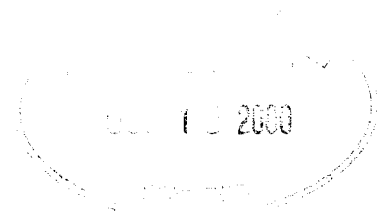


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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

TO: Honorable D. Michael Chappell
Administrative Law Judge

ALPHARMA, INC.'S OPPOSITION TO AVENTIS
PHARMACEUTICALS, INC.'S MOTION TO ENFORCE
COMPLIANCE WITH THE SUBPOENA SERVED ON ALPHARMA, INC.

The Aventis Pharmaceuticals Inc.'s (aka "Hoechst") Motion to Enforce Compliance With the Subpoena Served on Alpharma, Inc. ("Motion to Enforce Compliance") should be denied because Hoechst refused Alpharma's attempts to negotiate a reasonable response to the subpoena, failed to make any meaningful effort to confer about the scope and burden of the discovery demanded by Hoechst and Alpharma has no responsive documents.

1. Background.

The FTC initiated its action against Hoechst Marion Roussel, Inc., Cardem Capital L.P., and Andrx Corp. alleging that Hoechst and Andrx entered into an agreement in which Andrx was paid millions on dollars to delay bringing a generic alternative to Cardizem CD to market. *FTC*

Complaint, <http://www.ftc.gov/os/2000/03/hoechstandrxc.complaint.htm> (March 14, 2000). In addition, buyers of Cardizem CD heart medication have filed suits against Hoechst and Andrx's challenging their agreement. See *In re Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 618 (E.D. Mich. 2000) (Class action and individual suits consolidated into this multi district antitrust litigation; plaintiffs' motions to dismiss denied).

2. Communications regarding the Subpoena issued to Alparma.

Alparma, Inc. ("Alparma") is not involved in the manufacture of any cardiovascular pharmaceutical products. Alparma is a stranger to and has no vested interest in these proceedings. As set forth in the accompanying affidavit of Tefft W. Smith ("Mr. Smith") of Kirkland & Ellis, Mr. Smith, as counsel for Alparma, immediately upon receiving subpoenas from Hoechst and Andrx in July of 2000, called D. Edward Wilson, Jr.'s ("Mr. Wilson") office of Shook, Hardy & Bacon as counsel for Hoechst (no counsel's name was listed for Andrx) and left a voice mail explaining that Alparma: (1) had no interest in the litigation; (2) had no involvement in the cardiovascular pharmaceutical products category; (3) wanted to confer to mitigate to any burden and expense; and (4) requested Mr. Wilson to advise counsel for Andrx of these facts, to coordinate with Andrx and to please call Mr. Smith.

Mr. Smith also called Federal Trade Commission ("FTC") Complaint Counsel, Dan Kotchen ("Mr. Kotchen"), to inquire as to what relevance the FTC saw Alparma having to the FTC's case. Mr. Smith advised Mr. Kotchen of the subpoenas received and Alparma's desire to limit its involvement in the litigation to avoid unnecessary expense. Mr. Smith asked Mr. Kotchen to advise counsel for Hoechst and Andrx of Kirkland & Ellis' representation of Alparma and Mr. Robert Wrobel, its General Counsel (who had been listed by the FTC –

without Mr. Wrobel's knowledge or agreement – as a witness for the FTC) and Alpharma's desire to minimize its participation in the litigation and any burden or expense.

According to representations by Mr. Kotchen, FTC Complaint Counsel did so advise counsel for Hoechst and Andrx, as confirmed by Mr. Kotchen's letter dated July 19, 2000 to James M. Spears, Shoock, Hardy & Bacon, L.L.P. and Louis M. Solomon, Solomon, Zauderer, Ellenhorn, Frischer & Sharp, July 19, 2000:

I am writing to clarify the scope of the testimony we plan to introduce at trial from Alpharma, a company listed on our preliminary witness list. We recently were contacted by Alpharma's counsel, Tefft Smith, regarding the breadth of your subpoenas *duces tecum*. We hope that a clarification of the limited scope of Alpharma's relevancy to this matter will facilitate any subpoena negotiations between you and Alpharma. *** An Alpharma witness will testify at trial (if at all) solely about an agreement it entered into with L. Perrigo Co., in which Alpharma agreed to relinquish its eligibility to the Hatch-Waxman 180-day exclusivity right for its over-the-counter formula of ibuprofen oral suspension. *** We hope this clarification will allow you to negotiate with Alpharma a reasonable response to your subpoenas.

