to.

11. As used herein, the connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

12. As used herein, the term "communication" means every manner of transmitting or receiving information, opinions, and thoughts whether orally, in writing, or electronically.

13. As used herein, the term "health benefit plan" refers to any plan which you operate or administer which provides for the payment or reimbursement of health care related expenses.

14. As used herein, the term "prescription benefit plan" refers to any plan which you operate or administer, either solely or in conjunction with another entity, which provides for the payment of or reimbursement for pharmaceutical products dispensed pursuant to doctors' prescriptions.

15. As used herein, the term "plan" or "plans" refers jointly to the health benefit plan and prescription benefit plan.

16. As used herein, the term "substitutability" refers to the degree to which doctors, patients, pharmacies, wholesalers, pharmacy benefit managers ("PBMs"), and/or health benefit plans shift purchases between or among pharmaceutical products based on considerations including, but not limited to, cost, efficacy, and side effects.

17. The response to each document production request is to be numbered in a manner consistent with these requests and is to be preceded by the specific request.

18. If any form of privilege or immunity is claimed as ground for withholding a response, submit a written statement that describes the factual basis of the purported privilege or claim of immunity in sufficient detail to permit the court to adjudicate the validity of the claim.

19. If a request is deemed objectionable, state the reasons for the objection. If a portion of a request is deemed objectionable, state the objection, and answer the remaining unobjectionable portion of the request.

SHOOK, HARDY & BACON L.L.P.

By: D. E. Wilson

James M. Spears
Paul S. Schleifman
D. E. Wilson, Jr.
Peter D. Bernstein
600 14th Street, N.W.
Washington, D.C. 20005-2004
202-783-8400

Attorneys for Respondent Hoechst Marion Roussel, Inc.

Dated: June 5, 2000

Attachment 1, attached

Attachment 1 to Subpoena Duces Tecum Issued on Behalf of HMRI

Pfizer, Inc.
Merck & Co., Inc.
Astra Zeneca Pharmaceuticals LP
Novartis Pharmaceuticals Corporation
Abbott Laboratories Inc.
Mylan Pharmaceuticals Inc.
Parke-Davis
Key Pharmaceutical, Inc.
Bayer Corporation
G. D. Searle & Co.
Watson Laboratories, Inc.
Zenith Goldline Pharmaceuticals Inc.
Forest Pharmaceuticals, Inc.
Biovail Corporation
Teva Pharmaceuticals USA, Inc.

TAB B

LAW OFFICES

SHOOK, HARDY & BACON L.L.P.

HAMILTON SQUARE
600 14TH STREET NW SUITE 800
WASHINGTON DC 20005-2004

D.E.W., JR. - x47044

TO:

AETNA US HEALTHCARE
C/O AETNA US HEALTHCARE
980 JOLLY ROAD
BLUE BELL PA 19422

Registered No. R 291 384 941 **Date Stamp**

To Be Completed By Post Office

Reg. Fee $	$6.00	Special Delivery $	$0.00
Handling Charge $	$0.00	Return Receipt $	$1.25
Postage $	$0.77	Restricted Delivery $	$0.00
Received by:			

WASHINGTON, DC M.O.H.S. JUN 05 2000

Domestic Insurance Is Limited To $25,000; International Indemnity Is Limited (See Reverse)

Customer Must Declare Full Value $ $0.00

☐ With Postal Insurance
☒ Without Postal Insurance

To Be Completed By Customer (Please Print) All Entries Must Be in Ballpoint or Typed

FROM: Shook, Hardy & Bacon LLP
600 14th St., N.W., Suite 800
Washington, D.C. 20005-20066

TO: Aetna U.S. Healthcare
c/o Aetna U.S. Healthcare
980 Jolly Road
Blue Bell, PA 19422

PS Form 3806, February 1995 **Receipt for Registered Mail** (Customer Copy) (See Information on Reverse)

FIRST CLASS MAIL

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "*Return Receipt Requested*" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Aetna U.S. Healthcare
c/o Aetna U.S. Healthcare
980 Jolly Road
Blue Bell, PA 19422

4a. Article Number
R 291 384 941

4b. Service Type
☒ Registered ☐ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery
JUN 7 2000

5. Received By: (Print Name)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Addressee or Agent)
X

Is your RETURN ADDRESS completed on the reverse side?

