

DOCKET NO. CV 03 0083299 S (X07)

STATE OF CONNECTICUT,	:	SUPERIOR COURT
<i>PLAINTIFF</i>	:	
	:	COMPLEX LITIGATION
	:	DOCKET
V.	:	AT TOLLAND
	:	
AVENTIS PHARMACEUTICALS, INC.	:	
<i>DEFENDANT</i>	:	SEPTEMBER 17, 2004

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S  
MOTION FOR PROTECTIVE ORDER**

Plaintiff, the State of Connecticut (the “State”), respectfully submits this memorandum in support of its motion for a protective order (the “Motion”) against the defendant’s attempt to compel deposition testimony and the production of documents from James T. Fleming (“Fleming”), the former Commissioner of the Connecticut Department of Consumer Protection (the “Department”), and Edwin R. Rodriguez (“Rodriguez,” together with Fleming, the “Commissioners”), present Commissioner of the Department. As set forth more fully below, the Court should grant a protective order pursuant to Section 13-5 of the Connecticut Practice Book in order to protect the Commissioners (and the State) from annoyance, oppression, undue burden and expense.

**I. INTRODUCTION**

The State has brought this sovereign enforcement action against the defendant, Aventis Pharmaceuticals, Inc. (“Aventis” or the “Defendant”), pursuant to the State’s police powers under Conn. Gen. Stat. §§ 42-110m and 42-110o of the Connecticut Unfair Trade Practices Act (“CUTPA”). The State seeks to remedy a long standing course of deceptive, unfair and unlawful

conduct by the Defendant, a large pharmaceutical company doing business in the State. Relief, sought exclusively under Conn. Gen. Stat. §§ 42-110m and 42-110o, includes restitution, injunctive relief and civil penalties.

The Revised Complaint alleges that the Defendant violated CUTPA by artificially inflating drug costs incurred both by the Connecticut Department of Social Services (“DSS”), through its administration of the Connecticut Medical Assistance Program, including Medicaid, and by Connecticut residents who are Medicare beneficiaries. The Revised Complaint alleges that the Defendant reported false average wholesale prices, also known as “AWPs”, to national drug price reporting services that governmental agencies such as DSS utilize to determine reimbursement rates to healthcare providers (including pharmacists and physicians) for prescription drugs. These reported average wholesale prices, however, bore no relationship to the actual wholesale prices that pharmacists, physicians and other healthcare providers actually pay for drugs manufactured by the Defendant. The Revised Complaint alleges that the Defendant marketed the “spread” (or price differential) between the artificially high average wholesale price reported by Defendant and the true average wholesale prices reflecting what healthcare providers actually paid for Defendants’ drugs.

Through this misleading sales and marketing scheme, the Defendant promoted certain prescription drugs and increased its market share for those drugs, all at the expense of the Connecticut Medical Assistance Program and Connecticut Medicare beneficiaries. In the words of a federal district judge presiding over similar average wholesale price litigation: “The defendants trumpeted a lie by publishing the inflated AWPs, knowing (and intending) them to be

used as instruments of fraud.” In re Lupron Marketing and Sales Practices Litigation, 295 F. Supp. 2d 148, 167 (D. Mass. 2003).<sup>1</sup>

On September 3, 2004, after this Court denied its Motion to Strike the Revised Complaint, the Defendant filed its Answer to Revised Complaint (the “Answer”). In its Answer, the Defendant denies many of the allegations of the Revised Complaint and purports to assert twenty-two separate special defenses. By Notices of Deposition dated August 25, 2004, the Defendant gave notice that it sought to depose the Commissioners. In addition, and pursuant to Practice Book § 13-27(g), the Defendant sought to compel the Commissioners to produce an extremely broad range of documents at their respective depositions. The separate document requests are identical, not only to each other, but to document requests the Defendant previously served on the State. The State has already objected to certain of those document requests (which objections are presently under consideration by this Court) and is now in the process of producing documents responsive to others. Copies of the Defendant’s Notices of Deposition to the Commissioners are attached hereto as Exhibit A.