Alpharma heard nothing from Hoechst, Andrx or their counsel until Mr. Wrobel (*notably* not Mr. Smith of Kirkland & Ellis) received calls from Mr. Wilson, representing Hoechst and Sharon Sash ("Ms. Sash") representing Andrx, separately on September 19, 2000.¹ Although

¹ Mr. Wilson knew that Alpharma and Mr. Wrobel were represented by Mr. Smith prior to contacting Alpharma on September 19, 2000. See Wilson Declaration ¶3; Complaint Counsel's letter dated July 19, 2000; Affidavit of Tefft Smith ¶2.

Having so been put on notice, it was unethical and improper for Hoechst's counsel to contact Mr. Wrobel directly, without the permission of counsel. D.C. RULES OF PROFESSIONAL CONDUCT § 4.2 (prohibits a lawyer from communicating with a party known to be represented by
(continued...)

counsel for Alparma was then on trial in Federal Court in the Beechnut/Heinz matter brought by the FTC, Mr. Smith called both Mr. Wilson and Ms. Sash, indicating he was responding on behalf of Mr. Wrobel.

On September 21, Mr. Wilson called and insisted on speaking with Mr. Smith who explained he was preparing for closing arguments that afternoon in the Beechnut/Heinz case. Mr. Smith took the call and was subjected to a rude and offensive harangue by Mr. Wilson about Alparma's supposed need immediately to produce "all the documents" demanded in the subpoena because he was facing an "imminent discovery cut-off period." Counsel for Alparma asked Mr. Wilson to "cut the attitude," saying that efforts had been made to confer with Hoechst in the past and that both Mr. Wrobel and counsel for Alparma were currently committed on other matters. Mr. Smith advised Mr. Wilson that Mr. Wrobel's only available date for a deposition was October 24th as Mr. Wrobel was out of the country on other business until then.

Mr. Wilson responded that the proposal was "not satisfactory" and threatened a motion to compel in Federal Court. Counsel for Alparma advised that Hoechst "should do what it feels it has to do" but indicated that counsel did not believe that the matter would be heard in Federal Court. Mr. Smith asked: "what exactly does Hoechst really want from Alparma?" Mr. Wilson

¹ (...continued)

another lawyer); Rule 4.2 "also covers any person, whether or not a party to a formal proceeding, who is represented by counsel . . ." D.C. RULES OF PROF'L CONDUCT § 4.2, Comment 4); ABA MODEL CODE OF PROF'L CONDUCT R. 4.2 (prohibits a lawyer from communicating with a person known to be represented by another lawyer).

Mr. Wilson is a member of the D.C. Bar and must conform to the standards of ethical conduct required by the D.C. Bar when practicing before the Federal Trade Commission. FTC Rules of Practice, 16 C.F.R § 4.1(ε)(1); *See also In the Matter of Intel Corporation*, 1999 FTC Lexis 206, *20 (D.C. RULES OF PROF'L CONDUCT apply when attorney practicing before the Commission is a member of the D.C. bar).

rattled off a long list of items. Mr. Smith asked Mr. Wilson to put his request in a letter and said that he would review it with Alparma to determine what, if any, such documents Alparma might have and what burden would be associated in responding to such a request. Mr. Smith advised that he had to leave to go to court and the call ended.

