LEXSEE 1996 FTC LEXIS 478

In the Matter of AUTOMOTIVE BREAKTHROUGH SCIENCES, INC., ABS TECH SCIENCES, INC., corporations, and RICHARD SCHOPS, individually and as an officer and director of said corporations; In the Matter of BRAKE GUARD PRODUCTS, INC., a corporation, and ED F. JONES, individually and as an officer and director of said corporation

DOCKET NO. 9275; DOCKET NO. 9277

Federal Trade Commission

1996 FTC LEXIS 478

ORDER DENYING INTERLOCUTORY APPEALS

November 5, 1996

ORDER:
[*1]

ORDER DENYING INTERLOCUTORY APPEALS

Respondents Brake Guard Products, Inc. and Ed F. Jones ("Brake-Guard") have filed two requests for interlocutory appeals, pursuant to Rule 3.23(b). One seeks interlocutory review of the Order Striking Witnesses, dated October 15, 1996, and the other seeks interlocutory review of the Partial summary Decision, dated October 16, 1996. Rule 3.23(b) requires that the movant satisfy a very stringent showing that the challenged ruling: (1) involve a controlling issue of law; (2) there is a substantial ground for difference of opinion regarding that controlling issue of law; and (3) that an immediate appeal would either materially advance the ultimate termination of the litigation or that subsequent review would be an inadequate remedy. See Rule 3.23(b); Kroger Co., 91 F.T.C. 1146 (1978). Neither of Brake-Guard's requests involve a controlling issue of law, which has been defined as an issue that:

> is not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases.

[*2]
The Times Mirror Co., D. 9103 (Order Denying Interlocutory Appeal, Dec. 20, 1978), slip op. at 1; George Irvin Chevrolet Co., D. 9124 (Order Denying Appeal, April 24, 1979), slip op. at 2. Moreover, granting an interlocutory appeal of either request will slow, not advance the termination of this litigation. Finally, subsequent review of the issues presented will not be an inadequate remedy.

With regard to the request for interlocutory review of the Order Striking Witnesses, I have already granted Brake-Guard a portion of the relief requested. During the ongoing hearings in this matter, on October 24, 1996, I authorized Brake-Guard to present the testimony of the individual it has represented to be the witness "absolutely necessary" to its defense (Respondent Brake-Guard's Request to File an Interlocutory Appeal of the Order Granting Complaint Counsel's Motion to Exclude Witnesses, at 3), subject to Brake-Guard producing that witness for a deposition in Washington, D.C.

Accordingly, it is hereby ORDERED that Brake-Guard's request that I certify interlocutory appeals to the Commission of my Order Striking Witnesses and Partial Summary Decision is hereby DENIED.

LEXSEE 1979 FTC LEXIS 77

In the Matter of BASF WYANDOTTE CORPORATION a corporation.

DOCKET No. 9125

Federal Trade Commission

1979 FTC LEXIS 77

ORDER DENYING INTERLOCUTORY APPEAL

November 20, 1979

ALJ: [*1]

James P. Timony, Administrative Law Judge

ORDER:

By an application dated November 2, 1979, pursuant to Rule 3.23(b), respondent seeks interlocutory review of a Protective Order issued October 23, 1979.

At contention is Paragraph 5(d) of the Protective Order which defines the "qualified persons" who will be able to see the confidential materials, many of which were obtained from respondent's competitors. Respondent argues that the paragraph denies it due process by limiting its choice of independent consultants and by prohibiting its employees from seeing the materials. Respondent asserts that the Protective Order entered in this proceeding is more stringent than those entered by federal courts. By a paper received November 15, 1979, complaint counsel oppose the application. Respondent's competitor, Ciba-Geigy, also submitted a memorandum in opposition to the application.

Rule 3.23(b) implicitly provides that the application for review must justify the need for interlocutory review by

Respondent asserts that the Protective Order is more restrictive than those ordered by federal courts in antitrust cases. However, respondent has been unable to cite any authority in support of this proposition.

Respondent argues that Paragraph 5(d) n2 unduly restrains its access to outside consultants, and is a denial of due process. Respondent has not shown that it actually has been unable to hire consultants because of this provision, but rather speculates it will be unable to do so. Counsel for Ciba-Geigy has offered support demonstrating the relative ease with which he found a "qualified chemist" who would accept employment under the terms of the order. n3

n2 Paragraph 5(d) of the Protective Order includes as Qualified Persons:
(d) persons who are assisting complaint counsel and counsel for respondent in the preparation for trial of this proceeding, provided that such persons are not officers, directors, or employees of any company (or subsidiary, division, or affiliate thereof) which is engaged in the production or sale of pigments or dyestuffs, and provided further that such persons are not consultants in the pigments or dyestuffs filed for any such compants or dyestuffs, and provided further company; except that persons employed by respondent for purposes of this proceeding shall be qualified person, provided that for a period of three years such persons are not also employed for pigments or dyestuffs advice other than in this proceeding.

n3 See Response of Ciba-Geigy to Application of Respondent for Interlocutory Review, dated November 15, 1979, wherein counsel for Ciba-Geigy states that he made two phone calls and located a qualified chemist named Percy Perletz, with thirty years of industrial experience in dyestuffs and pigments. Dr. Perletz, a Ph.D. in chemistry, was employed for the las 10-15 years by Allie

LEXSEE 1988 FTC LEXIS 164

In the Matter of Coca-Cola Company of the Southwest, a Corporation, and Dr Pepper/Seven-Up Company, a Corporation

DOCKET NO. 9215

Federal Trade Commission

1988 FTC LEXIS 164

ORDER RE MOTIONS TO DISMISS

October 25, 1988

ALJ: [*1]

James P. Timony, Administrative Law Judge

ORDER:

ORDER RE MOTIONS TO DISMISS

Respondents move to dismiss the complaint for failure to state a claim upon which relief can be granted, arguing that it challenges the acquisition on an incorrect legal ground, using the standard of Section 7 of the Clayton Act, that it related to the issuance of the complaint. Order granting motion to dismiss, R.J. Reynolds Tobacco Co., Inc., Docket No. 9206 (August 4, 1986) at p. 2 (Hyun, A.L.J.), rev'd on other grds., Order issued March 4, 1988. The administrative law judge sits in a "judicial capacity" and may dismiss a complaint on the ground that "the facts alleged do not state a cause of action." Florida Citrus Mutual, 50 F.T.C. 959, 961 (1954). This authority of the administrative law judge to decide to dismiss, and to rule as a matter of law, may be exercised whether the issue is constitutional as in R.J. Reynolds Tobacco Co., Inc., or a matter of statutory construction. Cf., Times-Mirror Company, 92 F.T.C. 230 (1978). Similarly, the administrative law judge has authority to dismiss parties where the issue is procedural, such as deleting an individual respondent who is deceased or substituting a respondent improperly named. Crush International Limited, **[*3]** et al., 80 F.T.C. at 1024.

Where the motion to dismiss involves a matter lying in the administrative discretion of the Commission, however, it must be certified for determination, e.g., to argue that the Commission should not proceed against one of several companies engaging in the same practice as the respondent, Moog Industries, Inc. v. FTC, 355 U.S. 411 (1958) and FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967); to stay proceedings pending disposition of a court decision in another case involving a similar issue, Amrep Corp., 87 F.T.C. 283 (1976); to argue that the Commission issued the complaint as a result of industry or congressional pressure, Exxon Corp., 83 F.T.C. 1759 (1974); to add a party, Crush International Limited, et al., 80 F.T.C. at 1024; to argue that the Commission should have instituted a rulemaking proceeding, Boise Cascade Corp., Docket No. 9133, November 21, 1980 (Parker, A.L.J.); to amend the complaint altering the theory of the original complaint, Kaiser Aluminum & Chemical Corp., Docket No. 9080, September 15, 1977 (Timony, A.L.J.). And, of course, the Commission's mental process leading to a determination that it has **[*4]** reason to believe that a proceeding appears to be in the public interest can not be challenged by a motion to dismiss. Florida Citrus Mutual, 50 F.T.C. 959, 961 (1954). n3

n3 This is not to say that such discretion can never be challenged. Moog Industries, Inc. v. FTC, 355 U.S. 411, 414 (1958; FTC V. Universal-Rundle Corp., 387 U.S. 244, 251 (1967). Moreover, FTC v. Klesner, 280 U.S. 19, 30 (1929) indicates that a proceeding that is not in the t
during the course of the proceeding." Since the defense will be supported by facts beyond the pleadings, it should not be determined on a motion to dismiss but on an evidentiary record, either by summary or initial decision. Suburban Propane Gas Corp., 71 FTC 1695, 1698 (1976).

The argument that the administrative law judge is solely a fact-finder misperceives the nature of an administrative trial. The role of the administrative law judge is "functionally comparable" to a trial judge employed in the judicial branch. Butz v. Economou, 438 U.S. 478, 513 (1978); Nash v. Califano, 613 F.2d 10, 15 (2d Cir. 1980); NLRB v. Permanent Label Corp., 657 F.2d 512, 527-28 (3rd Cir. 1981) **[*5]** (Aldisert, concurring). See, Disciplinary Proceedings, 6 Western New England Law Review 807, 810-15 (1984). The judicial power of the administrative law judge springs from the Administrative Procedure Act and the Commission's Rules of Practice. These enumerated powers should be "liberally construed in the light of the history and-24.8nt of the Administrative Procedure Act. It was the general statutory purpose to enhance the status and role of [administrative law judges]." Florida Citrus Mutual, 50 F.T.C. at 969-70. (Chairman Howrey, dissenting on other grounds).

The administrative law judge has jurisdiction to decide whether a complaint states a claim upon which relief may be granted.

Merits of the motions

Respondents' motions to dismiss are based on the theory that "the Complaint asserts that Respondent's receipt of b33 -efforts TJenses from Dr Pepper Company and Canada Dry Corporation are violations of the Clayton Act § 7, 15 U.S.C. § 18, and Federal Trade Commission Act § 5, 15 U.S.C. § 45, which assertion is invalid as a matter of law." n4 The applicable statute, they argue, is the I4.81brandComppdpy 3(i)ns oforida Citrus 1.1506 TDebrand

Respondents apparently see this case as an attack on the vertical granting of exclusive licenses to market soft drinks. The complaint, however, is based on the horizontal acquisition by Coca-Cola Bottling Company of the Southwest of assets, including the licenses, from another bottler, San Antonio DPB. n5

n5 Respondent Dr Pepper/Seven-Up Company admits the acquisition as alleged. The Answer of respondent Coca-Cola Bottling Company of the Southwest asserts that "Respondent admits that it acquired the Dr Pepper and Canada Dry franchises and other assets in transactions occurring on or about September, 1984 among San Antonio Dr Pepper Bottling Company, Dr Pepper Company, Respondent, and Canada Dry Corporation." Answer p. 3, P7. I am bound, however, to decide the motions to dismiss on the facts alleged in the complaint. 2A

LEXSEE 1990 FTC LEXIS 350

In the Matter of COLLEGE FOOTBALL ASSOCIATION, an unincorporated association, and CAPITAL CITIES/ABC, INC., a corporation

DOCKET NO. 9242

Federal Trade Commission

1990 FTC LEXIS 350

ORDER RE MORE DEFINITE STATEMENT

October 9, 1990

LEXSEE 1993 FTC LEXIS 180

In the Matter of COLUMBIA HOSPITAL CORPORATION, a corporation.

