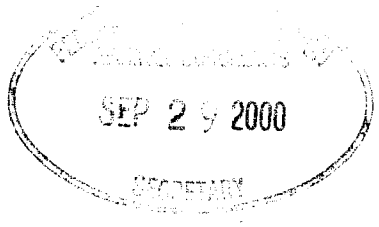

In the Matter of

HOECHST MARION ROUSSEL, INC.
a corporation,

CARDERM CAPITAL L.P.,
a limited partnership,

and

ANDRX CORPORATION,
a corporation.

Docket No. 9293

To: Administrative Law Judge D. Michael Chappell

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

Aetna U.S. Healthcare, Inc. ("Aetna") hereby opposes Aventis Pharmaceuticals, Inc.'s motion for certification to the Commission of its request to enforce the subpoena issued to, but never properly served on, Aetna.

I. INTRODUCTION

Aventis Pharmaceuticals, Inc. (a.k.a. "HMRI") fails to explain (1) why the 18,500 pages of documents already produced are not sufficient, (2) why the documents it seeks are relevant, (3) which of its specific document requests require further production, and (4) why Aetna should produce documents respondent has already conceded constitute trade secrets, and which a U.S. District Court has already ruled are irrelevant and inadmissible as trade secrets in a related proceeding.[1]

HMRI[2] blithely argues that the documents sought somehow relate to the issue of relevant market. However, as HMRI is well aware, but fails to mention, the federal court in the related Multidistrict Litigation action ("MDL Action") has already specifically ruled that the documents requested are not relevant to the definition of "relevant market" as it pertains to the alleged antitrust violations regarding Cardizem CD and Cartia XT.

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[1] *In re Cardizem CD Antitrust Litigation*, MDL 1278, pending in the U.S. District Court for the Eastern District of Michigan. Like the Complaint in the MDL Action, the Complaint in this matter alleges that respondents engaged in anticompetitive conduct by preventing the entry of bioequivalent generic versions of Cardizem CD into the marketplace, thereby allowing HMRI illegally to continue its monopoly of the Cardizem CD market.

[2] The motion was filed under the name "Aventis Pharmaceuticals, Inc.," but the subpoena was issued under the name "HMRI." HMRI, or Hoechst Marion Roussel, Inc., is one of the named defendants in the related action, *In re Cardizem CD Antitrust Litigation*, MDL 1278, and is a named respondent in this action. HMRI is also the name appearing on the document requests at issue. Therefore, for consistency, Aetna will refer to the respondent here as "HMRI."

Further, the MDL Court ruled that, even if relevant, the irreversible harm to Aetna if it were required to produce such trade secret material far outweighs any possible tangential benefit to HMRI. *See*, Affidavit Of Jennifer S. Abrams In Support Of Non-Party Witness Aetna U.S. Healthcare, Inc.'s Motion For A Protective Order Pursuant To 16 C.F.R. §3.31(c)(2)&(d) ("Abrams Aff. ISO PO"), Ex. D, filed on September 25, 2000.[3]

The MDL Action consists of several consolidated federal and state actions alleging antitrust violations against defendants HMRI and Andrx, respondents here, for the same anticompetitive conduct at issue here. The Panel for Multidistrict Litigation assigned these matters to Judge Nancy Edmunds, U.S. District Court Judge for the Eastern District of Michigan, in June, 1999. In her numerous rulings, including those denying respondents' motions to dismiss and granting plaintiffs' motion for partial summary judgment that the agreement between Andrx and HMRI was a *per se* violation of federal and state antitrust laws, Judge Edmunds has demonstrated a deep familiarity with the issues here.[4] Likewise, Magistrate Judge Marc L. Goldman, working at Judge Edmunds' assignment by Order dated February 16, 2000, having addressed numerous discovery issues in the MDL Action, likewise developed a keen understanding of the issues paralleling those here. *See, e.g.,* Exhibit D to Abrams Aff. ISO PO at 1.

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[3] Aetna has also addressed many of the same issues in its motion for a protective order, filed July 25, 2000 with this court, and incorporates by reference those arguments here.

[4] *See*, Judge Edmunds' opinions, posted on-line at: http://www.mied.uscourts.gov/

II. BACKGROUND

A. HMRI Failed To Properly Serve The Subpoena

Pursuant to 16 C.F.R. § 4.4(b), all subpoenas directed to corporations must be served on an "officer or agent authorized to accept service." HMRI failed to comply with this simple rule in attempting to serve its subpoena directed to Aetna.[5]

Instead, HMRI apparently attempted to serve Aetna by mailing its subpoena to Aetna's offices in Pennsylvania without addressing it to anyone. *See*, Exhibit B to Wilson Dec. (envelope was inexplicably addressed to "Aetna U.S. Healthcare, c/o Aetna U.S. Healthcare"). *See*, Abrams Aff. ISO PO, Exhibit B. The HMRI subpoena *duces tecum* listed the subpoenaed party as the "Custodian of Records for: Aetna U.S. Healthcare." *See*, Abrams Aff. ISO PO Exhibit A. Although Aetna employs thousands of people in multiple locations, none bears the title "Custodian of Records."

As a result of HMRI's carelessness, the subpoena was not received by Aetna's legal department until July 10, 2000. HMRI had designated June 26, 2000, as the return date, but notably failed to contact Aetna on that date or in the following weeks. Aetna's counsel undertook to be responsive to the subpoena as soon as it became aware of it, despite the failure of proper service by HMRI. *See*, Declarations of Peter St. Phillip and Jennifer S. Abrams filed in support of Aetna's opposition to this motion ("St. Phillip Dec."; "Abrams Dec."). In light of Aetna's efforts to be responsive, Aetna is mystified

[5] Aetna has discussed HMRI's failure of service of process in its motion for a protective order filed before this Court on September 25, 2000, supported by the affidavit of Jennifer S. Abrams and the Exhibits thereto, and, in the interest of efficiency, respectfully requests the Court refer to those documents here.

by HMRI's unsupported claim that *Aetna* "stonewalled" or "engaged in dilatory tactics" Resp. brief at 10, 5.