Neither Alparma nor Mr. Smith received any letter nor any other communication relating to this matter prior to receiving Hoechst's Motion to Enforce Compliance. The representation by Hoechst and Mr. Wilson that counsel for Alparma "informed Aventis counsel that Aventis should file a motion to compel" is patently false. The Motion to Enforce Compliance and the related affidavit of "Mr. Wilson" of Shook, Hardy & Bacon is untrue in its statements and contains factually material omissions as related above and in Mr. Smith's attached affidavit. Mr. Wilson had an obligation to confer with Mr. Smith in a good faith effort to resolve any discovery issues. Federal Trade Commission's Rules of Practice, 16 C.F.R § 3.22(f). Mr. Wilson knowingly disobeyed this obligation.²

3. The Subpoena Requests Are Objectionable.

The subpoena served on Alparma seeks "all documents" that relate to twenty-six categories of documents. With the exception of Request No. 5 (e), Requests 1-17 seek information relating to cardiovascular pharmaceutical products. Alparma does not manufacture

² "A Lawyer Shall Not: ...(c) Knowingly disobeyed an obligation under the rules of a tribunal..." D.C. RULES OF PROF'L CONDUCT R. 3.4 (c). "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person..." D.C. RULES OF PROF'L CONDUCT R. 4.4; *Cf. Shepherd v. American Broadcasting Cos., Inc.*, 62 F.3d 1469, 1483 (D.C. Cir. 1995) ("we think Rule 4.4 provides a sound standard to guide a district court's use of its inherent power to sanction an attorney for harassment"). Mr. Wilson acted in bad faith in filing the Motion to Enforce Compliance and the related affidavit and his conduct was unethical and unprofessional.

cardiovascular pharmaceutical products and is not in that business. Therefore, Alharma does not have any documents responsive to these requests. In Mr. Smith's efforts to comply with the subpoena, he notified Mr. Wilson of this fact.

Request No. 5(e) seeks "[a]ll documents that reflect or relate to the following sales and marketing information: (e) promotional materials of any kind, including but not limited to brochures, print advertisements, transcripts of electronic media advertisement." This request is vague, ambiguous and overbroad and seeks information irrelevant to this proceeding. In addition, much of this information is publically available.

Request Nos. 18-25 seek information relating to any communication between Alharma and the FTC, including communications relating to this case. These can be obtained from the FTC.

4. Hoechst Motion to Enforce Compliance should be denied and Alharma should be awarded its costs and expenses, including attorneys fees.

Alharma does not have any documents related to cardiovascular pharmaceutical products as it is not in that business. Hoechst was so informed and ignored or disregarded this fact in harassing and seeking to intimidate Alharma with threats of FTC process. The administrative law judge is authorized to deny discovery or "make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense..." FTC Rules of Practice, 16 C.F.R § 3.31 (d)(1)³.

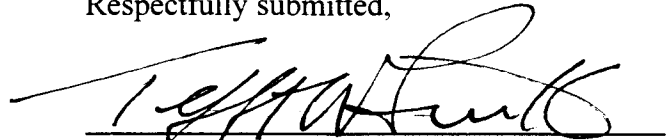
³ Cf. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) (court may assess attorney fees as a sanction for: willful disobedience of court order; conduct that abuses judicial process; or bad faith, vexatious, wanton, or oppressive conduct); *Harlan v. Lewis*, 982 F.2d 1255 (8th Cir. 1993) (federal court imposed monetary sanctions on lawyer for improper and unethical conduct);

(continued...)

Accordingly, Hoechst's motion should be denied and Alpharma should be awarded its costs and expenses in responding to Hoechst's abuse of process and unprofessional conduct. Mr. Wrobel is prepared to sit for a one-half day deposition, in Washington, D.C., with all expenses, including attorneys fees, being paid by Hoechst, at Mr. Wrobel's convenience. Having heard nothing from Mr. Wilson over the past two weeks, October 24th is no longer convenient.

Date: October 12, 2000

Respectfully submitted,



Tefft W. Smith
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5212 Telephone
Attorney for ALPHARMA, INC.