DOCKET NO. 9256

For the foregoing reasons, Columbia respectfully requests that Your Honor certify to the Commission its motion to dismiss the Complaint, as has been deemed appropriate in numerous other matters. See Florida Citrus Mutual, 50 F.T.C. 959, 961 (1954); First Buckingham Community, Inc., 73 F.T.C. 938, 944 (1968); Drug Research Corporation, 63 F.T.C. 998, 1014-15 (1963); Certification to the **[*4]** Commission of Respondent's Motion to Dismiss, MidCon Corp., D. 9198 (July 21, 1987).

Columbia further requests that Your Honor recommend that the matter be considered on an expedited basis by the Commission in order to minimize the discovery expenditures during the pendency of this motion.

Respectfully submitted,

Stephen T. Braun
General Counsel
Donald P. Fay
Senior Counsel
COLUMBIA HOSPITAL CORPORATION
777 Main Street
Fort Worth, Texas 76102

Raymond A. Jacobsen, Jr.

Gregory L. Baker

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Jon B. Dubrow

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1299 Pennsylvania Ave., N.W.

Washington, D.C. 20004

DATED: July 15, 1993

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE COMPLAINT AS NO LONGER IN THE PUBLIC INTEREST

Respondent Columbia Hospital Corporation ("Columbia"), submits this Memorandum in support of its motion to dismiss the Complaint as no longer in the public interest.

The Commission's February 18, 1993 Complaint challenged Columbia's then-proposed acquisition of Medical Center Hospital of Punta Gorda, Florida ("Medical Center") and the Asset Exchange Agreement by which Columbia then sought to acquire Medical Center. The Notice of Contemplated **[*5]** Relief sought three substantive remedies from Columbia: 1) divestiture of Medical Center; 2) a ten-year prior approval requirement for future hospital acquisitions or mergers in the alleged relevant section of the country (Charlotte County, Florida); and 3) a ten-year prior notice requirement for acquisitions in an unspecified geographic area. By letter dated May 5, 1993, Columbia terminated the Asset Exchange Agreement and the proposed acquisition of Medical Center. (See Attachment 1 hereto). Hence, the exchange challenged in the Complaint will not occur. On this basis alone, the Commission is authorized to dismiss this case as no longer in the public interest. n1

n1 See BIC Pen Corp., 89 F.T.C. 139, 143 (1977); Schlumberger Ltd., 103 F.T.C. 78, 83 (1984).

Moreover, as made clear at the Prehearing Conference on June 15, 1993, Columbia is willing to agree to a ten-year prior approval on future acquisitions or mergers in Charlotte County, Florida. (See Attachment 2).

Prior Commission decisions establish that dismissal is in the public interest when abandonment of a transaction provides the Commission with the bulk of its contemplated relief, namely abandonment **[*6]** or divestiture. Columbia's abandonment and willingness to accept a prior approval requirement in Charlotte County clearly provides more than adequate relief in this case. Further prosecution of this case is not in the public interest. Accordingly, the Complaint should be dismissed.

STATEMENT OF FACTS

On October 19, 1992, Columbia agreed to acquire Medical Center Hospital in Punta Gorda, Florida ("Medical Center") from Adventist Health System/Sunbelt Health Care Corporation. Following an investigation by Commission staff, on February 1, 1993, the Commission filed a complaint in Federal district court for the Middle District of Florida seeking a preliminary injunction to prevent consummation of the proposed transaction pending completion of administrative proceedings before the Commission.

On February 18, 1993, the Commission issued its administrative Complaint. The Notice of Contemplated Relief proposed three substantive remedies: 1) divestiture of Medical Center; 2) a ten-year requirement for prior Commission approval of acquisitions or mergers in the alleged relevant geographic market (Charlotte County); and 3) a ten-year requirement for prior notice to the Commission **[*7]** of certain acquisitions in other unspecified areas of the country.

On May 5, 1993, Judge Merryday issued an Order granting the Commission's preliminary injunction motion. On this same date, Columbia terminated the October 19, 1992, Asset Exchange Agreement and abandoned the contemplated divestiture of acquired company) Cargill, Inc., 86 F.T.C. 1226, 1231 (1975) (divestiture of acquired company); National Portland Cement Co., 71 F.T.C. 395, 485 (1967); Crane Co., 61 F.T.C. 1462, 1467-68 (1962); Food Town Stores, Inc., 88 F.T.C. 435, 439 (1976); Rhinechem Corporation, 94 F.T.C. 132, 135 (1979); Purex Corp., Ltd., [1973-76 Transfer Binder] Trade Reg. Rep. (CCH) P 20,370 (June 26, 1973). See also First Buckingham Community, Inc., 73 F.T.C. 938, 947 (1968) (dismissal on public interest grounds after "positive, unqualified affirmation that respondents have discontinued, and will not resume . . ." challenged business **[*11]** practices).

n2 In22. T.C. 132, 135 (1979); P[(aTJ13g3m)13.1(p)0.3(anynny); Nationa motion to dismiss, the Commission emphasized that because the trial had already concluded, further proceedings would involve minimal expense, and no substantial cost savings would result from a dismissal of the proceeding. See Order Denying Motion to Dismiss, MidCon Corporation, D. 9198 (November 16, 1987). In contrast, the proceedings in this matter are in **[*15]** their initial stages, with no discovery having been conducted in anticipation of a full administrative trial. At the June 15, 1993 pretrial hearing Judge Timony readily agreed that this is a complex case which will require substantial discovery before it is ready for trial.

II. CONTINUED PROSECUTION OF THIS CASE IS NOT IN THE PUBLIC INTEREST BECAUSE COLUMBIA'S ABANDONMENT OF THE MEDICAL CENTER TRANSACTION PROVIDES THE COMMISSION ADEQUATE RELIEF AND FURTHER PROSECUTION WOULD IMPOSE SUBSTANTIAL BURDENS AND COSTS ON THE COMMISSION, COLUMBIA AND THIRD PARTIES.

A. The Commission Has Already Obtained The Principal Relief To Which It Could Be Entitled If A Violation Of Law Were Proved

The Commission has already secured the principal relief to which it would be entitled in the event it could successfully prove that Columbia's abandoned acquisition of Medical Center would have violated Section 7 of the Clayton Act or Section 5 of the FTC Act. The Commission's Notice of Contemplated Relief in this case included three substantive remedies in addition to cancellation of the Asset Exchange Agreement, namely divestiture of Medical Center, prior approval of acquisitions or mergers **[*16]** in Charlotte County, and a ten year notice requirement for acquisitions in an unspecified geographic area. Columbia has canceled the Asset Exchange Agreement and will not acquire Medical Center. Moreover, Columbia's offer to accept a prior approval requirement in Charlotte County meets the Commission's second substantive relief provision.

The only additional relief sought, which the Commission can not obtain short of a full trial on the merits, is a prior notice requirement for acquisitions in an unspecified geographic area. Columbia believes that the greatest prior notice relief the Commission could obtain, if the abandoned acquisition were eventually found to have violated the antitrust laws after a full adjudicative trial and appeal, would be a prior notice requirement for otherwise non-reportable transactions involving general acute care hospitals. See American Medical International, 104 F.T.C. 1, 221-26 (1984) ("AMI"); Hospital Corporation of America, 106 F.T.C. 361, 520-27 (1986), aff'd, 807 F.2d 1381 (7th Cir. 1986) ("HCA"). n4 Litigating this entire case over the issue of prior notice is not in the public interest. See e.g. Schlumberger, 103 F.T.C. **[*17]** at 81.

n4 This prior notice requirement would have no effect on acquisitions reportable under the Hart-Scott-Rodino Act. 15 U.S.C. § 18(a). See AMI, 104 F.T.C. at 226; HCA, 106 F.T.C. at 525.

Furthermore, prior notice may not be an appropriate remedy in this case even if the Commission were to prevail in litigation. If Columbia's proposed acquisition of Medical Center were found to have violated the antitrust laws, it could only be a violation of Section 5 of the FTC Act. There could be no violation of Section 7 of the Clayton Act because the transaction was not consummated. See Complaint P 15, Columbia Hospital Corporation, D. 9256 (1993). This presents a material distinction from HCA and AMI, where the acquisitions had been completed, and Section 7 had been found violated. Under these circumstances, it would be incongruous for the Commission to obtain the same relief from Columbia as it did from AMI and HCA.

Although a prior notice requirement was ordered in HCA and AMI under different circumstances, such a requirement very well might be found not to be appropriate where, as here, the transaction has been abandoned. In two recent hospital **[*18]** merger cases, the Commission has approved consent orders which preserved the target company as an independent competitor and contained a prior approval requirement, but not prior notice. See University Health, et. al., 5 Trade Reg. Rep. (CCH) P 23,218 (September 22, 1992); The Reading Hospital, et. al., 5 Trade Reg. Rep. (CCH) P 22,785 (April 24, 1990). Furthermore, the Commission recently published a proposed consent order which provided only for prior approval for future transactions in the alleged geographic market and did not even require divestiture of the acquired hospital. See Dominican Santa Cruz Hospital, et. al., Trade Reg. Rep. (CCH) P 23,345 (March 16, 1993). n5

n5 The Commission has not yet given final approval to this consent order.

B. Significant Costs And Risks Would Be Imposed If The Commission Pursues Further Remedies

Donald P. Fay

Senior Counsel **[*23]**

COLUMBIA HOSPITAL CORP.

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HOWREY & SIMON

1299 Pennsylvania Ave., N.W.

Washington, D.C. 20004

DATED: July 15, 1993

APPENDIX:

ATTACHMENT 1

May 5, 1993

By Telecopy (407) 897-1919

Adventist Health System/Sunbelt
2400 Bedford Road
Orlando, Florida 32803-1489

Attention: Chief Executive Officer

Ladies and Gentlemen:

Reference is made to the Asset Exchange Agreement dated as of October 19, 1992, between and among Adventist Health System/Sunbelt Health Care Corporation, Adventist Health System/Sunbelt, Inc., Columbia Hospital Corporation, and Basic American Medical, Inc. (the "Asset Exchange Agreement"). Specific reference is made to Section 10.3 of the Asset Exchange Agreement. Pursuant to the provisions thereof, Columbia terminates the Asset

Prehearing Conference

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

[ATTACHMENT 2 TO FOLLOW]

EXHIBIT A

UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of COLUMBIA HOSPITAL CORPORATION a Corporation

DOCKET NO. 9256

ORDER CERTIFYING TO THE COMMISSION RESPONDENT'S MOTION TO DISMISS ON PUBLIC INTEREST GROUNDS

At the request of Respondent,

IT IS ORDERED that Respondent Columbia Hospital Corporation's Motion to Certify to the Commission Respondent's Motion to Dismiss the Complaint as No Longer Being in the Public Interest is hereby GRANTED.