PS Form 3811, December 1994 102595-97-B-0179 Domestic Return Receipt

Thank you for using Return Receipt Service.

TAB C

LOWEY DANNENBERG BEMPORAD & SELINGER, P.C.

THE GATEWAY • ONE NORTH LEXINGTON AVENUE

WHITE PLAINS, NEW YORK 10601-1714

TELEPHONE: (914) 997-0500 • TELECOPIER: (914) 997-0035

E-MAIL: LDBS@WESTNET.COM • INTERNET: HTTP://WWW.LDBS.COM

RICHARD B. DANNENBERG
STEPHEN LOWEY
RICHARD BEMPORAD
NEIL L. SELINGER
DAVID C. HARRISON
SHERRIE BROWN
WILLIAM J. BAN
WILLIAM R. WEINSTEIN
RICHARD W. COHEN
STACEY E. BLAUSTEIN
JEANNE D'ESPOSITO
THOMAS M. SKELTON
MICHELLE RAGO
VINCENT BRIGANTI
PETER D. ST. PHILLIP, JR.
GEOFFREY M. HORN

July 21, 2000

VIA FACSIMILE TRANSMISSION

D. Edward Wilson, Esq.
Shook, Hardy & Bacon L.L.P.
Hamilton Square
600 14th Street, N.W., Suite 800
Washington, DC 20005-2004

Re: *In the Matter of Hoechst Marion Roussel, Carderm Capital, and Andrx Pharmaceuticals, Inc.*, FTC Docket No. 9293

Dear Mr. Wilson:

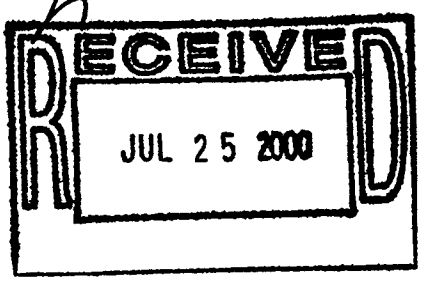
Please find enclosed Aetna U.S. Healthcare Inc.'s Responses and Objections to HMRI's Subpoena *Duces Tecum* in the Federal Trade Commission matter.

We believe that the subpoena is improper because (i) it is overbroad, burdensome and seeks irrelevant information; (ii) it seeks trade secrets, which the Michigan Court has already determined are privileged, and (iii) it was not properly served upon Aetna U.S. Healthcare. Nicole Lavallee, Esq. of Berman DeValerio Pease & Tabacco, P.C. will be handling all responses and negotiation relative to this subpoena. Her office number is (415) 433-3200, but she can be reached today or tomorrow at my office.

Unless we are able to reach an agreement, we intend to move for a protective order and/or motion to quash.

Very truly yours,

Peter St. Phillip



cc: Nicole Lavallee, Esq.
counsel of record

PSP:rhl

1369 / LTR / 00044046.WPD v1

UNITED STATES OF AMERICA
BEFORE THE 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

PLAINTIFF AETNA U.S. HEALTHCARE, INC.'S RESPONSES AND OBJECTIONS TO HMRI'S SUBPOENA DUCES TECUM DIRECTED TO HMRI'S FIRST DOCUMENT PRODUCTION REQUEST TO AETNA U.S. HEALTHCARE

Plaintiff Aetna U.S. Healthcare, Inc. ("Aetna"), pursuant to 15 U.S.C. § 57b-1 and 16 C.F.R. §§ 3.31 *et seq.*, hereby responds[1/] and, by and through its attorneys, objects to Exhibit A to Subpoena Duces Tecum Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b) (1997), dated May 17, 2000, and titled: "HMRI's First Document Production Request To Aetna U. S. Healthcare" (the "Document Requests"), as follows:

[1/] Aetna objects to the manner of service of the subpoena because it was not served in compliance with 16 C.F.R. § 4.4(b). The subpoena was not served upon an officer or agent of Aetna authorized to accept service of process. Instead, the subpoena was made out to "Custodian of Records" for Aetna, and was sent via registered mail addressed to "AETNA US HEALTHCARE; C/O AETNA US HEALTHCARE." Due to HMRI's failure to properly serve the subpoena, it was misdirected within Aetna.