³ (...continued)

Shepherd v. American Broadcasting Cos., Inc., 62 F.3d 1469, 1475 (D.C. Cir. 1995) (courts may sanction attorney or party misconduct with fines, awards of attorney fees and expenses, contempt citations, disqualifications or suspensions of counsel); *Faison v. Thornton*, 863 F.Supp. 1204, 1218-1219 (D. Nev. 1993) (court ordered attorneys to pay opposing parties' attorney fees and costs as sanctions for violating ethical rule prohibiting communication with party represented by counsel).

FTC Rules of Practice affirm that the FTC is empowered to reprimand, suspend, or disbar an attorney who does not conform to the standards of ethical conduct or is otherwise "guilty of conduct warranting disciplinary action." Federal Trade Commission's Rules of Practice, 16 C.F.R § 4.1(e)(2). The Administrative Law Judge may suspend or bar any attorney from participation in a particular proceeding who "shall refuse to comply with his directions, or who shall be guilty of disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of such proceeding." FTC Rules of Practice, 16 C.F.R § 3.42 (d).

CERTIFICATE OF SERVICE

I, Tefft W. Smith, hereby certify that on October 13, 2000, a copy of Alpharma Inc.'s Opposition to Adventis Pharmaceuticals, Inc.'s Motion to Enforce Compliance With the Subpoena Served on Alpharma, Inc. was served by hand delivery or Federal Express to the following persons:

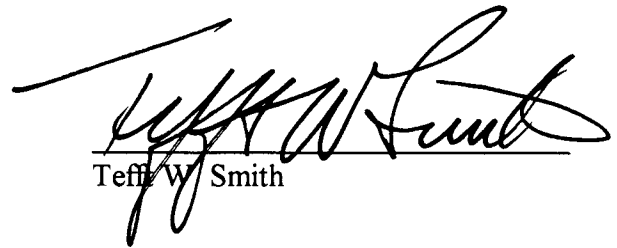
Richard Feinstein
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

Daniel Kotchen
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

D.E. Wilson
Shook, Hardy & Bacon
600 14th Street, N.W.
Washington, D.C. 20005-2004

Sharon Sash
Solomon, Zauderer, Ellenhorn,
Frischer & Sharp
45 Rockerfeller Plaza
New York, NY 10111



Tefft W. Smith

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

TO: Honorable D. Michael Chappell
Administrative Law Judge

DECLARATION OF TEFFT W. SMITH IN OPPOSITION
TO ADVENTIS PHARMACEUTICAL, INC.'S MOTION FOR
ENFORCEMENT OF SUBPOENA SERVED ON ALPHARMA, INC.

I TEFFT W. SMITH, declare under penalty of perjury as follows:

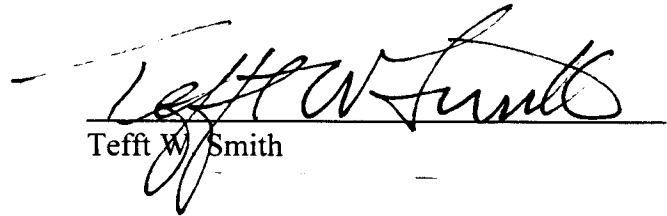
1. I am a member in good standing of the Bars of the District of Columbia and Illinois, I am a Partner in the law firm of Kirkland & Ellis and counsel for Alpharma, Inc. ("Alpharma") in this matter. The following statements are true based on my own personal knowledge.
2. Immediately upon receiving a subpoena from Adventis Pharmaceuticals, Inc. (aka "Hoechst") and Andrx in July of 2000, I, as counsel for Alpharma, immediately called Mr. Wilson's office as counsel for Hoechst (no counsel's name was listed for Andrx) and left a voice mail explaining that Alpharma: (1) had no interest in the litigation; (2) had no