James P. Timony, Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1993, a true and correct copy of the foregoing MOTION OF COLUMBIA HOSPITAL CORPORATION TO DISMISS THE COMPLAINT AS NO LONGER BEING IN THE PUBLIC INTEREST, AND TO CERTIFY SUCH MOTION TO THE COMMISSION, as well as an accompanying PROPOSED ORDER and MEMORANDUM IN SUPPORT were served by HAND DELIVERY upon:

Mark J. Horoschak, Esq.

Bureau of Competition

Federal Trade Commission

601 Pennsylvania Ave., N.W.

Washington, D.C. 20058 **[*25]**

DATED: July 15, 1993

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS n1

Pursuant to Section 3.22 of the Commission's Rules of Practice, 16 C.F.R. § 3.22, complaint counsel hereby opposes the motion of respondent Columbia Hospital Corporation ("Columbia") to dismiss the complaint in this case on public interest grounds. n2 We ask Your Honor to recommend, pursuant to Commission Rule 3.22(a), that the Commission summarily deny Columbia's motion to dismiss. n3 Outright dismissal of this case -- without any safeguard against a renewed attempt by Columbia to carry out the proposed acquisition challenged here -- plainly is not in the public interest.

n1 Columbia does not ask that the proceedings before Your Honor be stayed. We oppose any stay, or other delay, based on the pendency of Columbia's motion.

n2 Columbia does not request that Your Honor order dismissal of the complaint, but rather requests certification of its dismissal motion to the Commission. Columbia's motion for dismissal, solely on the basis that further proceedings in this matter would not be in the public interest, clearly is one "upon which the Administrative Law Judge has no authority to rule," and therefore must be certified to the Commission. Commission Rule 3.22(a); Order Certifying to the Commission the Coca-Cola Company's Motion to Dismiss the

Complaint, Coca-Cola Co., Docket No. 9207 (Oct. 27, 1986), citing Florida Citrus Mutual, 50 F.T.C. 959, 961 (1954). By arguing only that the Commission should end this proceeding as a matter of prosecutorial discretion, Columbia implicitly recognizes -- as it must, see p. 3 below -- that it is not entitled as a matter of law to the relief it seeks, and therefore that Your Honor cannot grant that relief.

n3 We believe the Commission should "summarily" deny Columbia's motion, not only in accordance with Columbia's own request for expedition, see Motion of Columbia Hospital Corporation to Dismiss the Complaint as No Longer in the Public Interest, and to Certify Such Motion to the Commission ("Columbia Motion") at 3, but also because the only issues properly before the Commission (relating to Columbia's motion for outright dismissal of the complaint, as opposed to its alternative suggestions about possible settlement) are straightforward and do not require reconsideration of the governing Commission precedent in Coca-Cola Co., Docket No. 9207 (interlocutory order denying motion to dismiss, Aug. 9, 1988) (discussed in more detail at pp. 5-6 below). **[*26]**

Moreover, Your Honor should make no recommendation on, and the Commission should not give any consideration at all to, Columbia's suggestion that this matter could be settled by a consent agreement, limited to prior approval relief governing hospital acquisitions in the relevant market (forgoing prior notice of acquisitions elsewhere in the country, a form of relief the Commission proposed in its Notice of Contemplated Relief). Commission Rule 3.25 precludes consideration by Your Honor or the Commission of Columbia's "settlement offer," because Columbia has not satisfied the basic requirement of Rule 3.25 that a settlement proposal be presented in the form of an executed proposed consent order. Even if consideration of Columbia's offer is not barred by Rule 3.25, Your Honor cannot make an informed recommendation -- and the Commission cannot reach an informed decision from the adjudicative record -- based on Columbia's general assertions and vague offer. Not only is there no specific settlement offer for the Commission to examine, but no record evidence has yet been adduced relating to the need for the prior notification relief Columbia asks the Commission to forgo.

I. DISMISSING **[*27]** THE COMPLAINT IN THIS PROCEEDING CLEARLY WOULD BE CONTRARY TO THE PUBLIC INTEREST

Columbia argues that its "abandonment" of its proposed acquisition of Medical Center Hospital, after that transaction was preliminarily enjoined by a Federal court, makes further proceedings unwarranted. The Commission recently rejected arguments similar to Columbia's. Moreover, the facts of this case provide no basis for departing from the Commission precedent rejecting Columbia's position. In particular, dismissal of this proceeding would leave Columbia free to revive its illegal, "abandoned" Medical Center acquisition.

Columbia is not entitled -- indeed, does not claim to be entitled -- to dismissal as a matter of law based on its "abandonment" of the Medical Center acquisition. This principle is clear from the Commission's interlocutory orders denying motions to dismiss in Warner Communications, Inc. n4 and MidCon Corp. n5 In Warner, the Commission refused to dismiss the complaint in a case very similar to this one, where respondent's proposed acquisition was called off after it was preliminarily enjoined by a Federal court. The Commission squarely held that "voluntary cessation **[*28]** of unlawful activity is not a basis for halting a law enforcement action," and that a "claim that the allegedly unlawful transaction has been abandoned does not make the matter moot," particularly when it is not "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' in either identical or functionally-equivalent form." n6 Similarly, the Commission in MidCon rejected the argument that respondent's sale of a pipeline company after the complaint was issued (which, respondent argued, eliminated the horizontal competitive overlap giving rise to the Commission's complaint) made the case moot. "[I]f a case could be mooted [merely] by voluntary cessation of allegedly unlawful conduct, the respondent would be 'free to return to his old ways.'" n7 To prevail, a respondent must further demonstrate (as the MidCon respondents did not) that "there is no reasonable expectation that the wrong will be repeated." n8 As we discuss below at p. 7, Columbia has not met its burden of showing that there is no "reasonable expectation" that it will resume the conduct challenged in this case.

n4 Warner Communications, Inc., 105 F.T.C. 342 (1985).

n5 Order Denying Motion to Dismiss, MidCon Corp., Docket No. 9198 (Nov. 16, 1987) ("MidCon Order").

n6 Warner at 342-43, quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968).

n7 MidCon Order at 2, quoting United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953).

n15 Indeed, Columbia emphasizes this possibility, in arguing that the Commission runs the risk that if this case is litigated and Columbia wins, Columbia will be free to acquire Medical Center. Columbia Motion at 2 n.1.

Columbia emphasizes its termination of the agreement to acquire Medical Center, immediately after a Federal court preliminarily enjoined Columbia from consummating that acquisition. But termination of that specific agreement does not preclude another attempt to acquire Medical Center, based on a new agreement. This is a distinction Columbia appears to understand perfectly well. In response to press reports shortly after the Federal court injunction, to the effect that termination of the acquisition agreement meant the Medical Center acquisition had been abandoned, Columbia officials emphasized that was not a valid conclusion:

The day after [Medical Center] hospital's owner announced that its deal with Columbia **[*33]** had died in the wake of a federal court injunction, a Columbia executive said that his Texas-based health corporation *had merely terminated the current agreement. Working out a new agreement is "still an option," said Lee Wood, Columbia's director of investor relations.*

"We have terminated the original agreement," Wood said, "but whether or not we will go forward with Adventist [*Health System/Sunbelt*], *we haven't decided."*

[Columbia spokesperson David] Margulies said that *terminating the agreement between the two companies "does not eliminate any possibilities for making another deal."* n16

n16 "Don't Count Columbia Out," Sarasota (Florida) Herald Tribune (Charlotte A.M. edition), May 10,inves4es thiTJ But te n20 Warner, 105 F.T.C. at 343.

n21 Coca-Cola Order at 4.

n22 The possibility of Hart-Scott-Rodino notification for such an acquisition is not an adequate substitute for the certainty of an adequate opportunity to review and if necessary block an acquisition, which prior approval relief would provide. See Warner at 343 (availability of H-S-R notification does not preclude additional "fencing-in" relief against future mergers). **[*36]**

Finally, Columbia's suggestion that the Commission forgo any relief at all, in view of the termination of the proposed Medical Center acquisition, is inconsistent with the Commission's intentions as stated in the Notice of Contemplated Relief in this case. Only one form of proposed relief identified in the Notice -- divestiture -- is expressly made contingent on Columbia's consummation of the Medical Center acquisition. By contrast, there is no such contingency for the prior approval and other forms of relief elsewhere identified in the Notice.

II. COLUMBIA'S "SETTLEMENT OFFER" TO AGREE TO PRIOR APPROVAL RELIEF IS NOT PROPERLY BEFORE YOUR HONOR OR THE COMMISSION

Commission Rule 3.25(b) plainly requires a settlement proposal presented for the Commission's consideration to be a concrete proposed consent order that has been executed by respondent and satisfies other specific requirements. There must be a specific proposed order; it must be executed by respondent; and it must satisfy several procedural requirements set forth in Rule 2.32 of the Commission's Rules (such as waiver of right to seek judicial review). Only such a consent proposal may be certified to the **[*37]** Commission pursuant to Rule 3.25(c) or Rule 3.25(d). n23

n23 Moreover, Rule 3.25 allows settlement by means other than a consent order only through "filing of an admission answer" or submission of a stipulated record and agreed order. Commission Rule 3.25(g).

Despite the explicit requirements of Rule 3.25 governing settlements of adjudicative proceedings, Columbia presents its willingness to agree to some yet unspecified "prior approval requirement in Charlotte County" as support for (or at least a backstop to) its proposal for outright dismissal of the complaint in this case. n24 In the absence of Columbia's proffer of an executed consent agreement satisfying the requirements of Rule 3.25, Your Honor and the Commission should give no weight or consideration at all to Columbia's vague "prior approval" suggestion. Columbia's suggestion comes nowhere near compliance with the specific provisions of Rule 3.25. It would be an abuse of the general provisions of Rule 3.22(a), relating to certification of motions to the Commi (forgoing prior notification of hospital acquisitions outside the relevant market, in return for avoidance of litigation risks and expenses) is reasonable. The information required to weigh **[*39]** Columbia's offer, relating to whether the benefits Columbia posits for its proposed disposition of this case outweigh the costs, is at present incomplete and may remain so until development of an adjudicative record in this case. n26

n26 This would not be a problem if, upon submission of a proposed consent order complying wilAoa0Tnis Twf, upon subm8

Garry R. Gibbs

Gary H. Schorr

Michael R. Bissegger

Counsel Supporting the Complaint

July 26, 1993

CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the attached COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS was served by facsimile on Raymond A. Jacobsen, Jr., attorney for respondent, on this 26th day of July, 1993.