PRELIMINARY STATEMENT

Each of Aetna's responses to these Document Requests is subject to all objections as to competence, relevance, materiality, admissibility, privilege, and privacy, and any and all other objections on grounds that would require exclusion of any response herein if such were offered in any FTC proceeding or in court, which objections are reserved and may be interposed at time of trial.

No incidental or implied admissions are intended in the responses. Aetna's response to all or any part of the Document Requests should not be taken as an admission that: (1) Aetna accepts or admits the existence of any fact(s) set forth in or assumed by the Document Request; or (2) Aetna has in its possession, custody or control documents responsive to that Document Request; or (3) documents responsive to that Document Request exist. Aetna's response to all or any part of any Document Request is not intended to be, and shall not be, a waiver by Aetna of all or any part of its objection(s) to that Document Request.

The following responses are based upon information known at this time and are given without prejudice to Aetna's right to supplement these responses or to produce evidence based on subsequently discovered information. Aetna's responses are based upon, and therefore are limited by, Aetna's present knowledge and recollection, and consequently, Aetna reserves the right to make any changes in these responses if it appears at any time that inadvertent errors or omissions have been made.

GENERAL OBJECTIONS

1. Aetna incorporates each and every general objection set forth below into the responses to each Document Request as if they were fully set forth in the response to each

request. For emphasis, from time to time a particular objection may also be set forth below in the specific responses to particular requests. Such reiteration shall in no way be deemed a waiver of other general objections not specifically set forth, nor a waiver of any other rights Aetna may have.

2. Aetna objects to the Document Requests insofar as they seek information concerning pharmaceutical products other than Cardizem® CD and its FDA AB-rated generic bioequivalents on the grounds that such information is not reasonably calculated to lead to the discovery of admissible evidence, is oppressive, unduly burdensome, and is intended to harass and/or annoy Aetna, who is not a party to this action.

3. Aetna objects to the Document Requests insofar as they purport to impose obligations on Aetna exceeding Aetna's obligations under applicable discovery rules, including 15 U.S.C. § 57b-1 and regulations promulgated thereunder.

4. Aetna objects to the Document Requests insofar as they are vague, overbroad and unduly burdensome, call for irrelevant material, and are intended primarily to harass, oppress and annoy Aetna and are not intended to produce evidence reasonably calculated to lead to the discovery of admissible evidence.

5. Aetna objects to the Document Requests insofar as they seek documents that contain trade secrets, proprietary business information, and/or competitively sensitive information.

6. Aetna objects to the Document Requests insofar as they seek documents that contain information that is insulated from disclosure by federal, state or local law governing disclosure of confidential patient prescription information.

7. Aetna objects to the Document Requests insofar as they seek information that is

protected by the attorney-client privilege and/or the attorney work product doctrine. Aetna will not produce any such information at any time.

8. Aetna objects to the Document Requests insofar as the Document Requests are unreasonably duplicative and are also cumulative of discovery already served produced to HMRI in a multi-district proceeding currently pending in the United States District Court for the Eastern District of Michigan, captioned *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE).

9. Aetna objects to the Document Requests insofar as the information sought is obtainable from HMRI's own records and the records of HMRI's co-respondents, and that obtaining the information from these sources is more convenient, less burdensome and less expensive than seeking the information from Aetna.

10. Aetna objects to the Document Requests to the extent that they are designed to, or do, circumvent court rulings limiting discovery, including all such rulings in the case captioned *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE). The Court in *In re Cardizem CD Antitrust Litigation* ruled, by Order dated July 7, 2000, that Aetna need not produce documents relating to the creation, determination, maintenance, or utilization of Aetna's formularies.

11. Aetna objects to the Document Requests to the extent that they purport to seek disclosure of information or documents, which information and documents are not now and never have been in the possession, custody or control of Aetna.