- involvement in the cardiovascular pharmaceutical products category; (3) wanted to confer to mitigate to any burden and expense; and (4) requested Mr. Wilson to advise counsel for Andrx of these facts, to coordinate with Andrx and to please call me.
3. I also called Federal Trade Commission (“FTC”) Complaint Counsel, Dan Kotchen (“Mr. Kotchen”), to inquire as to what relevance the FTC saw Alparma having to the *IMO Hoechst Marion Roussēl, Inc., Carderm Capital L.P., and Andrx Corp.* case.
 4. I advised Mr. Kotchen of the subpoenas received by Hoechst and Andrx and of Alparma’s desire to limit its involvement in the litigation to avoid any burden or expense.
 5. I asked Mr. Kotchen to advise counsel for Hoechst and Andrx of Kirkland & Ellis’ representation of Alparma and Mr. Robert Wrobel, its General Counsel.
 6. Alparma was listed by the FTC, without Mr. Wrobel’s knowledge or agreement, as a witness for the FTC.
 7. Alparma heard nothing from Hoechst, Andrx or their counsel until Mr. Wrobel informed me that he had received calls from Mr. Wilson, representing Hoechst and Sharon Sash (“Ms. Sash”) representing Andrx on September 19, 2000.
 8. Although I was then on trial in Federal Court in the Beechnut/Heinz matter brought by the FTC, I called both Mr. Wilson and Ms. Sash, indicating that I was responding on behalf of Mr. Wrobel and Alparma.
 9. On September 21, Mr. Wilson called and insisted on speaking with me. I explained to him that I was preparing for closing arguments that afternoon in the Beechnut/Heinz case, but he insisted on speaking with me about the Hoechst subpoena.

10. Mr. Wilson subjected me to a rude and offensive harangue about Alpharma's supposed need to immediately produce "all the documents" demanded in the subpoena because he was facing an "imminent discovery cut-off period."
11. I asked Mr. Wilson to "cut the attitude," and I told him that I had made efforts to confer with Hoechst in the past and that both Mr. Wrobel and I were currently committed on other matters.
12. I advised Mr. Wilson that Mr. Wrobel's only available date for a deposition was October 24th as Mr. Wrobel was out of the country on other business until then.
13. Mr. Wilson told me that the proposal was "not satisfactory" and he threatened to file a motion to compel against Alpharma in Federal Court.
14. I told Mr. Wilson that Hoechst "should do what it feels it has to do" but indicated that I did not believe that the matter would be heard in Federal Court.
15. I asked Mr. Wilson: "what exactly does Hoechst really want from Alpharma?" Mr. Wilson rattled off a long list of items. I asked Mr. Wilson to put his request in a letter and told him that I would review his request with Alpharma to determine what, if any, such documents Alpharma has and what burden would be associated in responding to such a request.
16. I advised Mr. Wilson that I had to leave to go to court and the call ended.
17. Neither Alpharma nor Kirkland & Ellis received any letter or any other communication relating to this matter prior to receiving Hoechst's Motion to Enforce Compliance.
18. The representation by Hoechst and Mr. Wilson that I "informed Aventis counsel that Aventis should file a motion to compel" is patently false.

19. I informed Hoechst, that Alharma has no involvement in the cardiovascular pharmaceutical products category on more that one occasion, but they ignored or disregarded this fact in harassing and seeking to intimidate me and, therefore, Alharma with threats of FTC process.

Executed on October 12, 2000



Tefft W. Smith



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

July 19, 2000

Via Facsimile

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

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

Re: Hoechst-Andrx Generic Cardizem, FTC Docket No. 9293

Dear Mit and Lou:

I am writing to clarify the scope of the testimony we plan to introduce at trial from Alpharma, a company listed on our preliminary witness list. We recently were contacted by Alpharma's counsel, Tefft Smith, regarding the breadth of your subpoenas *duces tecum*. We hope that a clarification of the limited scope of Alpharma's relevancy to this matter will facilitate any subpoena negotiations between you and Alpharma.

An Alpharma witness will testify at trial (if at all) solely about an agreement it entered into with L. Perrigo Co., in which Alpharma agreed to relinquish its eligibility to the Hatch-Waxman 180-day exclusivity right for its over-the-counter formula of ibuprofen oral suspension.

We hope this clarification will allow you to negotiate with Alpharma a reasonable response to your subpoenas.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel Kotchen".

Daniel Kotchen

cc: Tefft Smith