Oscar M. Voss

LEXSEE 1996 FTC LEXIS 18

In the Matter of DILLARD DEPARTMENT STORES, INC., a corporation

DOCKET NO. 9269

Federal Trade Commission

1996 FTC LEXIS 18

CERTIFICATION TO COMMISSION OF COMPLAINT COUNSEL'S MOTION TO DISMISS AND TO VACATE JURISDICTIONAL RULING

February 13, 1996

ALJ: [*1]

Lewis F. Parker, Administrative Law Judge

ORDER:

At the request of complaint counsel and pursuant to Section 3.22(a) of the Rules of Practice, I certify to the Commission the attached motion to dismiss this matter and to vacate jurisdictional ruling, along with a memorandum of points and authorities in support of the motion.

APPENDIX:

To: The Honorable Lewis F. Parker
Administrative Law Judge

MOTION TO DISMISS MATTER AND TO VACATE JURISDICTIONAL RULING

Pursuant to Commission Rule of Practice, 3.22(a), Complaint Counsel hereby ask that Your Honor certify to the Commission this Motion to dismiss this matter in its entirety and to vacate the partial summary decision of March 16, 1995 concerning the Commission's jurisdiction.

Complaint Counsel make this request because of a change in the applicable law by the Federal Reserve Board subsequent to the Commission's filing of this case, and because it would not be in the public interest to continue litigating this matter solely to resolve the pending jurisdictional issues.

Complaint Counsel respectfully refer Your Honor to the accompanying Memorandum of Points and Authorities in support of this Motion.

Respectfully submitted this 12th day of February, **[illegible]**

I. SUMMARY

Complaint Counsel submit this memorandum in support of their request that the ALJ certify to the Commission their motion to dismiss this matter and to vacate the ALJ's March 16, 1995 Decision because both are in the public interest. Seven months after the Commission filed this lawsuit against respondent Dillard Department Stores, Inc. (" Dillard's"), the Federal Reserve Board ("FRB"), thro5f7t

> Commission suggests deleting "automatically," and further suggests replacing "solely" with the term "primarily."

Letter to William W. Wiles, Secretary, at 6-7.

On April 3, 1995, the FRB promulgated its final OSC in which it adopted its original December 14 language instead **[*10]** of the Commission's proposed language. 60 Fed. Reg 16771, 16778. Thus, creditors could meet the standard announced by the FRB for conducting a reasonable investigation as long as they did not deny consumers' claims "solely" or "automatically" because consumers did not comply with a specific creditor request. n6

n6 Although it is not absolutely clear that the Commission would have to meet the revised FRB standard in proving Count I of its complaint against Dillard's because the practices occurred prior to the revision, it is likely that the ALJ would apply FRB inerpretations of what constitutes a reasonable investigation. See Ford Motor Co. v. Milholland, 444 U.S. 555, 565 (1980) (FRB OSC is dispositive "unless demonstrably irrational"). In addition, it is likely that the ALJ would read the new 226.12(b) standards into the reasonable investigation requirements of 226.13, even though that section was not revised by the FRB.

In addition, the FRB imposed a cardholder cooperation requirement that had not been part of the proposed OSC revision. Specifically, the FRB stated:

> If the card issuer otherwise had no knowledge of facts confirming the unauthorized use, the lack of **[*11]** information resulting from the cardholder's failure or refusal to comply with a particular request may lead the card issuer reasonably to terminate the investigation.

60 Fed. Reg. 16,771, 16,778. Thus, if consumers failed to provide the card issuer with adequate information concerning the unauthorized use, and the card issuer had no other means to obtain information about the use, the card issuer could terminate its investigation and hold the cardholder liable for the unauthorized charges.

B. Jurisdictional Issue

Shortly after the FRB put out for comment its revisions to 226.12(b) (but before they were final), Dillard's filed a motion for partial summary decision, n7 arguing that during part of the period covered by the allegations of the complaint (after June 18, 1991), Dillard's had either transferred its credit card accounts or transferred the servicing of its accounts to its wholly -owned subsidiary, Dillard National Bank, and, therefore, when Dillard's performed contractual services for the bank, the Office of the Comptroller of the Currency had exclusive jurisdiction over Dillard's. On February 6, 1995, Complaint Counsel filed their opposition to Dillard's motion, **[*12]** arguing that the FTC had jurisdiction over Dillard's for these transactions, and that there had been no express or implied repeal of the FTC's broad residual jurisdiction over agents of non-banks. On March 16, 1995, Judge Parker issued a Partial Summary Decision holding that the FTC did not have jurisdiction over Dillard's after June 18, 1991, and dismissing all allegations of the complaint from that time on.

n7 Dillard's Renewed Motion for Partial Summary Decision, filed Jan. 23, 1995.

Because of the possible far-reaching consequences of the ALJ's March 16 Decision, on March 24, Complaint Counsel filed a notice of appeal to the Commission of the ALJ's Decision. On April 14, respondent filed a motion to dismiss the appeal, and on June 8, the Commission granted respondent's motion without reaching the merits of the appeal. n8

n8 The Commission determined, among other things, that because the March 16 Decision did not constitute an "initial decision" under the Commission's rules, it was not appealable directly to the Commission at that time because it was an interlocutory order.

III. THE COMMISSION SHOULD DISMISS THE COMPLAINT AND VACATE THE ALJ'S JURISDICTIONAL RULING **[*13]** IN THE PUBLIC INTEREST

A. The Change In The Law By The FRB Warrants Dismissal Of The Complaint As In The Public Interest

It is well settled that the Commission can dismiss a proceeding any time it appears there is a lack of public interest. FTC v. Klesner, 280 U.S. 19 (1929).

> In considering such administrative matters as whether to issue a complaint, or, as here, whether to go on with further proceedings in a case that has already been commenced by issuance of a complaint, the Commission is required to take into account a broad range of considerations bearing upon the public interest. In order to discharge its responsibility to make the most effective possible allocation of its necessarily limited resources of funds and personnel, the Commission must consider - - as a matter of administrative judgment and discretion - - which of the various courses of action open to it should be followed.

Drug Research Corp., 63 FTC 998, 1014 (1963) (order dismissing complaint). Only the Commission, and not an ALJ,
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Stephen L. Cohen

Philip E. Rothschild

Martha Landesberg

COMPLAINT COUNSEL

LEXSEE 1991 FTC LEXIS 306

In the Matter of DIRAN M. SEROPIAN, M.D.

Docket No. D-9248

Federal Trade Commission

1991 FTC LEXIS 306

ORDER DENYING RESPONDENT'S MOTION FOR A MORE DEFINITE STATEMENT

July 3, 1991

ALJ: [*1]

Lewis F. Parker, Administrative Law Judge

The respondent, Dr. Diran M. Seropian, has filed a motion seeking a more definite statement of the charges against him, claiming that he cannot frame an appropriate response to the complaint since it does not:

1. Describe conduct with which he is charged in an individual capacity.

2. Name the others who were allegedly involved in the combination or conspiracy and does not disclose the acts and coercive means referred to in paragraphs seven and eight.

3. Reveal the basis for the claim that the alleged unlawful acts are continuing, and will continue or recur.

It is true that the complaint lacks the details which Dr. Seropian will need before he can mount a defense against its allegations, but such details need not be given in the complaint. The Rules of Practice, § 3.11(b)(2) require only that the complaint shall contain "a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts . . . alleged to be in violation of the law."

The complaint meets this standard since it gives Dr. Seropian notice of the charges against him. L. G. Balfour v. FTC, 442 F.2d 1, 19 (7th Cir. 1971). **[*2]** The details of the Commission's case will be revealed to Dr. Seropian during the discovery phase of this proceeding, for complaint counsel will file a nonbinding statement and will be required at the appropriate time to turn over to him the names of potential witnesses and copies of documents which they intend to offer in evidence.

Since the complaint does not detail the charges against Dr. Seropian, his answer need not be any more informative. Therefore,

IT IS ORDERED that Dr. Seropian's motion for a more definite statement be, and it hereby is, denied.

LEXSEE 2001 FTC LEXIS 96

In the Matter of H.J. HEINZ COMPANY a corporation; MILNOT HOLDING CORPORATION, a corporation; and MADISON DEARBORN CAPITAL PARTNERS, L.P., a limited partnership

Docket No. 9295

Federal Trade Commission

2001 FTC LEXIS 96

CERTIFICATION TO THE COMMISSION

June 6, 2001

ALJ: [*1]

D. Michael Chappell, Administrative Law Judge

ORDER:

CERTIFICATION TO THE COMMISSION

On May 25, 2001, Complaint Counsel filed with the Office of the Secretary a Motion to Dismiss the above captioned matter. In that motion, Complaint Counsel represents that Respondents H.J. Heinz Company and Milnot Holding Corporation abandoned the challenged transaction immediately after the decision by the U.S. Court of Appeals for the District of Columbia Circuit in F.T.C. v. Heinz Co., et al., 2001 U.S. App. LEXIS 7735 (April 27, 2001). Complaint Counsel further represents that those respondents have consented to the filing of the motion to dismiss, but makes no representation as to the position of Respondent Madison Dearborn Capital Partners, L.P. The motion was not filed as a joint motion, but no opposition has been filed. To the extent that any of the respondents intended to respond, the deadline for filing an opposition was June 4, 2001.

Section 3.22(a) of the Commission's Rules of Practice sets forth that the Administrative Law Judge shall certify to the Commission any motion upon which he has no authority to rule, accompanied by any recommendation that he may deem appropriate. 16 C.F.R. § 3.22(a). **[*2]** Where a motion to dismiss requires a determination as to whether continued litigation would be in the public interest, the Administrative Law Judge is without authority to rule. Columbia Hospital Corp., 1993 FTC LEXIS 180 (July 28, 1993); Midcon Corp., 1987 FTC LEXIS 5 (Nov. 16, 1987). Further, where a motion to dismiss is addressed to the Commission in its administrative capacity, the ALJ shall certify the motion to the Commission. Drug Research Corp., 63 F.T.C. 998 (Oct. 3, 1963).

Accordingly, Complaint Counsel's Motion to Dismiss is hereby certified to the Commission. Because no factual or legal findings have been made, the certification is without recommendation.