B. Aetna Consistently Participated In Good Faith In Meet And Confer Sessions And Made Over 18,500 Documents Available To HMRI In Response To Its Subpoena

On July 21, 2000, Aetna served HMRI with its Responses And Objections To HMRI's Subpoena Duces Tecum Directed To HMRI's First Document Production Request To Aetna U.S. Healthcare.[6] *See*, Exhibit A to Abrams Dec. On the same day, counsel for HMRI, Mr. Wilson, and Mr. St. Phillip spoke several times by telephone, during which Mr. St. Phillip first suggested that Aetna may agree to allow HMRI to use the documents produced in the MDL Action in this action. Aetna also agreed to extend the time in which HMRI might need to move to compel, pending Aetna and HMRI's agreement that resort to the Court was necessary to resolve their concerns. This understanding was confirmed by a second letter dated July 21, 2000. *See*, St. Phillip Dec. ¶ 5 and Exhibit A.

Aetna made considerable effort to meet and confer with HMRI. *See*, Exhibits to Abrams Dec., letters between Aetna's counsel and counsel for HMRI. However, HMRI persisted in insisting that its meet and confer obligations had been met by the July 21, 2000, conversations, and also insisted that Mr. St. Phillip had promised production of documents. However, as stated above and as is shown by the letters attached to the St.

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[6] Pursuant to the Scheduling Order in this Matter dated April 26, 2000, Additional Provisions No. 2, the motion to compel should have been filed "no later than 20 days after service of the responses and/or objections to the discovery requests." (Emphasis added). However, respondent asked Aetna for additional time. Aetna agreed to allow respondent additional time, although no stipulation or letter to that effect was ever filed. HMRI cannot now complain that Aetna engaged in dilatory conduct.

Phillip and Abrams Decs., this is not so. Specifically, by letters dated July 26, 2000, and August 18, 2000, Nicole Lavallee offered to meet and confer with HMRI's counsel to attempt to discover the exact nature of HMRI's concerns. In response, by letter dated August 1, 2000, HMRI again insisted that Aetna begin production of documents.[7]

In a telephonic meet and confer on August 22, 2000, Aetna's counsel was told that HMRI had created an ethical wall between those attorneys defending the MDL Action and those defending the instant action (the "FTC Action"). HMRI's counsel confirmed that those defending the FTC Action had not had access to documents produced by Aetna in the MDL Action. Those documents included Aetna's formularies and all reimbursement data for Cardizem CD and Cartia XT for the state of Michigan.[8] As is shown in Aetna's Motion for a Protective Order and as is explained more fully below, the document requests at issue here are virtually identical to those at issue in the MDL Action.

Accordingly, Aetna offered to give HMRI access to all of the documents it produced in the MDL Action, subject to a protective order. Counsel further agreed that HMRI's counsel would review those documents, and then meet and confer if HMRI believed that the subpoena calls for anything not already produced in the MDL Action. *See*, August 22, 2000 letter, Exhibit E to Abrams Dec., confirming counsel's agreement.

Following its review of the 18,500-plus pages of documents, HMRI never articulated the basis for its allegation that Aetna has not been responsive. *See*, September

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[7] Contrary to Mr. Wilson's statements, Aetna never agreed to produce documents in addition to the MDL production. Aetna did offer HMRI the MDL documents on more than one occasion, starting on July 21, 2000.

[8] The court in the MDL Action limited discovery to the state of Michigan as an exemplar.

14, 2000, letter from Wilson to Abrams, Exh. G to Abrams Dec. In fact, rather than engaging in further disclosure, HMRI's counsel unilaterally declared "our meet and confer obligations completed." Contrary to his earlier representations about his firm's "ethical wall" between the MDL and FTC actions, HMRI's counsel Wilson stated that he was actually "already familiar with" the documents. *Id.* *See*, Abrams Dec. Exh. H, letter from Abrams to Wilson regarding the meet and confer.

In short, Aetna does not believe that HMRI acted in good faith in attempting to resolve these issues. Accordingly, Aetna filed its Motion for a Protective Order on July 25, 2000.[9]

III. ARGUMENT

A. Aetna's Objections and Responses Are Specific And Proper, Including Its Objection That The Requested Documents Are Not Relevant

Respondent wrongly characterizes Aetna's objections and responses as a set of general objections not linked to specific requests. In fact, Aetna not only lists each general objection applicable to each specific response, but Aetna also states explicitly its strongest objections to each request.[10] *See e.g.*, Exhibit C to Wilson Declaration at 5.

First, the requested documents call for irrelevant materials. The central feature of these requests, as in the MDL Action, is for production of documents relating to the

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[9] In light of HMRI's conduct, its unsupported statement that Aetna has "stonewalled" and "reneged on agreements" is astounding. Respondent's brief at 10.

[10] HMRI's authority that blanket objections are impermissible is inapposite because Aetna did not use "blanket" objections, but explained each objection: *e.g.*, the terms used were unclear. *See, e.g.,* Respondent's Brief at 8, citing *McLeod, Alexander, Powell & Apffel, P.C. v. Quarles*, 894 F.2d 1482 (5th Cir. 1990). Further, Aetna repeatedly offered to meet and confer to address these issues, but, as discussed, HMRI's only response was to command Aetna to produce documents.

creation and use of formularies – *e.g.* Requests Nos. 1-6, 8-9. As is explained in more detail in Aetna's motion for a Protective Order, these documents are irrelevant. The MDL Court specifically held that such documents are not relevant to the definition of "relevant market." While the formularies themselves may be relevant, Aetna has already made these documents available to HMRI.

Further, Aetna has explained how each request is irrelevant and overbroad. For example, in its Responses to Requests Nos. 1-10 and 12, Aetna objects that "information concerning pharmaceutical products other than Cardizem® CD and its FDA-rated generic bioequivalents" is not reasonably calculated to lead to the discovery of admissible evidence. First, as is discussed more fully in Aetna's motion for a protective order and in section III.B.(2) below, the relevant market here includes only Cardizem CD and any FDA-approved AB-rated bioequivalent generic. Second, in the MDL Action, HMRI did not even bother to litigate this same objection from Aetna.

