UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright
Terrell McSweeny

In the Matter of	)	
SUBPOENA AD TESTIFICANDUM TO VIROPHARMA, INC. DATED SEPTEMBER 4, 2014	)	File No. 121-0062 October 29, 2014

ORDER DENYING PETITION TO QUASH
SUBPOENA AD TESTIFICANDUM

By McSWEENY, Commissioner

Shire ViroPharma, Inc. ("Shire"), as successor to ViroPharma, Inc. ("ViroPharma"),[1] has petitioned to quash a subpoena ad testificandum issued to ViroPharma on September 4, 2014. For the reasons stated below, the petition to quash ("Petition") is denied.

I. BACKGROUND

On September 4, 2014, the Commission issued a Subpoena Ad Testificandum ("Subpoena") to obtain oral testimony from Shire at an investigational hearing as part of an investigation to determine whether ViroPharma may have unlawfully delayed generic competition with its branded drug, Vancocin, by filing and maintaining multiple meritless petitions to the U.S. Food & Drug Administration ("FDA") and the courts or by filing and maintaining those petitions without regard to the merits. Those petitions include, among other things, a citizen petition, amendments and supplements to that petition, Freedom of Information Act ("FOIA") requests, and lawsuits against the FDA.

While identifying and preparing the appropriate witnesses to testify on behalf of a corporation might require substantial effort, that does not excuse a corporation from the obligation to provide relevant testimony. Courts have acknowledged that "[p]reparing a . . . designee to provide a corporation's testimony may be an onerous and burdensome task, but this consequence is merely an obligation that flows from the privilege of using the corporate form to do business."[9] Despite the burden, the corporation must make a conscientious, good-faith effort to prepare its designated witnesses so that they can answer fully the questions posed.[10] "[A] corporation with no current knowledgeable employees must prepare its designees by having them review available materials, such as fact witness deposition testimony, exhibits to depositions, documents produced in discovery, materials in former employees' files and, if necessary, interviews of former employees or others with knowledge." Such an approach to provide a con[11]

Testimony elicited at an investigational hearing is qualitatively different from documentary evidence and written discovery.[16] An investigational hearing is iterative and live. It can elicit a more spontaneous response than written discovery. Moreover, even when a witness offers a conclusory or prepared response, an investigational hearing allows staff to probe the underlying facts, circumstances, and motivations. Consequently, "[b]y its very nature, the discovery process entails asking witnesses questions about matters that have been the subject of other discovery . . . Thus, the fact that information has been provided . . . concerning a particular category does not, in itself, make that category an impermissible subject of a 30(b)(6) deposition."[17]

Furthermore, even when a corporation has responded to document requests, oral testimony can provide a "roadmap" through the documents[18] and shed light on how the corporation has construed them.[19] For these reasons, courts consistently reject the proposition that a corporation need not provide testimony in response to a Rule 30(b)(6) subpoena on the ground that its documents are a viable substitute.[20] In fact, oral testimony conventionally follows written submissions because it enables FTC staff to probe the details, explanations, and limitations of prior written responses. A "[party who has received written production is entitled to explanations of the information produced, including how the information was gathered, by whom, whether or not the party adopts that information, where the information came from, [and]

whether there is some additional information."[21] Where responses include ambiguities and qualifications, those "ambiguities and qualifications mean that [the party's] responses are subject to interpretation. In this situation, the . . . [investigator] should be permitted to depose [the party] regarding these qualifications and attempt to clarify these ambiguities."[22]

Many of Shire's CID submissions raise questions that are best explored only through questions propounded to a live witness in an investigational hearing. In its Petition, Shire focuses in particular on Topic 13 of the Subpoena, which seeks testimony on "each Vancocin FDA Submission."[23] Shire asserts that parts of Topic 13 seek information that Shire already provided in its responses to CID Specifications 21 through 23.[24] Yet those responses were incomplete and lacking in detail,[25] or invited the Commission to request additional information.[26] Shire identifies other topics that were also the subject of the earlier CID.[27] When there are "explanations or interpretations that [the subpoena recipient] has regarding the submissions, [the investigator is] entitled to them[.]"[28] As such, Shire's earlier submissions on

[21] *United States v. Educ. Mgmt. LLC*, No. 2:07-CV-00461, 2014 WL 1391105, at *2 (

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