ORDERED:

LEXSEE 1995 FTC LEXIS 452

In the Matter of INTERNATIONAL ASSOCIATION OF CONFERENCE INTERPRETERS, a/k/a Association Internationale des Interpretes de Conference, a corporation, and UNITED STATES REGION OF THE INTERNATIONAL ASSOCIATION OF CONFERENCE INTERPRETERS, an unincorporated association

DOCKET NO. 9270

Federal Trade Commission

1995 FTC LEXIS 452

ORDER DENYING MOTION TO CERTIFY INTERLOCUTORY APPEAL

February 15, 1995

ALJ: [*1]

James P. Timony, Administrative Law Judge

ORDER:

ORDER DENYING MOTION TO CERTIFY INTERLOCUTORY APPEAL

Introduction

By an order on January 24, 1995, respondents' Motion to Dismiss was denied. n1 On January 31, 1995, respondents filed a motion to certify an interlocutory appeal to the Commission on two aspects of the denial of their motion to dismiss. Respondents seek certification and Commission review, with a stay of proceedings, of the determination that the Commission can exert personal jurisdiction over AIIC and that principles of international comity do not preclude this action against AIIC.

n1 The order of February 7, 1995, modified and supplemented the case law supporting the ruling on the

Thus, the test established by Rule 3.23(b) has three parts: (1) there must be a ruling on a controlling issue of law or policy; (2) as to which there is a substantial ground for difference of opinion; and (3) an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. n3

n3 Respondents do not argue that subsequent review will be an inadequate remedy.

A. Personal Jurisdiction

Respondents argue that this dispute about the existence of personal jurisdiction over AIIC "inherently **[*3]** involves a controlling issue of law." Although dismissal of the complaint as to AIIC would be conclusive, that decision is controlled by issues of fact, not law.

There is no dispute about the applicable law in this case. A well-established test for specific jurisdiction is whether the respondents have "purposefully directed" their activities towards the United States. n4

n4 Respondents argue that jurisdiction could not be found over an association unless it controls where its members are present, citing Donatelli v. National Hockey League, 893 F.2d 459, 470-71 (1st Cir. 1990) ("Donatelli"). That case involved a hockey player's unsuccessful attempt to assert solely general jurisdiction in Rhode Island over the National Hockey League because a member team, the Boston Bruins, had, without assistance from the league, held an annual exhibition game there, sold regular season tickets in the state, and sent play-by-play broadcasts into Rhode Island. The defendant league itself did not conduct significant activities in the forum. Id. at 465, 468. The issue was whether minimum contacts were satisfied when the only contacts with the forum arose from one member's presence there. Donatelli holds that when the only contact with a forum is a member's presence, the association must have directed that member to be present in the forum. Here, the jurisdiction is both specific and general, with allegations that AIIC has purposefully undertaken activities directed towards the United States and that its presence here is more than incidental. **[*4]**

The respondents argue about the weight given to particular facts: "there are substantial grounds for difference of opinion regarding the application of the case law concerning personal jurisdiction over associations to the facts of this case." (Motion for Certification at 9). This is not within the interlocutory review process. Rule 3.23(b) does not provide for "early resolution of disputes concerning whether the trial court properly applied the law to the facts." Abortion Rights Mobilization, Inc. v. Regan, 552 F. Supp. 364, 366 (S.D.N.Y. 1982); State of N.C. v. Alexander & Alexander Services, 685 F. Supp. 114, 115 (E.D.N.C. 1988):

The first substantive clause of § 1292(b) requires that

C. Advancing the Termination of this Litigation

Even if AIIC prevailed on its claim that the Commission lacked jurisdiction over it, this litigation could still proceed **[*6]** against the United States Region. In addition, respondents have not made the requisite showing that there is a likelihood of success on the merits. Hence, termination of this litigation will not be advanced by an interlocutory appeal.

A finding of lack of personal jurisdiction over AIIC would not foreclose Commission jurisdiction over the United States Region. The complaint alleges that the United States Region has participated in enforcing the AIIC fee schedules and anticompetitive work rules applied in the United States. (Complaint, PP5, 6) The complaint further alleges that the United States Region is in conspiracy to fix the price, output and marketing of interpretation services in the United States. (Complaint, P13) These allegations, if proven, would justify an order against the United States Region irrespective of what happens to AIIC.

D. Standard of Proof

Respondents argue that there exists a substantial ground for difference of opinion as to the standard of proof complaint counsel must meet to defeat their motion to dismiss for lack of personal jurisdiction. Respondents argue that the preponderance of evidence standard applies even without discovery or an evidentiary **[*7]** hearing.

There is no substantial ground for difference of opinion on the standard of proof for judging motions to dismiss for lack of personal jurisdiction. Complaint counsel need only make a prima facie showing of jurisdiction at this stage of the litigation. United Elec. Radio and Machine Workers v. 163 Pleasant St. Corp., 987 F.2d 39, 43-44 (1st Cir. 1993); Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991); Bullion v. Gillespie, 895 F.2d 213, 217 (5th Cir. 1990).

E. Comity

Respondents also cite considerations of comity as a basis for seeking interlocutory review of the denial of their motion to dismiss. Respondents argue that the January 24 Order held that this action concerns only conduct affecting services rendered in the United States to conclude that it was in accord with principles of international comity, and did not address any other international comity considerations set forth in the International Antitrust Guidelines.

Following the Guidelines, in performing comity analysis, the order addressed: (1) The relative significance of the alleged violation within the United States as compared to abroad. ("The setting of United States fees has significant **[*8]** effects here and minimal effects abroad.") (Order Denying Motion to Dismiss at 3); (2) The nationality of the persons involved in or affected by the conduct. ("Most interpreters practicing in the domestic market are United States residents.") (Id.); (3) The presence or absence of a purpose to affect United States consumers, markets or exporters. ("AIIC's promulgating a schedule of fees, in United States dollars, for interpreters to charge when working in the United States is purposefully directed towards the United States.") (Id. at 2, n. 2); (4) The relative significance and foreseeability of effects of the conduct on the United States as opposed to the effects abroad. ("The complaint is directed at conduct that raises domestic prices and limits the terms of contracts negotiated and performed in the United States.") (Id. at 3) ("That the publication of rates and approval of rules may have taken place in Europe as well as the United States does not diminish the resulting harm to the United States.") (Id.); (5) The existence of reasonable expectations that would be furthered or defeated by the action. ("AIIC cannot claim that this action goes against its reasonable **[*9]** expectations, because it has anticipated being sued for antitrust violations and has a policy for dealing with such suits.") (Id.); (6) The degree of conflict with foreign law or articulated foreign economic policies. ("Because this action concerns only conduct affecting services rendered in the United States, it poses little risk of conflict with foreign law.") (Citing Hartford Fire Ins. Co. v. California, 113 S.Ct. 2891, 2911 (1993).) (Order Denying Motion to Dismiss at 3-4).

Respondents have failed to show that there is a substantial ground for difference of opinion as to the effect of comity considerations on this stage of the litigation.

Respondents make two assertions, not associated with any of the factors cited by the Commission in its Guidelines, that they say raise substantial comity questions justifying certification. Respondents argue that this proceeding could lead to an order abrogating agreements they have negotiated with intergovernmental organizations, such as the United Nations, and that at some point complaint counsel may seek discovery from AIIC. These issues are not ripe. New York Health and Hospitals Corp. v. Blum, 678 F.2d 392, 396 (2d Cir. 1982). **[*10]** Similarly, discovery against AIIC, would raise no substantial comity concerns. Societe Nationale Industrialle Aerospatiale v. United States District Court, 107 S.Ct. 2542, 2556 n.29 (1987).

Certification to the Commission of questions of comity is

LEXSEE 1994 FTC LEXIS 213

In the Matter of NEW BALANCE ATHLETIC SHOE, INC. a corporation

DOCKET NO. 9268

Federal Trade Commission

1994 FTC LEXIS 213

NO DATE IN ORIGINAL

October 20, 1994

ORDER:
[*1]

ORDER DENYING MOTION TO DISMISS OR FOR A MORE DEFINITE STATEMENT

Respondent moves to dismiss the Complaint (or in the alternative for a more definite statement) as deficient in clarity of facts and theory. At this stage of pleading the allegations appear

2003 WL 1866415 (F.T.C.)

Discovery Relating to Subject Matters as to Which Rambus's Privilege Claims Were Invalidated on Crime-Fraud Grounds and Subsequently Waived, January 21, 2003, at 1 ("Rambus does not oppose Complaint Counsel's request

2003 WL 1866415 (F.T.C.)

Assoc. of Conf. Interpreters, supra; Schering-Plough, supra (quoting Conf. Interpreters). As previously noted, both the attorney-client privilege and the crime-fraud exception are well-settled legal doctrines.

The section 1292(b) cases cited by respondent do not support interlocutory review here. For example, Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), involved the "availability vel non" of the attorney-client privilege of the corporation as against its stockholders. While that issue was deemed to be a controlling question of law as opposed to a question of fact or matter for the discretion of the trial court, no such issue as to the applicability of the attorney-client privilege "vel non" is involved here. Similarly, in Columbia/HCA Healthcare Corporation Billing Practices Litigation, 293 F.3d 289 (6th Cir. 2002), there was substantial diversity of views among the circuits as to

2003 WL 1866415 (F.T.C.)

Similarly, in Greene v. Union Mutual Life Insurance Co. of America, 764 F.2d 19 (1st Cir. 1985), the order in question resulted in dismissal of the entire complaint, possibly as a result of clerical error or because the plaintiff's choice of words inadvertently led the judge into using the incorrect legal standard. That order caused far more drastic consequences than at issue here. The First Circuit held that the district court should consider whether its ruling resulted in an injustice. [FN9]

Finally, the ruling in School District No. 13 v. ADandS, Inc., 5 F.3d 1255, resulted in summary judgment in favor of defendants. The Ninth Circuit held that the district court's refusal to reconsider its ruling on the basis of 21,000 pages of documents not previously presented to the court "may have been harsh," but, under the circumstances, was not an abuse of discretion. 5 F.3d at 1263.

Simply put, Judge Timony's discovery order was not an abuse of discretion, and Rambus has ut, G.6(d 3(sco)4(d (5.9(G.6nsgput)4(,h

2003 WL 1866415 (F.T.C.)

cover, technologies under consideration by JEDEC, all without informing JEDEC, and later to enforce its patents against the industry in order to collect royalties.