Further, Aetna specifically explains its objections to each request. *See, e.g.,* objections to Requests Nos. 1 and 7 based on the lack of definitions for the terms used, such as "standard of care" and "market share tiers," and the fact that requested materials are trade secrets; objections to Requests Nos. 2 - 6 as completely duplicative of Request No. 1 (formularies) and unreasonably burdensome because the documents at issue were already produced in the MDL Action.

Aetna has also objected on the grounds that many of the documents requested are available elsewhere, *see*, Response to Requests nos. 8-9 regarding substitutability and no. 12 regarding sales and other data. As a prescription drug manufacturer, HMRI has presumably conducted research regarding the drugs at issue, including marketing and

substitutability studies. Aetna is an insurance company and not in the pharmaceutical business. The small benefit to respondent of Aetna's documents compared to the burden on Aetna of production and loss of trade secrets argues strongly against such production. *See, e.g., E.B. Muller & Co. v. FTC*, 142 F.2d 511, 520 (6th Cir. 1944).

Pursuant to respondent's own case law, these objections are specific and proper. *See*, *McLeod*, 894 F.2d at 1484. Aetna has produced over 18,500 pages of responsive documents. Aetna properly and timely responded to HMRI's subpoena despite HMRI's failure of service and efforts to meet and confer.

Respondent requests that Aetna be barred from testifying in this action pending any further production. While Aetna is willing to help the FTC by its testimony if required, Aetna has no interest in becoming involved in these proceedings. The protection of its trade secrets is Aetna's first priority. Aetna views these requests as an attempt to unfairly obtain Aetna's trade secrets, to harass Aetna and as an attempt to circumvent the rulings in the MDL Action. HMRI's motion must be denied.

B. The Document Production Is Responsive

Respondent is only entitled to discovery that it is "reasonably expected to yield information relevant to . . . the defenses of any respondent." 16 CFR §3.31 (c)(1). Aetna has produced all relevant non-trade secret documents.[11] These include all formularies, all pharmacy contract files from January 1, 1996, to the present for the state

[11] HMRI claims Aetna should have produced a privilege log. However, Aetna's objections are based on the irrelevance and trade secret nature of the documents at issue. *See* Motion for a Protective Order. Privilege logs are accordingly not required. 16 C.F.R. §§3.37(b), 3.38A(b). Further, as HMRI and Aetna had already litigated these exact issues in the MDL Action.

of Michigan, and data reflecting each reimbursement made to Michigan pharmacies for the period January 1, 1996, to February 2000 for Cardizem CD.[12] Aetna also produced examples of contracts that Aetna maintained with Michigan employers during the class period. *See*, Abrams Aff. ISO PO ¶ 9. These documents are directly responsive to the categories of requests propounded by HMRI.

(1) Aetna's production is responsive

HMRI complains that the "overwhelming majority of the documents produced in the [MDL Action] were copies of contracts between Aetna and individual pharmacies." HMRI states that they are "neither responsive to the subpoena nor relevant to this proceeding." Resp. Brief at 5 ftnt. 5. While Aetna believes HMRI asked for the documents and that therefore they are responsive, it does not dispute that they are not "relevant to this proceeding." HMRI's complaint only bolsters Aetna's claim that the requests are overly broad and vague (general objection no. 4, reprinted in responses to requests nos. 1, 3-13 for the same reasons).

As requested, Aetna produced all non-trade secret documents "relating to" formularies or substitutability pursuant to requests nos. 1 – 6, 8-9, and the "sale" of Cardizem CD and Cartia XT pursuant to request no. 12. As stated, Aetna's search for relevant documents produced, *inter alia*, formularies, contracts with pharmacies

[12] Because Cartia XT was not commercially available, no early figures exist for Aetna payments for Cartia XT. However, information is available on what Aetna paid for Cartia XT when it finally become available in June 1999. Aetna has produced all information regarding what Aetna paid for Cartia XT. Moreover, to the extent that the fact that a drug is placed on Aetna's formularies could be deemed relevant because of potential volume discounts, Aetna stipulated in the MDL Action that Cartia XT was placed on Aetna's formularies as soon as practicable after its commercial launch, and will so stipulate here if asked. Respondents will be able to reference Aetna's data and identify exactly when the first reimbursement for Cartia XT was made.

regarding reimbursements for sales, and records of reimbursements for the sale of Cartizem CD and Cartia XT to pharmacies.[13]

HMRI argues that the MDL production is not responsive because the requests in the MDL purportedly related to class certification issues, while the requests here targeted "relevant market." However, both requests are, in substance, identical. Both want all documents relating to formularies, sales data, and contracts.[14] These were the documents that were produced in the MDL action and made available to respondent here.

Significantly, HMRI argued in the MDL action that the trade secrets underlying Aetna's formularies were necessary and relevant to the definition of "relevant market." Magistrate Judge Goldman, after extensive oral presentation on this issue, rejected HMRI's argument, stating:

> The arguments as to the relevancy with respect to both damages and the definition of the relevant market are speculative. . . . I can't find relevancy at all, and even if relevant, it's not sufficient and necessary to overcome trade secrets. So the motion with respect to Aetna [to compel discovery from Aetna] is denied.

See Transcript of July 7, 2000, Hearing at 20, attached to Abrams Aff. ISO PO at

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[13] Further, HMRI's rush to demand more documents indicates that perhaps HMRI has not, in fact, reviewed all the documents already produced, as it apparently it overlooked the formularies produced by Aetna.

[14] The document requests in the FTC Action also demand all documents related to contract with respondent's direct competitors. For the reasons stated in Aetna's Motion for a Protective Order, these documents are trade secrets with no relevance to the relevant market definition. The burden on Aetna to produce such sensitive material outweighs any legitimate tangential benefit to respondent. HMRI should not be allowed to pervert this proceeding instituted to enforce fair trade by using it to unfairly acquire the trade secrets and confidential material of its competitors.

Exhibit D (emphasis added).[15] HMRI's assertion here that "relevant market" was not at issue in the MDL Action is belied by HMRI's argument before the Court and by Judge Goldman's ruling.[16] Significantly, damages are not even at issue in this action.

