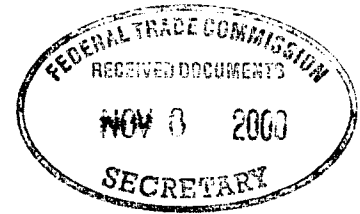


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of)
)
)
HOECHST MARION ROUSSEL, INC.,)
 a corporation,)
)
CARDERM CAPITAL L.P.,)
 a limited partnership,)
)
and)
)
ANDRX CORPORATION,)
 a corporation.)

Docket No. 9293

**ORDER DENYING ANDRX'S MOTION TO COMPEL
DEPOSITION TESTIMONY OF FTC STAFF MEMBERS**

I.

On October 24, 2000, Respondent Andrx Corp. ("Andrx") filed a Motion to Compel Deposition Testimony or to Preclude ("motion to compel"). By this motion, Andrx seeks to compel five current or former FTC staff members to testify concerning pre-complaint discussions they had with Andrx. In the alternative, Andrx seeks to preclude Complaint Counsel from adducing evidence at trial concerning these discussions. On October 31, 2000, Complaint Counsel filed an Opposition to the Motion to Compel, asserting, among other arguments, that the proposed depositions would not yield any relevant information and that the proposed deponents, unlike counsel for Andrx and Respondent Aventis Pharmaceuticals, Inc., are not fact witnesses to the issues in dispute. On November 3, 2000, Andrx filed a motion for leave to file a supplemental submission in support of its motion to compel.

Andrx's motion for leave to file a reply brief is GRANTED. As set forth below, Andrx's motion to compel is DENIED.

II.

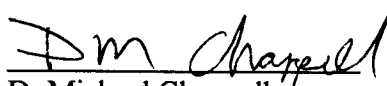
Four of the five FTC staff members Andrx wishes to depose are Commission attorneys who worked on the investigation that led to the complaint and are currently serving as Complaint Counsel. The fifth is a paralegal who no longer works for the Commission.

Deposition of opposing counsel is permissible "where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). It is also permissible where the attorney is a fact witness, such as an actor or a viewer. *American Casualty Co. v. Krieger, et al.*, 160 F.R.D. 582, 588 (S.D. Cal. 1995); *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85-86 n.2 (M.D.N.C. 1987). "In cases where the attorney's conduct itself is the basis of a claim or defense, there is little doubt that the attorney may be examined as any other witness[.]" *Johnston Dev. Group, Inc., et al. v. Carpenters Local Union No. 1578, et al.*, 130 F.R.D. 348, 352 (D.N.J. 1990); *In re Tutu Water Wells Contamination Litig.*, 184 F.R.D. 266, 267 (D.V.I. 1999).

Andrx asserts that these FTC staff members participated in a telephone conference call with counsel for Andrx in May or June 1999. Based upon the pleadings, there does not appear to be a factual dispute over whether this telephone conference took place or the details of the conference call. At the present time, there is only Andrx's speculation that a dispute may arise. The conduct of these staff members is not a basis for a claim or defense and these individuals did not participate in the underlying transaction giving rise to this cause of action. Nor has Andrx demonstrated the requisite need to take their depositions. Accordingly, Andrx is not permitted to take the depositions of these five FTC staff members.

However, should Complaint Counsel intend to present testimony of any of these staff members, even as rebuttal witnesses, Andrx will be permitted depose the proposed witnesses on the limited issue of the telephone conference call between FTC staff and counsel for Andrx in May or June of 1999.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: November 8, 2000