RESPONSES AND OBJECTIONS TO HMRI'S REQUESTS FOR THE PRODUCTION OF DOCUMENTS

Request No. 1: All documents that reflect or relate to determining pharmaceutical products for inclusion in, or exclusion from, formularies, including but not limited to contract manuals, contract training manuals, account training manuals, standard form contracts, discount grids, market share tiers, and market segment listings.

Response To Request No. 1:

Aetna objects to this Request and incorporates the General Objections into this response as if fully set forth herein, with particular reference to General Objections Nos. 2, 3, 4, 5, 8 and 10.

Aetna objects to Request No. 1 on the grounds that it is vague and overbroad, calls for irrelevant material, and is intended primarily to harass, oppress and annoy Aetna and not to produce evidence reasonably calculated to lead to the discovery of admissible evidence. Aetna further objects to Request No. 1 on the grounds that it is vague because terms listed therein are not defined.

Aetna further objects to Request No. 1 on the grounds that any and all information concerning the manner in which decisions regarding formulary lists are created, determined, maintained, or utilized is information which is of extreme competitive significance, is proprietary, and constitutes trade secrets. Aetna objects to Request No. 1 to the extent that it is designed to, or does, circumvent court rulings limiting discovery, including all such rulings in the case captioned *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE).

Request No. 2: All documents comprising pharmaceutical product formularies used in connection with any health benefit plan or prescription benefit plan through which you reimburse pharmacies and/or individuals for pharmaceutical products dispensed pursuant to doctors' prescriptions.

Response to Request No. 2:

Aetna objects to this Request and incorporates the General Objections into this response as if fully set forth herein, with particular reference to General Objections No. 8. Aetna objects to Request No. 2 insofar as it requests irrelevant material, and because it is unreasonably

duplicative of Request No. 1. Aetna objects to Request No. 2 insofar as it is unreasonably burdensome because such documents have already produced to HMRI in *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE).

Request No. 3: All documents that reflect or relate in any manner to the classification of prescription pharmaceutical products in formularies, including the classification of pharmaceutical products for treatment purposes and for determining co-payments or reimbursement amounts for individual participants and/or payments to pharmacies.

Response to Request No. 3:

Aetna objects to this Request and incorporates the General Objections into this response as if fully set forth herein, with particular reference to General Objections Nos. 2, 3, 4, 5, 6 and 10. Aetna objects to Request No. 3 insofar as it is unreasonably duplicative of Requests Nos. 1-2.

Aetna objects to Request No. 3 on the grounds that it seeks information concerning pharmaceutical products other than Cardizem® CD and its FDA AB-rated generic bioequivalents, on the grounds that such information is not reasonably calculated to lead to the discovery of admissible evidence, calls for irrelevant material, and is intended primarily to harass, oppress and annoy Aetna, who is not a party to this action.

Aetna further objects to Request No. 3 on the grounds that any and all information concerning the manner in which decisions regarding formulary lists are created, determined, maintained, or utilized is information which is of extreme competitive significance, is proprietary, and constitutes trade secrets. Aetna objects to Request No. 3 to the extent that it is designed to, or does, circumvent court rulings limiting discovery, including all such rulings in *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE).

Request No. 4: All documents that reflect or relate to any process or criteria, whether clinical or economic, including those documents relating to any internal organization such as a Pharmacy Quality Advisory Committee ("PQAC" or "QC") or Pharmacy and Therapeutics Committee ("P & T"), used to determine the cardiovascular pharmaceutical products to be included in, or excluded from, any formulary.

Response to Request No. 4:

Aetna objects to this Request and incorporates the General Objections into this response as if fully set forth herein, with particular reference to General Objections Nos. 2, 5, 8 and 10. Aetna objects to Request No. 4 insofar as it is unreasonably duplicative of Requests Nos. 1-3.

Aetna objects to Request No. 4 on the grounds that it seeks information concerning pharmaceutical products other than Cardizem® CD and its FDA AB-rated generic bioequivalents on the grounds that such information is not reasonably calculated to lead to the discovery of admissible evidence, calls for irrelevant material, is oppressive and unduly burdensome, and is intended to harass and/or annoy Aetna, who is not a party to this action.