(2) Aetna's production is complete because Aetna has produced all relevant non-trade secret material requested

As it argued in the MDL Action, HMRI argues here that documents relating to the process for the selection of drugs for inclusion on Aetna's formularies and studies regarding substitutability are relevant to the issue of "relevant market" because such documents "help define the various categories of pharmaceutical products offered in the marketplace . . ." Resp. Brief at 11. However, this argument is wrong both in law and in fact.

First, the relevant market is defined by the undisputed fact that Cartia XT was the only FDA approved AB-rated bioequivalent to Cardizem CD. Pursuant to the Food and Drug Administration's Regulations and relevant state law, once a doctor prescribes Cardizem CD, the consumer patient may only purchase Cardizem CD or its FDA-approved AB-rated bioequivalent. 21 U.S.C. § 355; 21 C.F.R. §§ 320 *et seq.* and §§355

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[15] Neither HMRI nor Andrx contested the fact that such documents constituted trade secrets.

[16] Respondent's authority purportedly supporting its contention that discovery rulings in the MDL Action should have no effect here is inapposite. In *Riddell Sports, Inc. v. Brooks*, 158 F.R.D. 555, 561 (S.D.N.Y. 1994), the court rejected the argument that discovery should be stayed in that action because it was stayed in a related action. That is irrelevant to Aetna's argument that the MDL Court's decisions regarding relevancy and trade secrets are, at the very least, persuasive here.

et seq.[17] Thus, the relevant market only includes Cardizem CD and its FDA-approved AB-rated bioequivalents. Cartia XT would have been the only potential product that was "reasonably interchangeable" or "identical to" Cardizem CD during the class period because it was the only FDA-approved AB-rated bioequivalent to Cardizem CD, but it was not commercially available until June, 1999, due to defendants' misconduct. Accordingly, the relevant market is limited to Cardizem CD and Cartia XT. Information regarding Aetna's formularies and their compilation and any studies regarding substitutibility have no bearing on the definition of "relevant market."

Second, assuming *arguendo* that the relevant market was not limited to Cardizem CD and its FDA approved AB-rated bioequivalent, HMRI's argument only speaks to the relevancy of the formularies themselves, not the underlying process by which Aetna determines which drugs to place on the formularies. HMRI argues that the documents are relevant because Aetna's formulary somehow influences whether a physician prescribes Cardizem CD or its generic version *versus* a different drug. This is utterly unsupported. Only physicians have the power to determine what drug should be given to a patient. *See, e.g.*, Aetna's web site, a "physician is responsible for all treatment decisions can prescribe any medication he or she believes is appropriate for [a patient]."

Third, Aetna's internal information concerning the manner in which decisions regarding formulary lists are created, determined, maintained, or utilized and the identification of members of any committee which makes decisions regarding

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[17] *See also, Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1317 (DC Cir. 1998); *Warner-Lambert Co. v. Shalala*, 202 F.3d 326, 327-8 (DC Cir. 2000); *Rhone-Poulenc Rorer Pharm., Inc. v. Marion Merrell Dow, Inc.*, 93 F.3d 511, 513 (8th Cir. 1996) ("Pharmacists may freely substitute among AB drugs, but only a prescribing physician may substitute one BC drug for another.").

formularies, is simply too remote to shed light on the issue of relevant market here. *In re: Remington Arms Co.*, 952 F.2d 1029, 1032 (8th Cir. 1991); *Allen v. Howmedica Leibinger, GmhH*, 190 F.R.D. 518, 522 (W.D. Tenn. 1999) (Under F.R.Civ.P Rule 26, "[d]iscovery may be denied 'where, in the court's judgment, the inquiry lies in a speculative area.'")(citation omitted); *Food Lion v. United food & Comm'l Workers Union*, 103 F.3d 1007, 1012-13 (DC Cir. 1997)(overturning district court's decision to allow discovery because evidence would be too remote)(collecting authorities). Where, as here, other means of proof is available and has been produced, sensitive trade secrets should not be subject to discovery. *In re Brand Name Prescription Drugs Antitrust Litig.*, 1994 U.S. Dist. LEXIS 17278, *6, *7 (ND Ill., December 5, 1994).

HMRI also wrongly argues that Aetna bears the burden of showing why it should not produce the documents. Resp. Brief at 8. This issue was also litigated in the MDL Action. The Court there held:

> Everyone [including HMRI] agrees that the process behind the formulary is a trade secret, and everyone agrees with the legal standard that the burden rests on the party seeking the information to show the relevancy and the necessity for the information.

Transcript at 19, Exhibit D to Abrams Aff. ISO PO. (emphasis added). The burden and irreparable harm to Aetna if it were to produce its trade secrets to HMRI is far outweighed by any remote theoretical benefit to HMRI. *See, also*, Non-Party Witness Aetna U.S. Healthcare, Inc.'s Motion For A Protective Order Pursuant To 16 C.F.R. §3.31(c)(2)&(d) at 9, 13-14.

HMRI now argues for the first time that it requires certain unspecified documents from Aetna because an Aetna Vice President, Bob Jackson, has been listed as one of

Complaint Counsel's witnesses. Resp. brief at 7. HMRI failed to ever mention Mr. Jackson until now, either in its subpoena or in its "meet and confers." Moreover, in its brief, HMRI still fails to state what requests it made that it believes are relevant to Mr. Jackson, much less what documents it wants from Aetna in that regard. Instead, HMRI lays out an irrelevant general discussion of case law regarding objections.[18] *See*, Resp. brief at 8-10.

HMRI has all documents that Aetna produced to the FTC, including anything from Mr. Jackson, and all documents produced in the MDL Action. Thus, it will not be prejudiced in its exam of Mr. Jackson. Further, HMRI never subpoenaed Mr. Jackson's testimony or his documents. No such documents are at issue here. HMRI cannot be heard to complain now that it will not be as well-prepared as it would like.

[18] In the "Background" section of its brief, at 3, respondent briefly states that Mr. Jackson is expected to testify regarding Aetna's prescription drug coverage program, including contracting, cost containment strategies and formularies. Thus, Aetna is at a loss why HMRI complains that Aetna produced its contracts with pharmacies. Further, HMRI never mentions that Aetna produced its formularies.