At the time Rambus was a member of JEDEC, the EIA Legal Guides (which also applied to JEDEC) established a "basic rule" that standardization programs conducted by the organization "shall not be proposed for or indirectly result in ... restricting competition, giving a competitive advantage to any manufacturer, [or] excluding competitors from the market." EIA Legal Guides, March 14, 1983, JEDEC0009277-9285 at JEDEC0009282 **[Tab 1]** [quoted in Complaint, ¶ 19.] Consistent with this commitment, JEDEC has sought to avoid, where possible, use of patented technologies in its standards, and has imposed an obligation on all JEDEC participants that they "inform the meeting of any knowledge they may have of any patents, or pending patents, that might be involved in the work [JEDEC is] undertaking." JEDEC Manual of Organization and Procedure JEP21-I, October 1993, JEDEC0009323-9351 at JEDEC0009341 **[Tab 2]** [quoted in Complaint, ¶ 21; see also Complaint, ¶ 20]. Rambus representatives understood that participating in JEDEC, while failing to disclose the existence of relevant patent applications, created a risk that the patents might be rendered unenforceable. Lester Vincent, Handwritten Notes, March 27, 1992, R203254 **[Tab 3]**; May 4, 1993, Letter from Vincent to Crisp, Attaching Presentation Entitled "Patents and Industry Standards," V1231 at V1242 **[Tab** 4]**; ***** [Tab 5]**; Vincent Dep. (4/11/01) 320:6-321:5, Rambus v. Infineon and** Vincent Dep. (3/14/01) 191:3-192:16, 198:14-23, Rambus v. Infineon **[Tab 6]**; Diepenbrock Dep. (3/14/01) 147:22-148:25, Rambus v. Infineon and Diepenbrock Dep. (4/11/01) 262:8-263:12, Rambus v. Infineon **[Tab 7]**.

In February and April 1992, Billy Garrett and Richard Crisp respectively observed proposals at JEDEC to incorporate various technologies into the proposed SDRAM standard. Shortly thereafter, Richard Crisp apparently discussed with his boss, Allen Roberts, Rambus's Vice President responsible for intellectual property, a proposal to add claims to Rambus's pending patent applications covering certain of the technologies that had been presented at JEDEC. Mr. Roberts, in turn, met with outside patent counsel Lester Vincent to discuss adding claims covering these technologies to Rambus's pending patent applications. See Lester Vincent, Handwritten Notes, May 2 [or 12], 1992, R202989 **[Tab 8]**. Shortly thereafter, Rambus CEO Geoff Tate prepared a draft five year business plan, in which he wrote:

For about 2+ years a JEDEC committee has been working on the specifications for a Synchronous DRAM. No standard has yet been approved by JEDEC. Our expectation is a standard will not be reached until end of 1992 at the earliest ... [W]e believe that Sync DRAMs infringe on some claims in our filed patents; and that there are additional claims we can file for our patents that cover features of Sync DRAMs. Then we will be in position to request patent licensing (fees and royalties) from any manufacturer of Sync DRAMs.

June 1992 Draft of Rambus Business Plan, R46394 at R46408-410 **[Tab 9]**.

In the final version of the business plan, prepared in September 1992, Mr. Tate further explained:

Rambus expects the patents will be issued largely as filed and that companies will not be able to develop Rambus-compatible or Rambus-like technology without infringing on multiple fundamental claims of the patents .... Rambus' patents are likely to have significant applications other than for the Rambus Interface.

September 1992 Rambus Business Plan, R169923 at R169929 **[Tab 10]**. Shortly thereafter, Richard Crisp was asked to address Rambus's Board of Directors concerning "the SDRAM status at JEDEC, the Rambus patent strategy and system level difficulties with SDRAMs." See Rambus Board of Directors Minutes, October 22, 1992, R28106 at R28107 **[Tab 11]**.

While Richard Crisp and other Rambus representatives were attending JEDEC meetings on a regular basis, Mr. Crisp and others at Rambus were working to broaden Rambus's pending patent applications to cover the technologies discussed in JEDEC. Vincent Notes, September 25, 1992, R203940 **[Tab 12]** ("- What to include in divisional applications: ... 2) DRAM - programmable latency via control reg[ister] ... => so cause problem w/synch[ronous] DRAM ... 4) using phase lock loops on DRAM,"); Id. at R203943 ("Richard => will get me copy of the ... synch DRAM spec[ification]"); *** **[Tab 13]** ***; Fred Ware e-mail, June 18, 1993, R202996 [FN10] **[Tab 14]**. The effort to deve Tw[(. TheFc0n)7.l(nd)6(2dtgab .1621.1497 TD0.0004 t563 TbyT*-0.49 Tw[(e)7.4(9(e)2C)3.9((")7(

2003 WL 1866415 (F.T.C.)
(Publication page references are not available for this document.)

(reporting on conference with Tate and others concerning "Enforcement: Sync DRAMs ... - config registers, - programmable latency, - PLLs").

On multiple occasions, Richard Crisp observed discussions within JEDEC of technologies that he believed were covered by claims in Rambus's pending patent applications; although he promptly informed officers and employees of Rambus on each occasion, he did not inform JEDEC. Richard Crisp e-mail, September 14, 1994, at R69546 **[Tab 17]** ("NEC PROPOSES PLL ON SDRAM!!!"); Crisp e-mail, May 24, 1995, R69579 **[Tab 18]** ("As far as intellectual property issues go here are a few ideas: ... DRAM with programmable access latency"). Indeed, a number of documents written while Rambus was still participating in JEDEC reflect *** [Tab 19] *****; Crisp e-mail, May 24, 1995, R69579** [Tab 18] **("I think it makes** sense to review our current issued patents and see what we have that may work against them"). *** **[Tab 20]** *** **[Tab 21]** *** **[Tab 22]** ***; Tate Trial testimony. [FN11]

After it withdrew from JEDEC, Rambus continued with its scheme of developing and prosecuting patent applications in order to obtain issued patents containing claims covering the JEDEC standards. Rambus continued to prosecute its pending Application No. 07/847,692, for example; this application, which contained claims relating to on-chip PLL/DLL technology, issued as U.S. Patent No. 5,657,481 in August 1997. Rambus also filed new patent applications intended to cover the same technologies that had been the subject of earlier patent applications. For example, in February 1997, Rambus filed Application No. 08/798,525, specifically described as a continuation of Application Nos. 07/847,961 and 08/469,490, both of which were pending while Rambus was a member of JEDEC and which had been amended to add claims relating to technologies discussed at JEDEC. Following amendment, the '525 application issued as

Lester Vincent's firm, for example, continued to prosecute pending Application No. 07/847,692, which resulted in the issuance of U.S. Patent No. 5,657,481 in August 1997. When Neil Steinberg arrived at Rambus in 1998, he took over prosecution of the existing patent applications and also drafted and filed new patent applications covering the same technologies that JEDEC representatives had seen discussed at JEDEC. Neil Steinberg took over prosecution of Application No. 08/798,525, for example, which resulted in the issuance of U.S. Patent No. 5,954,804, which Rambus asserted against Hitachi, Infineon, Micron and Hynix in their respective patent litigations. Indeed, Neil Steinberg was largely responsible for completing the efforts of Rambus to obtain issued patents containing claims covering the technologies at issue in this matter, patents which Rambus used to threaten multiple industry members and which it asserted against Hitachi, Infineon, Micron and Hynix in 2000.

When he arrived at Rambus, Neil Steinberg also took over responsibility for implementing Rambus's patent enforcement plan. Rambus's privilege log lists numerous communications among Neil Steinberg, Joel Karp, Lester Vincent and various foreign attorneys regarding amendment and prosecution of Rambus's U.S. and foreign patent applications, Rambus's "Strategic Patent Acquisition Program," and Rambus's IP strategy. Indeed, documents listed on Rambus's privilege log indicate that, in late 1998 and 1999 alone, Neil Steinberg made at least 7 presentations to Rambus's Board of Directors and 6 presentations to Rambus executives regarding Rambus's patent strategy, licensing, intellectual property and litigation strategies.

In total, Rambus's privilege log lists over 1600 documents that Rambus has not produced. See In the Matter of Rambus Inc. Privilege Log **[Tab 30]**. The vast majority of these documents relate to Rambus's patent or IP strategy or the prosecution of U.S. or foreign patent applications. The entries on this privilege log highlight the central role played by Rambus's lawyers in Rambus's scheme to broaden the claims contained in its patent applications and in Rambus's planning of its "patent strategy" and the ultimate enforcement of its patents. [FN12] Likewise, this privilege log demonstrates the continuity of both Rambus's patent prosecution efforts and its strategic planning from the early 1990's through the present. [FN13]

3. Rambus Misinterprets the Federal Circuit Ruling

Rambus attempts to argue that there can be no prima facie showing of fraud because of the Federal Circuit ruling. This misinterprets the Federal Circuit decision on two grounds. The Federal Circuit ruling was limited to the theory of fraud advanced by Infineon in that case as well as by the facts contained in the record in that case. In the present matter, both the allegations of the Complaint and the facts developed to date support a prima facie finding of fraud.

First, as explained at pages 1-2 above, the Complaint in this matter does not allege mere silence, but an on-going pattern of conduct intended to mislead and deceive JEDEC members. As a result, Rambus's arguments with respect to the strict need to find a specific duty, while they may have been appropriate in the Infineon litigation, are misplaced here. Precedent clearly establishes that there is no need to search for a strict duty to disclose if the conduct at issue goes beyond silence, and includes conduct such as statement of half-truths or concealment of material information. See United States v. Keplinger, 776 F.2d 678, 697 (7th Cir. 1985) ("Omissions or concealment of material information can constitute fraud ... without proof of a duty to disclose the information pursuant to a specific statute or regulation."); see also Meade v. Cedarapids, Inc., 164 F.3d 1218, 1222 (9th Cir. 1999) ("One who makes a representation that is misleading because it is in the nature of a 'half-truth' assumes the obligation to make a full and fair disclosure of the whole truth.") (quoting Gregory v. Novak, 121 Ore. App. 651, 855 P.2d 1142, 1144 (Or. Ct. App. 1993)). [FN14] Thus, Rambus's arguments about the need to find a strict duty, partially based on the Federal Circuit ruling, do not apply to the allegations set forth in the Complaint in this matter.

Even if it were necessary to find a strict duty to speak, the Federal Circuit ruling is not relevant to the factual record of this case. First, Complaint Counsel expects to have a large volume of evidence regarding the JEDEC duty to disclose that was not part of the Infineon record, and thus not available to the Federal Circuit. Second, even if Your Honor were to find, based on the full factual record of this case, that the duty found by the Federal Circuit based on the Infineon record is also consistent with all of the evidence in this matter, Complaint Counsel expects to present evidence (which was not presented in the Infineon lp9(i)6ig9(a)-1.ne uaa f7o-1.9(a)-1ET257.1 0.1172,nfesenaaaine hm0.3(e0)3.7f

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For these reasons, the Federal Circuit ruling is not applicable to the question of whether there is prima facie evidence, for purposes of the crime-fraud exception, that Rambus engaged in a fraudulent scheme and that its attorneys' communications were related to that scheme.