Aetna further objects to Request No. 4 on the grounds that any and all information concerning the manner in which decisions regarding formulary lists are created, determined, maintained, or utilized, including documents relating to any internal organization used to determine inclusion or exclusion from formularies, is information which is of extreme competitive significance, is proprietary, and constitutes trade secrets. Aetna objects to Request No. 4 to the extent that it is designed to, or does, circumvent court rulings limiting discovery, including all such rulings in *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE).

Request No. 5: All documents that reflect or relate to the policies or criteria for making any initial classification in formularies as well as any reclassification of any previously classified pharmaceutical product in subsequent formulary listings.

Response to Request No. 5:

Aetna objects to this Request and incorporates the General Objections into this response as if fully set forth herein, with particular reference to General Objections Nos. 2, 4, 5, 8 and 10. Aetna objects to Request No. 5 insofar as it is unreasonably duplicative of Requests Nos. 1-4.

Aetna further objects to Request No. 5 on the grounds that it is vague, overbroad, and unduly burdensome, is not reasonably calculated to lead to the discovery of admissible evidence, and calls for the production of irrelevant material.

Aetna further objects to Request No. 5 on the grounds that any and all information concerning the manner in which decisions regarding formulary lists are created, determined, maintained, or utilized is information which is of extreme competitive significance, is proprietary, and constitutes trade secrets. Aetna objects to Request No. 5 to the extent that it is designed to, or does, circumvent court rulings limiting discovery, including all such rulings in *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE).

Request No. 6: All documents that reflect or relate to the formularies in which Cardizem® CD has been listed, including but not limited to documents identifying all classifications or categories in which Cardizem® CD has been listed in each formulary, as well as the other pharmaceutical products included in each category so described.

Response to Request No. 6:

Aetna objects to this Request and incorporates the General Objections into this response as if fully set forth herein, with particular reference to General Objections Nos. 2, 4, 5, 8 and 10. Aetna objects to Request No. 6 insofar as it is unreasonably duplicative of Requests Nos. 1-5.

Aetna objects to Request No. 6 on the grounds that it is vague, overbroad, and unduly burdensome, is not reasonably calculated to lead to the discovery of admissible evidence, and

calls for irrelevant material.

Aetna further objects to Request No. 6 on the grounds that any and all information concerning the manner in which decisions regarding formulary lists are created, determined, maintained, or utilized is information which is of extreme competitive significance, is proprietary, and constitutes trade secrets. Aetna objects to Request No. 6 to the extent that it is designed to, or does, circumvent court rulings limiting discovery, including all such rulings in *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE).

Request No. 7: All documents that reflect or relate to standards of care for the treatment of hypertension and/or angina through the use of cardiovascular pharmaceutical products.

Response to Request No. 7:

Aetna objects to this Request and incorporates the General Objections into this response as if fully set forth herein, with particular reference to General Objections Nos. 2, 3 and 4.

Aetna objects to Request No. 7 on the grounds that it is vague, overbroad, and unduly burdensome, is not reasonably calculated to lead to the discovery of admissible evidence, and calls for irrelevant material. Aetna further objects to Request No. 7 on the grounds that it is vague because the term "standard of care" is not defined. Additionally, HMRI, being a manufacturer of products indicated for the treatment of angina and hypertension, is in possession of all such documents.

Request No. 8: All documents that reflect or relate, in any way, the substitutability of any cardiovascular pharmaceutical product for any other cardiovascular pharmaceutical product.

Response to Request No. 8:

Aetna objects to this Request and incorporates the General Objections into this response as if fully set forth herein, with particular reference to General Objections Nos. 2, 3, 4, 5, 8, 9 and 10.

Aetna objects to Request No. 8 on the grounds that such information is not reasonably calculated to lead to the discovery of admissible evidence, calls for irrelevant material, is oppressive, unduly burdensome, and is intended to harass and/or annoy Aetna, who is not a party to this action.

Aetna objects to the Request No. 8 insofar as the information sought is obtainable from HMRI's own records and the records of HMRI's co-defendants, and that obtaining the information from these sources is more convenient, less burdensome and less expensive than seeking the information from Aetna.