III. CONCLUSION

For the reasons stated above and in Aetna's motion for a protective order, HMRI's motion should be denied.

Respectfully submitted,

Date: September 28, 2000 **BERMAN, DeVALERIO, PEASE & TABACCO, P.C.**

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Counsel for Aetna U.S. Healthcare, Inc.

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: Administrative Law Judge D. Michael Chappell

DECLARATION OF JENNIFER S. ABRAMS IN OPPOSITION TO AVENTIS PHARMACEUTICAL, INC.'S MOTION FOR ENFORCEMENT OF SUBPOENA SERVED ON AETNA U.S. HEALTHCARE, INC.

I, Jennifer S. Abrams, hereby declare:

1. I am an associate with the law firm Berman, DeValerio, Pease & Tabacco, P.C. This firm is counsel for Aetna U.S. Healthcare, Inc. ("Aetna").

2. I submit this Declaration in opposition to Aventis Pharmaceutical, Inc.'s ("Aventis") motion for enforcement of a subpoena issued to Aetna. I have personal knowledge of the things stated herein, and could and would testify thereto if so required.

3. Attached hereto as Exhibit A is the cover letter dated July 21, 2000 from Peter St. Phillip, Esq., of Lowey, Dannenberg, Bemporad & Selinger, P.C., to D. Edward Wilson, Jr., Esq., with the attached copy of Aetna's Responses and Objections to Hoechst Marion Roussel, Inc.'s Subpoena *Duces Tecum* Directed to HMRI's First Document Production. Please note that the copy of this same document as attached to the Mr. Wilson's declaration is missing pages beyond page 12.

4. Attached hereto as Exhibit B is a letter dated August 1, 2000 from Mr. Wilson to Nicole Lavallee, Esq.

5. Attached hereto as Exhibit C is a memo from Mr. Wilson to Mr. St. Phillip dated August 7, 2000.

6. Attached hereto as Exhibit D is a letter dated August 18, 2000 from Ms. Lavallee to Mr. Wilson.

7. Attached hereto as Exhibit E is a letter dated August 22, 2000 from myself to Mr. Wilson.

8. Attached hereto as Exhibit F is a letter dated August 23, 2000 from myself to Mr. Wilson.

9. Attached hereto as Exhibit G is a letter dated September 14, 2000 from Mr. Wilson to me.

10. Attached hereto as Exhibit H is a letter dated September 18, 2000 from myself to Mr. Wilson.

Dated: September 28, 2000

Jennifer S. Abrams

EXHIBIT A

LOWEY DANNENBERG BEMPORAD & SELINGER, P.C.

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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,	:	Docket No. 9293
and	:	
ANDRX CORPORATION, a corporation.	:	

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).

Aetna further objects to Request No. 11 insofar as 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 relevant, is not reasonably calculated to lead to the discovery of admissible evidence, is oppressive and unduly burdensome, and is intended to harass and/or annoy Aetna, who is not a party to this action.

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.**

Response to Request No. 12:

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. 12 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.

Aetna further objects to this request on grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

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.

Response to Request No. 13:

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, 8 and 10.

Aetna objects to Request No. 13 insofar as it is unreasonably duplicative of Requests Nos. 10-11.

Aetna further objects to this request on grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

Dated: July 21, 2000

Stephen Lowey
Richard W. Cohen
Peter St. Phillip
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& SELINGER, P.C.
The Gateway, 11th Floor
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Joseph J. Tabacco, Jr.
Nicole Lavallee
Jennifer S. Abrams
BERMAN DeVALERIO PEASE &
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425 California Street, Suite 2025
San Francisco, CA 94104
Tel.: (415) 433-3200
Fax.: (415) 433-6382

Counsel for Aetna U.S. Healthcare, Inc.

CERTIFICATION

I, Gerald Lawrence, declare:

I have read the foregoing 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. On information and belief, they are true, and I declare under penalty of perjury, under the laws of the United States of America that these responses are true.

Executed on July 21, 2000, at Blue Bell, PA ~~Connecticut~~

Gerald Lawrence

EXHIBIT B

LAW OFFICES

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D. E. Wilson, Jr.
(202) 662-4861
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August 1, 2000

Nicole Lavallee, Esquire
Berman, DeValerio, Pease & Tabacco, P.C.
425 California Street, Suite 2025
San Francisco, CA 94104-2205

Re: **FTC Docket No. 9293, Subpoena Issued to Aetna U. S. Healthcare**

Dear Ms. Lavallee:

This responds to your letter of July 26, 2000. I am confused by your request that we meet and confer regarding the subpoena. I spent a considerable amount of time with Mr. St. Philip doing just this on the 21st of July. I would appreciate it if, rather than delaying production, Aetna would begin to produce documents in accordance with the discussion I had with Mr. St. Philip. If Aetna does not intend to produce documents in accordance with that outline, I would appreciate hearing from you or Mr. St. Philip, in writing, by return mail and we can request the Administrative Law Judge to sort out Aetna's objections to complying with the subpoena.

Finally, I would appreciate understanding with whom I should be speaking in the future concerning this subpoena. Thank you for your attention.

Sincerely,

D. E. Wilson, Jr./pej

D. E. Wilson, Jr.

DEW:pej

AUG 4 2000

43553.1

EXHIBIT C

Lowey Dannenberg Bemporad & Selinger, P.C.
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Telephone: (914) 997-0500 • Telecopier: (914) 997-0035
e-mail: Pstphillip@ldbs.com

TELECOPIER COVER SHEET

NAME: Nicole Lavallee, Esq.

FIRM: BERMAN DeVALERIO, PEASE & TABACCO

FAX No.: 415-433-6382

TEL No.: 415-433-3200

CASE: CARDIZEM
DATE: August 8, 2000

FROM: Peter D. St. Phillip, Jr., Esq.

No. of Pages (including cover sheet): 27

MESSAGE:

Nicole:

Please find a memo from D.E. Wilson, Jr. attaching ALT Chappell's August 7, 2000 order awarding and reissuing the protective order.