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example, that there was a relationship between attorney

V. CONCLUSION.

For the reasons stated herein, Respondent's Application for Review of the February 28, 2003 Order Granting

2003 WL 1866415 (F.T.C.)

2003 WL 1866415 (F.T.C.)

LEXSEE 2003 FTC LEXIS 49

In the Matter of RAMBUS INC., a corporation

Docket No. 9302

Federal Trade Commission

2003 FTC LEXIS 49

ORDER DENYING RESPONDENT'S APPLICATIONS FOR REVIEW OF FEBRUARY 26, 2003, ORDER (GRANTING COMPLAINT COUNSEL'S MOTION FOR COLLATERAL ESTOPPEL) AND FEBRUARY 28, 2003, ORDER (GRANTING COMPLAINT COUNSEL'S MOTION TO COMPEL DISCOVERY RELATING TO to destroy documents that would be harmful in such litigation. Respondent, in its Opposition, asserted that the Federal Circuit's decision in Infineon II fully vacated Infineon I and, therefore, all findings from Infineon I were a nullity and without any collateral estoppel effect in the instant matter. The February 26 Order by Judge Timony granted Complaint Counsel's motion and gave collateral estoppel effect to three findings of fact made by the district court in Infineon I. n1

n1 The three findings of fact held to be subject to collateral estoppel are:

1. When "Rambus instituted its document retention policy in 1998," it did so, "in part, for the purpose of getting rid of documents that might be harmful in litigation."

2. Rambus, at the time it implemented its "document retention policy," "clearly . . . contemplated that it might be bringing patent infringement suits during this timeframe" if its efforts to persuade semi-conductor manufacturers to license "its JEDEC-related patents" "were not successful."

3. Rambus's "document destruction" was done "in anticipation of litigation."

[*4]

B. Crime-Fraud Exception Motion

On January 7, 2003, Complaint Counsel filed a Motion to

Since the Court grants Respondent's Request for Reconsideration **[*11]** of the February 28 Order, even considering

once prima facie evidence of fraud is established by the party seeking discovery. Vargas did not direct that its holding is limited only to the grand jury context and inapplicable to civil proceedings. Since Judge Timony, relying on the standard in Vargas and the factual presumptions in the February 26 Order on **[*19]** Complaint Counsel's Motion for Default Judgment, found that Complaint Counsel sufficiently established a prima facie case that Respondent used its attorneys after 1996 to prosecute patents and thereby continue fraudulent conduct that began before Respondent dropped out of JEDEC in 1996, this Court cannot conclude that the February 28 Order is clearly erroneous.

c. The February 28 Order Appears Manifestly Unjust

While Vargas remains valid, n4 the Court is persuaded by cases such as Haines and Laser Industries, Ltd. v. Reliant Technologies, Inc., 167 F.R.D. 417 (N.D. Cal. 1996), that a different procedural standard controls access to the crime-fraud exception in a purely civil context. As a result, to permit Complaint Counsel to establish a prima facie case and then to compel production of documents without providing Respondent with an adequate opportunity to reply, would represent a manifest injustice since it irrevocably could "break the seal of a highly protected privilege," Haines 975 F.2d at 96.

n4 The decision cited by Respondent, In re M&L Business Machine Co., Inc., 167 BR 937 (D. Colo. 1994), does not establish that Vargas does not apply to civil proceedings even within the Tenth Circuit. It fails on this point because M&L simply follows the reasoning of the Third Circuit in Haines without considering the import of its own Circuit Court's decision in Vargas. Though the Court might agree with the reasoning of M&L, it is unable to determine if the M&L court ignored Vargas, believed it inapplicable, or simply was proF2 Two4w[abningli7108 0 c6h

LEXSEE 1999 FTC LEXIS 14

In the Matter of R.J. REYNOLDS TOBACCO COMPANY, a corporation

Docket No. 9285

Federal Trade Commission

1999 FTC LEXIS 14

ORDER DISMISSING COMPLAINT

January 26, 1999

ORDER:
[*1]

ORDER DISMISSING COMPLAINT

On November 24, 1998, Complaint Counsel filed a motion to dismiss this matter on the grounds that the relief sought in this proceeding has now been achieved through a recent settlement between the major tobacco companies (including Respondent) and the attorneys general for 46 state and 5 other jurisdictions n1 and a modification of the annual survey on tobacco, alcohol, and drug use that is conducted by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services. The Administrative Law Judge, by order dated December 2, 1998, certified this motion to the Commission, and, by order dated December 7, 1998, stayed further action in the adjudication before him, pending the Commission's review of Complaint Counsel's motion to dismiss. Respondent's answer, directed to the ALJ on December 4, states that it agrees that this matter should be dismissed but urges the ALJ to recommend that the Commission dismiss with prejudice. n2 Respondent also asked the ALJ to take action respecting placement on the public record of certain materials received in discovery from the Robert Wood Johnson Foundation ("Foundation") **[*2]** and Dr. John P. Pierce. In a statement filed with the Commission, the Foundation requested the Commission to order in camera treatment for its submissions and to order related relief.

> n1 Master Settlement Agreement Between Settling State Officials and Participating Manufacturers (Nov. 23, 1998)(available as of December 15, 1998 at http://www.naag.org/settle.html)(hereafter the "November 23 Master Settlement Agreement").n2 Respondent attached to its response its Motion to Dismiss on the grounds that Complaint Counsel failed to satisfy its evidentiary burden, filed November 23, 1998. This motion was not certified to the Commission by the ALJ and is, accordingly, not before the Commission.

Upon consideration of the submission of the parties, the Commission hereby dismisses the complaint without prejudice and denies the Foundation's request for relief respecting materials it submitted in discovery. By Order dated December 29, 1998, the ALJ has denied Respondent's motion for action respecting discovery materials.

DISCUSSION

Complaint Counsel's Motion to Dismiss

The Commission's notice order accompanying the complaint set out three key areas of relief: (1) a prohibition **[*3]** of advertisements to children of Camel brand cigarettes through the use of themes or images relating to "Joe Camel" or associated figures; (2) dissemination of public education messages discouraging persons under 18 from smoking; and (3) collection, maintenance, and making data available to the Commission concerning sales of each brand of Respondent's cigarettes to persons under 18 and each brand's share of smokers under 18.

With respect to the first area of relief, the November 23 Master Settlement Agreement specifically bans the use of all cartoon characters, including Joe Camel, in the advertising, promotion, packaging, and labeling of any tobacco product.

As for the second, the settlement requires the tobacco companies to help finance a national public education fund designed to carry out on a nationwide basis sustained advertising and education programs to counter underage usage of tobacco products and to educate consumers about the causes and prevention of diseases associated with the use of tobacco products. n3 Finally, the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services is revising the protocol for its annual **[*4]** national household survey on drug abuse to add specific questions to elicit brand share of smokers under 18. n4

n3 The November 23 Master Settlement Agreement anticipates that each state will seek state court approval of smoking. However, we do agree with the ALJ that proving a link between advertising and youth smoking might be accomplished by means other than a definitive, statistically significant scientific study. Because we are not ruling on the merits of this matter, we express no opinion on whether the record does or does not contain the necessary, relevant evidence.

Further, in dismissing this complaint, the Commission is not reaching a decision on the merits. Respondent's motion to dismiss is not before the Commission for decision, and Respondent does **[*8]** not appear to ask the Commission to enter a ruling on the merits. n8 Indeed, a ruling on the merits would require the Commission to remand this matter to the ALJ, resulting in a possible resumption of the trial. n9 We understand that neither Complaint Counsel nor Respondent intends that result.

n8 Respondent does argue that closure to the prosecution of Reynolds "can be accomplished by recognizing the arguments advanced in Reynolds' pending Motion for Dismissal as additional rationales for terminating this proceeding," Respondent's Response to Complaint Counsel's Motion to Dismiss, at 2. We view this discussion of possible outcomes to fall short of a request for an explicit ruling on the merits of Reynolds' motion.n9 We view the ALJ's Order Staying Proceedings as indicative of his lack of willingness to decide Respondent's Motion to Dismiss at this time and, as discussed supra, the ALJ is authorized by Rule 3.22 (e) to defer ruling on such a motion to dismiss until immediately after all evidence has been received and the hearing record is closed.

The Commission has consistently refrained from dismissing a complaint with prejudice absent a substantive ruling. Without **[*9]** such a ruling by the ALJ or the Commission, it is not appropriate to foreclose the possibility of further litigation where unanticipated problems might develop with one or more of the relevant remedies. n10

n10 The Commission is not persuaded that any future litigation challenging the Joe Camel campaign would violate any of Respondent's Due Process or other legal rights. The doctrine of res judicata, which bars a subsequent action only if there is a final judgment on the merits in the earlier action, would not apply. As described above, no such judgment was rendered here by the ALJ or the Commission. See, e.g., United States v. Cunan, 156 F.3d 110 (1st Cir. 1998). In addition, the Double Jeopardy Clause of the Fifth Amendment "protects only against the imposition of multiple criminal punishments for the same offense." Hudson v. United States, 118 S. Ct. 488, 493 (1997)(emphasis in the original). Nor can we conclude that any passage of time between the dismissal of the instant complaint and the possible commencement of a new proceeding would deprive Respondent of an opportunity to present an effective defense. In any event, a future Commission would undoubtedly give careful consideration, as part of its determination that a case is in the public interest, to any claims Respondent might make that it was unfairly prejudiced by the passage of time.

[*10]

We, therefore, conclude that the complaint should be dismissed without prejudice.

Requests Relating to Third Party Submissions

Respondent's Response to Complaint Counsel's Motion to Dismiss initially requested that the ALJ hold open the public record to permit Respondent "to place in evidence certain documents submitted in discovery from" the Foundation and Dr. Pierce. After opposing statements were filed by the Foundation and Dr. Pierce, n11 Respondent filed a submission with the ALJ explaining that its response had only requested (and, notwithstanding the stay, continued to request) that the ALJ issue an order establishing a schedule for a briefing and hearing on the disclosure issue. By order dated December 29, 1998, the ALJ declined to issue such an order.

n11 The Foundation and Dr. Pierce, along with the Commonwealth of Massachusetts, had previously filed oppositions before the ALJ to Respondent's Notice of Disclosure of confidential documents submitted by the Foundation and Dr. Pierce.

The Foundation's statement in opposition to Respondent's request, which was filed with the Commission, asked the Commission to rule on its prior motion to the ALJ. That motion sought **[*11]** in camera treatment for Foundation documents. The statement also asked, as related relief, that Respondent "be required to (i) submit a certification that it has fully complied with the terms of the protective order with regard to the Foundation's peer review materials [and] (ii) provide to the Foundation all copies of all agreements executed in accordance with paragraph 11 of the protective order." n12 n12 The Paragraph 11 agreements are those executed by certain recipients of confidential materials obtained by RJR.