Aetna further objects to Request No. 8 to the extent that it seeks information concerning substitutability of products that is of extreme competitive significance, is proprietary, and constitutes trade secrets. Aetna objects to Request No. 8 to the extent that it is designed to, or does, circumvent court rulings limiting discovery, including all such rulings in *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE).

Request No. 9: All documents that reflect or relate in any way to programs, campaigns or activities undertaken by you which are designed to encourage the use or substitution of any cardiovascular pharmaceutical product for any other cardiovascular pharmaceutical product.

Response to Request No. 9:

Aetna objects to this Request and incorporates the General Objections into this response

as if fully set forth herein, with particular reference to General Objections Nos. 2, 3, 4, 5, 8, 9 and 10. Aetna objects to Request No. 9 insofar as it is unreasonably duplicative of Request No. 8.

Aetna objects to Request No. 9 on the grounds that such information is not reasonably calculated to lead to the discovery of admissible evidence, calls for irrelevant material, is oppressive and unduly burdensome, and is intended to harass and/or annoy Aetna, who is not a party to this action.

Aetna objects to Request No. 9 insofar as the information sought is obtainable from HMRI's own records and the records of HMRI's co-defendants, and that obtaining the information from these sources is more convenient, less burdensome and less expensive than seeking the information from Aetna.

Aetna further objects to Request No. 9 to the extent that it seeks information concerning substitutability of products that is of extreme competitive significance, is proprietary, and constitutes trade secrets. Aetna objects to Request No. 9 to the extent that it is designed to, or does, circumvent court rulings limiting discovery, including all such rulings in *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE).

Request No. 10: All documents that reflect or relate to agreements or contracts between you and any of the entities listed on Attachment 1 with regard to cardiovascular pharmaceutical products.

Response to Request No. 10:

Aetna objects to this Request and incorporates the General Objections into this response as if fully set forth herein, with particular reference to General Objections Nos. 2, 3, 4, 5, and 8.

Aetna objects to Request No. 10 on the grounds that such information is not reasonably calculated to lead to the discovery of admissible evidence, calls for irrelevant material, is

oppressive, unduly burdensome, and is intended to harass and/or annoy Aetna, who is not a party to this action.

Aetna further objects to Request No. 10 to the extent that it seeks information that is of extreme competitive significance, is proprietary, and/or constitutes trade secrets. Aetna objects to Request No. 10 to the extent that it is designed to, or does, circumvent court rulings limiting discovery, including all such rulings in *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE).

Request No. 11: All documents that reflect or relate in any way to the negotiation of contracts or other agreements regarding discounts, rebates, credits, allowances, chargebacks and other price adjustments between you and any of the entities listed on Attachment 1 with regard to cardiovascular pharmaceutical products.

Response to Request No. 11:

Aetna objects to this Request and incorporates the General Objections into this response as if fully set forth herein, with particular reference to General Objections Nos. 4, 5, and 8. Aetna objects to Request No. 11 insofar as it is unreasonably duplicative of Request No. 10.

Aetna objects to Request No. 11 insofar as it is unreasonably duplicative and cumulative of discovery already served on Aetna in a related action captioned *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE).

Aetna further objects to Request No. 11 to the extent that it seeks information that is of extreme competitive significance, is proprietary, and constitutes trade secrets. Aetna objects to Request No.11 to the extent that it is designed to, or does, circumvent court rulings limiting discovery, including all such rulings in *In re Cardizem CD Antitrust Litigation*, MDL 1278 (NGE).

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, Peter D. Bernstein, hereby certify that on September 21, 2000, a copy of Aventis Pharmaceuticals, Inc.'s Motion to Enforce Compliance with the Subpoena Served on Aetna U.S. Healthcare, Inc., and documents in support thereof was served upon the following persons by hand delivery and/or Federal Express as follows:

Donald S. Clark, Secretary
Federal Trade Commission
Room 172
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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

Richard Feinstein
Federal Trade Commission
Room 3114
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Louis M. Solomon [By FedEx]
Solomon, Zauderer, Ellenhorn,
Frischer & Sharp
45 Rockefeller Plaza
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Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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Kleinfeld, Kaplan and Becker
1140 19th St., N.W.
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