P.S.P.

If you did NOT receive all the pages, please call our Mail Room (914) 997-0500

The original document will be sent by:

- ☐ **E-Mail**
- ☐ **First Class Mail**
- ☐ **Overnight Mail**
- ☐ **No other form of delivery is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us**

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FACSIMILE TRANSMISSION FROM (202) 783-4211

TO: **PETER ST. PHILLIP** FAX NO: **914/997-0035**

FROM: **D. E. WILSON, JR.** #: **1056**

DATE: **AUGUST 7, 2000** TIME:

SHB Client Matter No.: **HMRI.64169**

Pages transmitted including cover sheet:

ORIGINAL DOCUMENT WILL NOT FOLLOW.

If you experience any problems, please call extension _____.

OPERATOR:

COMMENTS/MESSAGE:

43211.1

LAW OFFICES

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BUENOS AIRES

August 7, 2000

By Telecopier

MEMORANDUM FOR Counsel for Respondents to FTC Subpoena Duces Tecum Issued on Behalf of HMRI in FTC Docket No.9293

FROM: D. E. Wilson, Jr.
Counsel for Aventis Pharmaceuticals, Inc.

SUBJECT: Protective Order

Attached please find a copy of the Second Amended Protective Order Governing Discovery Material in the above-referenced case. It incorporates all of the amendments to date, including an "Attorney Eyes Only" provision. This removes any confidentiality reasons for not complying with the subpoena duces tecum. If you plan to object to the subpoena on the grounds that it requires your client to produce confidential information, please let me know, in writing, at your earliest convenience so that we can discuss your concerns before either side initiates proceedings before the Administrative Law Judge.

Thank you for your attention.

43518.1

EXHIBIT D

BERMAN, DEVALERIO, PEASE & TABACCO, P.C.
ATTORNEYS AT LAW

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OF COUNSEL
BERMAN, DEVALERIO & PEASE, LLP
ONE LIBERTY SQUARE
BOSTON, MASSACHUSETTS 02109
TELEPHONE: (617) 542-8300
FACSIMILE: (617) 542-1194

August 18, 2000

BY FACSIMILE & U.S. MAIL

D. E. Wilson, Jr.
Shook, Hardy & Bacon, LLP
Hamilton Square
600 14th Street, N.W., Suite 800
Washington, DC 20005-2004

Re: FTC Docket No. 9293, Subpoena Issued to Aetna U.S. Healthcare

Dear Mr. Wilson:

I am writing in response to your letter dated August 1, 2000, which was sent by mail, regarding the Aetna U.S. Healthcare ("Aetna")'s responses and objections to the subpoena sent to Aetna in the above-captioned matter.

As indicated in Peter St. Phillip's letter accompanying Aetna's Responses and Objections to the subpoena, my letter dated July 26, 2000, and a telephone message left by Jennifer S. Abrams of my office with you in the first week of August, 2000, we are willing to meet and confer regarding the scope of production.

However, rather than respond to our invitations to meet and confer, you state that you have already met and conferred with Peter St. Phillip regarding this matter. However, I have spoken with Mr. St. Phillip and this is incorrect. As confirmed by Mr. St. Phillip's letter to you dated July 19, 2000, you agreed to stay any attempts to enforce the subpoena "pending our discussions regarding the appropriate scope of discovery." As confirmed by Mr. St. Phillip's letter dated July 21, 2000, he advised that you should contact me to meet and confer on this matter. Copies of these letters are attached hereto.

As set forth in its Reponses and Objections, Aetna objects to producing the requested documents because (1) the requests seek irrelevant information; (2) the requests are overbroad and burdensome; (3) the requests seek confidential and privileged trade secrets, and (4) the subpoena was improperly served. *See* 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. Indeed, the Michigan District Court has ruled that this very same information is irrelevant and not subject to production in the action MDL 1278. *See*, transcript of the hearing on, *inter alia*, Defendant Hoechst Marion Roussel's Motion To Compel The Production Of Documents Regarding The Aetna Formularies, July 7, 2000, Case No. 99-MD-1278, before Magistrate Judge Goldman, at 20-21 ("The arguments as to the relevancy with respect to both damages and the definition of the relevant market are speculative.") Moreover, relevance is even more problematic in this FTC proceeding since Aetna is not even a party to this matter. As the objections relate primarily to relevance, the August 7, 2000, Order Granting Consent Motion To Amend And Reissue Protective Order in the above-captioned matter does not support production, either. *See, also*, 16 C.F.R. § 3.31 (a).

Nevertheless, in an effort to resolve any possible dispute, we are willing to agree that you may use the documents already produced to you in MDL 1278 in the FTC matter. However, unless you can articulate a proper basis for discovery of such documents, Aetna will not produce any additional documents.

If you decide that you want to meet and confer on this matter, please contact me or Jennifer S. Abrams at my office to arrange a time to meet and confer.

Sincerely,

Nicole Lavallee

Encl.

EXHIBIT E

BERMAN, DEVALERIO, PEASE & TABACCO, P.C.
ATTORNEYS AT LAW

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August 22, 2000

OF COUNSEL
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TELEPHONE: (617) 542-8300
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VIA FACSIMILE & U.S. MAIL

D. Edward Wilson, Jr.
Shook, Hardy & Bacon, LLP
600 14th Street, N.W.
Suite 800
Washington, D.C. 20005—2004
Fax: 202.783.4211

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

Dear Mr. Wilson:

I am writing to confirm our telephone conversation today regarding the subpoena your client Hoechst Marion Roussel ("Hoechst") had issued to Aetna U.S. Healthcare, Inc. ("Aetna") in the above-captioned matter. As you know, Aetna has produced documents to Hoechst in the related action, MDL 1278 ("MDL Action") pending in the U.S. District Court for the Eastern District of Michigan. In our conversation today, I conveyed to you Aetna's agreement that Hoechst may use all documents produced to it by Aetna in the MDL Action in the above-captioned matter. We further agreed that you would review those documents, and then meet and confer with me again, should you believe that the subpoena in the above-captioned action calls for anything not already produced in the MDL Action. I further agreed that I would consult with Aetna regarding updating the document production to the current date.