The Foundation also sought other related relief, including a requirement that Respondent ". . . (iii) identify all persons to whom the Foundation's peer review materials have been disseminated or disclosed; (iv) describe with particularity any dissemination or disclosure of the peer review materials not authorized by or in accordance with

LEXSEE 2001 FTC LEXIS 198

In the Matter of Schering-Plough Corporation, drug is invalid or will not be infringed by the manufacture, use, or sale of the drug for which the ANDA applicant seeks approval. Id. at P 13. This is called a "Paragraph IV Certification." **[*3]** Id.

. If the ANDA contains a Paragraph IV Certification, the ANDA applicant must provide notice to each owner of the patent that is the subject of the certification and to the holder of the approved NDA to which the ANDA refers. Id. at P 14. Upon receiving notice of a Paragraph IV Certification, the patent holder has 45 days in which to file a patent infringement suit against the generic manufacturer. Id. If a patent infringement suit is initiated against the ANDA applicant, the FDA must stay its final approval of the ANDA for the generic drug until the earliest of (1) the patent expiration, (2) a judicial determination of the patent litigation, or (3) the expiration of a 30-month waiting period. Id.

. The Hatch-Waxman Act provides that the first to file a Paragraph IV certified ANDA ("the first filer")

. On December 29, 1995, ESI Lederle, Incorporated ("EST"), a division of AHP, submitted an ANDA to the FDA to market a generic version of Schering's K-Dur 20. Id. at P 51. ESI submitted a Paragraph IV Certification with this filing and notified Schering of its Paragraph IV Certification and ANDA. Id. Schering sued ESI for patent infringement in the United States District Court for the Eastern District of Pennsylvania on February 16, 1996, alleging that ESI's generic version of Schering's K-Dur 20 infringed Schering's '743 patent. Id. at P 53.

. On June 19, 1998, Schering and ESI executed a settlement agreement to their patent litigation whereby, inter alia, **[*7]** Schering agreed to pay ESI up to $ 30 million; AHP and ESI agreed to refrain from marketing the allegedly infringing generic version of K-Dur 20 or any other generic version of K-Dur 20, regardless of whether such product would infringe Schering's patents, until January 2004. Id. at P 54-55.

III. **ARGUMENTS OF THE PARTIES**

The Complaint alleges that Schering's settlement agreements with Upsher-Smith and with ESI violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 ("FTC Act") because they delayed the entry of Upsher-Smith's and ESI's generic versions of K-Dur 20. The Complaint also alleges that Schering's agreement with Upsher-Smith violates the FTC Act because it has the effect of keeping off the market other generic drugs manufactured by third parties.

Schering and Upsher-Smith urge dismissal or partial dismissal on the grounds that the Complaint fails to state a claim upon which relief could be granted. Schering asserts, first, that the Complaint's allegations that Schering's agreements with Upsher-Smith and ESI violate Section 5 of the FTC Act because they allegedly delayed entry of Upsher-Smith's and AHP's generics fail to state a claim because: (a) the **[*8]** Complaint fails to allege patent invalidity or non-infringement; and (b) the Complaint fails to allege that the patent suit was not bona fide or that the settlement was more anticompetitive than the probable outcome of the litigation. Schering asserts, second, that the Complaint's allegations that Schering's agreement with Upsher-Smith violates Section 5 of the FTC Act because it allegedly has the effect of blocking generics manufactured by third parties fails to state a claim because: (a) the Complaint misstates the FDA law; and (b) any effect the agreement had was by operation of federal law and thus immune from antitrust liability under the Noerr-Pennington doctrine.

Upsher-Smith asserts that the Complaint is deficient as a matter of law because it does not dispute that: (a) the patent suit was not bona fide; (b) the settlement resolved that dispute by compromise; or (c) the settlement was more anticompetitive than the probable outcome of the litigation.

Complaint Counsel responds to Schering's first argument and Upsher-Smith's argument by asserting that the allegations of the Complaint that Schering paid Upsher-Smith and AHP to delay their entry and withdraw their challenges to **[*9]** Schering's patent state an antitrust claim and provide a clear basis for that claim. Complaint Counsel asserts that, to state a claim, the Complaint need not contain allegations that Schering's patent is invalid or is not

Supp. 2d at 767. See also Key Pharmaceuticals, Inc. v. ESI-Lederle, Inc., 1997 U.S. Dist. LEXIS 13328, *12 (E.D. Pa. 1997) (agreement to delay others' entry into market may be an illegal restraint on trade).

The Court of Appeals for the District of Columbia recently held that allegations that a settlement agreement to a patent dispute between a brand name **[*20]** drug manufacturer and a generic manufacturer to delay the start of the 180-day exclusivity period states a cause of action. Andrx Pharmaceuticals, Inc. v. Biovail Corp. Int'l, 256 F.3d at 809 ("Although it is true that the first to file an ANDA is permitted to delay marketing as long as it likes, the statutory scheme does not envision the first applicant's agreeing with the patent holder of the pioneer drug to delay the start of the 180-day exclusivity period.").

Respondents may well be able to show at trial that there was no concerted agreement to preserve the exclusivity period or manipulate the start date, that Upsher-Smith's eligibility for the 180-day exclusivity period was a consequence of Upsher-Smith's unilateral action in attaining first filer status, and that the exclusionary effect was by operation of federal law. Or, Complaint Counsel may be able to prove that, by purely private conduct and agreement, the parties intended to delay other generic manufacturers' entry into the market by delaying the start of the 180-day exclusivity period. Such acts would not be immune from antitrust liability under Noerr-Pennington. The facts alleged in the Complaint, if taken as true, and **[*21]** the reasonable inferences therefrom sufficiently allege concerted action which states a claim for which relief may be granted. Accordingly, these allegations will not be dismissed.

2. Status of law on the 180 day exclusivity period

Schering also argues that the Complaint misstates the governing FDA regulations as it alleges that "at all time relevant herein, FDA final approval of an ANDA for a generic version of K-Dur 20 for anyone other than Upsher-Smith was blocked." Schering argues that under the FDA regularions in effect at the time of the settlement, Upsher-Smith may have lost all exclusivity rights and all rights to block third party generics when it settled its case.

Complaint Counsel admit.0001 Tc9Oa23.7831 -1[(Com)r5ul13.4(ent, ton of)Tj J23.57243 -TD[(arm]TJ2 180 day exclusivity period

In the Matter of Schering-Plough Corporation, a corporation, Upsher-Smith Laboratories, a corporation, and American Home Products Corporation, a corporation.
Docket No. 9297
February 12, 2002

ORDER DENYING MOTION OF AMERICAN HOME PRODUCTS CORPORATION TO STAY ORDER, FOR
CERTIFICATION FOR INTERLOCUTORY APPEAL AND APPLICATION FOR FULL COMMISSION REVIEW

I. PROCEDURAL HISTORY

On January 15, 2002, an Order Denying American Home Products Corporation's Motion for Protective Order and to Compel Return of Materials ("January 15th Order") was issued. American Home Products Corporation ("AHP") is no longer a respondent in this matter. AHP was a respondent at the time it filed the Motion for Protective Order and to Compel Return of Privileged and Work Product Material ("Motion for Protective Order"), on September 27, 2001.

On January 16, 2002, AHP filed an Emergency Motion to Stay Order, for Certification for Interlocutory Appeal and Application for Full Commission Review ("AHP Motion"). AHP's motion sought the following relief: (1) the stay of the order denying AHP's motion for protective order and to prohibit Complaint Counsel or Respondents from using the disputed documents in any manner pending appeal; (2) in the alternative, AHP seeks in camera treatment for each of the contested documents Complaint Counsel or Respondents intend to use as exhibits at the administrative hearing; (3) certification of the January 15, 2002 Order to the Commission for interlocutory review; (4) shortening of Complaint Counsel's time to respond to AHP's Motion; and (5) a ruling on AHP's request to stay or request for in camera treatment of AHP's documents by January 18, 2002.

By Order dated January 18, 2002, AHP's request for a stay of the order denying AHP's motion of protective order and to prohibit Complaint Counsel or Respondents from using the disputed documents was denied without prejudice, pending a determination on AHP's motion for in camera treatment. AHP's request in the alternative, for in camera treatment for the contested documents and testimony thereto was provisionally granted, pursuant to 16 C.F.R. § 3.45(g), in the Order of January 18, 2002. AHP was ordered to file a motion for in camera treatment of the documents within twenty days and instructed that the contested documents would be treated as in camera until a final ruling on whether in camera treatment of the material is appropriate, pursuant to Commission Rule 3.45(b).

Complaint Counsel was allowed five days to respond to AHP's Motion, pursuant to Commission Rule 3.23(b). Complaint Counsel filed its opposition on January 23, 2002. AHP then filed a reply in support of its motion on January 25, 2002.

On February 7, 2002, AHP filed a motion for in camera treatment, seeking indefinite in camera treatment for the

2002 WL 31433937 (F.T.C.)

A. Controlling Question of Law or Policy to Which There Is Substantial Ground for Difference of Opinion

The first prong of Commission Rule 3.23(b) contains two requirements that must be met. First, the ruling must involve a controlling question of law or policy. Second, there must also be a substantial ground for difference of opinion. The January 15th Order, which held that AHP waived privileges it may have had to nine documents and related deposition testimony when AHP inadvertently produced the documents and failed to take reasonable precautions to protect any privileges, satisfies neither of theseess.-1.1497 TD-0.0014 (en)-4.4(ts th)-lw5d8(3)-0.70ltanher oSubstanti8(

2002 WL 31433937 (F.T.C.)

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First, AHP will not suffer any additional harm if the Commission does not immediately review its request because it does not face further disclosure of the contested documents and belated assertion of privilege of the nine documents. It is inappropriate to ask the Commission to examine these factual circumstances and reach a different result.

In the second Commission case AHP relies upon, In re Thompson Medical Co., 101 F.T.C. 385 (Mar. 11, 1983), the Commission decided to grant review of an order by the Administrative Law Judge which held that prior statements of respondent's expert witnesses were "Jencks-type" statements and required respondent to produce them. At the time, there was a division among the courts as to the appropriate scope of discovery from experts. The Commission enunciated the standard for discovery from experts and held that, although the ALJ had analyzed the issue under a different standard, his analysis was appropriate. Id. at 389. "An ALJ has broad discretion to rule on discovery requests, and his determinations will be reversed only on a showing of clear abuse." Id.

The overwhelming majority of decisions by Administrative Law Judges deny requests for certification. Requests for certification by non-parties have not received special consideration. E.g., In re R.R. Donnelley & Sons Co., 1991 FTC LEXIS 478 (Oct. 30, 1991); In re American Medical Assoc., 1977 FTC LEXIS 89 (Sept. 30, 1977). Furthermore, Commission precedent makes it abundantly clear that interlocutory appeals from discovery rulings are disfavored. In re Gillette Co., 98 F.T.C. 875, 875 (Dec. 1, 1981). Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. Interlocutory appeals from discovery rulings merit a particularly skeptical reception because they are particularly suited for resolution by the