We further agreed to disagree, at this time, as to whether the subpoena was properly served on my client, and therefore as to whether time to address that issue has expired.

Please contact me at your earliest convenience if this letter does not conform to your understanding of our discussion in any way.

Sincerely,

Jennifer S. Abrams

EXHIBIT F

BERMAN, DEVALERIO, PEASE & TABACCO, P.C.
ATTORNEYS AT LAW

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August 23, 2000

OF COUNSEL
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D. Edward Wilson, Jr.
Shook, Hardy & Bacon, LLP
600 14th Street, N.W.
Suite 800
Washington, D.C. 20005—2004
Fax: 202.783.4211

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

Dear Mr. Wilson:

I am writing regarding my client's agreement that your client can use documents produced in the MDL Action in the FTC Action. This remains true. In my letter yesterday confirming that agreement, I neglected to confirm that, pursuant to the Protective Order issued in that case and your letter of August 7, 2000, which accompanied the copy of the Protective Order that you sent us, all documents produced by my client shall be considered, and/or designated, "Confidential" and "Attorneys Eyes Only."

Sincerely,

Jennifer S. Abrams

EXHIBIT G

LAW OFFICES

SHOOK, HARDY & BACON L.L.P.

KANSAS CITY
OVERLAND PARK
HOUSTON
SAN FRANCISCO
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LONDON
ZURICH
GENEVA
MELBOURNE
BUENOS AIRES

D. E. Wilson, Jr.
202-662-4861
dwilson@shb.com

September 14, 2000

By Fax and First Class Mail
Jennifer S. Abrams, Esquire
Berman, DeValerio, Pease & Tabacco, P.C.
425 California Street, Suite 2025
San Francisco, CA
94104-2205

Re: Aventis Subpoena to Aetna, FTC Docket No. 9293

Dear Ms. Abrams:

This letter confirms my voice mail of today. At your request and even though I was already familiar with them, I reviewed anew the documents produced by Aetna in the MDL Action. Only a few of these documents might even be considered somewhat responsive. The overwhelming majority are copies of contracts between Aetna and individual pharmacies in Michigan. These might be relevant for class certification purposes in the MDL proceeding, but they have nothing to do with a Part III, FTC proceeding concerning monopoly and market definition allegations.

Referring me to these documents either reflected a complete lack of familiarity with the subpoena or was done more purposefully to delay Aetna's compliance with the subpoena. In view of this, I consider our meet and confer obligations completed.

Sincerely,

D. E. Wilson, Jr.

Ltrdc.bas

EXHIBIT H

BERMAN, DEVALERIO, PEASE & TABACCO. P.C.
ATTORNEYS AT LAW

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September 18, 2000

VIA FACSIMILE & U.S. MAIL

D.E. Wilson, Jr.
Shook, Hardy & Bacon, LLP
Hamilton Square
600 14th Street, N.W. Suite 800
Washington, D.C. 20005-2004

Re: Aventis Subpoena to Aetna; FTC Docket No. 9293

Dear Mr. Wilson:

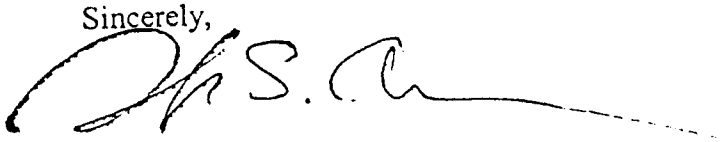
I am writing in response to your letter and voice-mail of September 14, 2000. I will disregard the inconsistencies between your voice-mail and letter regarding the date when you plan to consider our meet and confer efforts terminated, as it is evident you do not intend to confer further. This is evident because you have failed to give me a single specific as to which request or requests you feel have not been met, and what sort of document you believe may exist that you would wish to obtain.

You state that you have now completed your review of the documents my client produced to yours in the related MDL action, MDL 1278, which we agreed to let you review for the FTC action. I am surprised that you now tell me that you were "already familiar with" these documents. The reason we agreed to defer further meet and confers was precisely because you told me you were not familiar with the documents. In fact, you stated that a "Chinese Wall" existed between the members of your firm defending the MDL action, and the members defending the FTC action. We thus had agreed that meeting and conferring regarding our production to you was futile until you were, in fact, familiar with those documents and could detail to me whether you believed any further production was required, and why.

I will confirm again that we have indeed compared your requests for documents to those requested in the MDL action by your colleagues. Both requests cover the same pool of documents that actually exist at Aetna. Copies of all unprivileged and responsive

documents have been produced to you.

Sincerely,



Jennifer S. Abrams

cc: Peter St. Phillip
Gerald Lawrence

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: Administrative Law Judge D. Michael Chappell

DECLARATION OF PETER ST. PHILLIP, IN OPPOSITION TO AVENTIS PHARMACEUTICAL, INC.'S MOTION FOR ENFORCEMENT OF SUBPOENA SERVED ON AETNA U.S. HEALTHCARE, INC.

I, Peter St. Phillip, hereby declare, 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 an attorney associated with the law firm Lowey, Dannenberg, Bemporad & Selinger, P.C. ("Lowey Dannenberg") of White Plains, New York. Our firm, together with Berman, DeValerio, Pease & Tabacco, P.C. ("Berman DeValerio") represent Aetna U.S. Healthcare, Inc. in certain actions coordinated in the United States District Court for the Eastern District of Michigan, as *In re Cardizem CD Antitrust Litigation*, MDL 1278. District Judge Nancy Edmunds has appointed Lowey Dannenberg and Berman DeValerio co-lead counsel for the State Law Cases in those proceedings.

2. The State Law Cases coordinated before Judge Edmunds each allege that the September 1997 agreement between Hoechst Marion Roussel, Inc. (now Aventis Pharmaceutical, Inc.) ("HMRI") and Andrx Pharmaceuticals, Inc. ("Andrx") is a *per se* violation of various states laws prohibiting unfair trade and deceptive practices. Each of the State Law Cases seek damages and restitution in the nature of disgorgement from both HMRI and Andrx on behalf of state-wide classes of consumers and third party payors for the drugs Cardizem CD and Cartia XT.

3. In the second week of July, 2000, our firm received from Aetna U.S. Healthcare,

Inc. a subpoena *duces tecum* addressed to it. Upon receipt of this subpoena, I, Nicole Lavallee, Esq., and Jennifer Abrams, Esq., both of Berman DeValario, made immediate efforts to respond thereto.

4. I served Aetna's Responses and Objections to the subpoena on D.E. Wilson, Jr., Esq. by facsimile on July 21, 2000. Later that same day, I spoke with Mr. Wilson regarding the responses. I informed him that Nicole Lavallee, Esq. of Berman DeValario would be handling any negotiations relative to the responses and that it seemed possible that Aetna would agree to allow HMRI to use the documents that were produced in *In re Cardizem CD Antitrust Litigation*. I informed him that I did not have authority at that time to make substantive agreements on behalf of Aetna, but that Ms. Lavallee was the individual he needed to speak to regarding the scope of production.

5. Later that same day, I received a call from Mr. Wilson. He expressed concern that we may have filed our Responses and Objections with the Commission and that such filing may trigger a period within which his client would have to move for enforcement of the subpoena. I informed him that we did not file the Responses and Objections. After some discussion, I agreed to accommodate his concerns. We agreed that neither Aetna nor HMRI would take any formal action with respect to the subpoena until such time as our clients agreed that resort to Judge Chappell was required. After our conversation, I faxed a letter to Mr. Wilson memorializing this agreement and asked him to contact me if he had a different understanding of our arrangement. A copy of this letter is annexed hereto as Exhibit "A".

6. I have read Mr. Wilson's September 21, 2000 Declaration filed in support of Aventis' motion for enforcement of the subject subpoena. In connection with his statement in ¶ 3 that "[he] was told, alternatively, that [Aetna's responses and objections] is not, and then is Aetna's position with regard to the subpoena", neither statement was made by me.

Dated: September 28, 2000
White Plains, New York

Peter D. St. Phillip, Jr.

EXHIBIT A

LOWEY DANNENBERG F 1PORAD & SELINGER, P. C.
The Gateway-11th Floor • One North Lexington Avenue • White Plains, NY 10601
TELEPHONE: (914) 997-0500 • TELECOPIER: (914) 997-0035

TELECOPIER COVER SHEET

PLEASE DELIVER THE FOLLOWING PAGES TO:

Name: HAL SHAFTEL, ESQ.
SOLOMON, ZAUDERER, ET AL. 212-956-4068

D. EDWARD WILSON, ESQ.
SHOOK, HARDY & BACON, L.L.P. (D.C.) 202-783-4211

STACEY L. ERLICH, ESQ.
KLEINFELD, KAPLAN AND BECKER 202-223-5619

MARKUS H. MEIER, ESQ.
FEDERAL TRADE COMMISSION 202-326-3384

NICOLE LAVALLEE, ESQ.
BERMAN, DeVALERIO, PEASE & TABACCO 760-476-1372

Case: CARDIZEM CD

Date: JULY 21, 2000

From: PETER D. ST. PHILLIP, ESQ.

Total No. of Pages including THIS COVER SHEET: 2

Message:

If you do not receive all the pages, Please call Mail Clerk at (914) 997-0500

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 DENYING AVENTIS PHARMACEUTICALS, INC.'S MOTION FOR ENFORCEMENT OF THE SUBPOENA ISSUED TO AETNA U.S. HEALTHCARE, INC.

On September 21, 2000, Aventis Pharmaceuticals, Inc. filed a motion to enforce a subpoena it had issued to Aetna U.S. Healthcare, Inc. Having reviewed all arguments submitted by Aetna U.S. Healthcare, Inc. and Aventis Pharmaceuticals, Inc., it is hereby ORDERED that the motion be and hereby is DENIED. Aetna U.S. Healthcare, Inc. shall not produce any further discovery to respondent Hoechst Marion Roussel, Inc. in this matter.

IT IS SO ORDERED.

Dated: _____, 2000

_____
Administrative Law Judge D. Michael Chappell

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

CERTIFICATE OF SERVICE

I, TYLER KELLY, an employee of Berman, DeValerio, Pease & Tabacco, P.C., 425 California Street, Suite 2025, San Francisco, CA 94104, hereby certify that on September 28, 2000, I served true copies of the following documents:

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

2. DECLARATION OF JENNIFER S. ABRAMS IN OPPOSITION TO AVENTIS PHARMACEUTICAL, INC.'S MOTION FOR ENFORCEMENT OF SUBPOENA SERVED ON AETNA U.S. HEALTHCARE, INC.;

3. ORDER DENYING AVENTIS PHARMACEUTICALS, INC.'S MOTION FOR ENFORCEMENT OF THE SUBPOENA ISSUED TO AETNA U.S. HEALTHCARE, INC.;

4. DECLARATION OF PETER ST. PHILLIP, IN OPPOSITION TO AVENTIS PHARMACEUTICAL, INC.'S MOTION FOR ENFORCEMENT OF SUBPOENA SERVED ON AETNA U.S. HEALTHCARE, INC.

on the following parties:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission, Room 104
600 Pennsylvania Ave., N.W.,
Washington, D.C. 20580
Fax: 202-326-2427
(two courtesy copies)

Richard Feinstein
Director For Healthcare Services Office
Federal Trade Commission
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Markus Meier, Esq.
Federal Trade Commission
Bureau of Competition
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Louis M. Solomon
Solomon, Zauderer, Ellenhorn, Frischer & Sharp
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New York, NY 10111
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James M. Spears, Esq.
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Peter O. Safir, Esq.
Kleinfeld, Kaplan and Becker
1140 19th Street, N.W.
Washington, D.C. 20036
Fax: 202-223-5619

by placing same in sealed envelopes, affixing proper first class postage, and depositing them in the United States Mail at San Francisco, California.

Copies of the above-described documents were also sent via facsimile transmission to each recipient at the fax numbers shown above.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed at San Francisco, California, on September 28, 2000.

Tyler Kelly