Nothing in the Notices of Deposition, themselves, the accompanying letter from Defendant’s counsel, or the allegations made in the parties’ pleadings reveals any need for the Defendant to depose the Commissioners. Nevertheless, counsel for the Defendant initially informed the Attorney General’s Office that the Defendant sought to compel the Commissioners’

---

<sup>1</sup>These cases were not prepared in a vacuum. Connecticut is one of at least 15 states that have sued pharmaceutical companies for substantially similar schemes. Similar cases have been initiated by the States of Arkansas, California, Connecticut, Florida, Kentucky, Massachusetts, Minnesota, Montana, Nevada, New York, Ohio, Pennsylvania, Texas, West Virginia and Wisconsin, as well as some county governments. These cases are specifically identified in Appendix A to the Revised Complaint.

deposition testimony in order to probe the bases for the Commissioners' conclusion that there was reason to believe the Defendant had violated CUTPA prior to the time the Attorney General initiated this action pursuant to Conn. Gen. Stat. § 42-110m.<sup>2</sup> (See accompanying Affidavit of Assistant Attorney General Clare Kindall (the "Affidavit") at ¶ 5).

Upon learning of the Defendant's purported justification for deposing the Commissioners, the Attorney General's Office informed counsel for the Defendant that the State objected. On September 8, 2004, Assistant Attorneys General Clare Kindall and Robert W. Clark participated in a telephone conference with Attorney Danaher, counsel for the Defendant, in an effort to resolve the dispute. (Affidavit at ¶ 6). After the call, and at Attorney Danaher's request, Assistant Attorneys General Clark and Kindall wrote letters to Attorney Danaher setting forth the State's position and providing citations to some of the legal authorities supporting that position. (Copies of the September 8, 2004 Letters from Attorneys Kindall and Clark are attached to the Affidavit as Exhibit B).

More than a week later, on September 16, 2004 Attorney Danaher responded to those letters, informing the Attorney General's Office that he had reviewed the authorities cited therein and, nevertheless, planned to proceed with the Commissioners' depositions. (A copy of Attorney Danaher's September 16, 2004 Letter is attached to the Affidavit as Exhibit C). In his September

---

<sup>2</sup> Section 42-110m(a) of the General Statutes provides, in pertinent part, that: "[w]henver the commissioner [of the Department] has reason to believe that any person has been engaged in or is engaged in an alleged violation of any provision of this chapter said commissioner may proceed as provided in sections 42-110d and 42-110e or may request the Attorney General to apply in the name of the state of Connecticut to the Superior Court for an order temporarily or permanently restraining and enjoining the continuance of such act or acts or for an order directing restitution. . . ." Conn. Gen. Stat. § 42-110m(a) (emphasis added).

16, 2004 letter, Attorney Danaher attempted to “clarify” his initial justification for the depositions, claiming that the “precise purpose of the depositions is to discover factual information within the personal knowledge of the Commissioners.”

Despite diligent efforts to resolve the dispute, the parties remain at odds over the Defendant’s efforts to depose the Commissioners. As a result, the State has filed the present Motion, seeking to prevent the Defendant from deposing the Commissioners and requiring them to respond to the Defendant’s duplicative document requests. For the reasons set forth herein, this Court should grant that Motion and shield the Commissioners from further harassment, annoyance and undue burden.

## **II. ARGUMENT**

None of the allegations made in Revised Complaint or the Defendant’s Answer justify the Defendant’s attempt to depose the former and sitting Commissioners of Department. Nevertheless, in a clear attempt to annoy and harass the State, the Defendant persists in its efforts to depose the Commissioners under the novel (and dubious) theories that the Defendant is entitled to (a) probe the Commissioners’ conclusion that there was probable cause to commence this action; or (b) discover “facts” within the Commissioners’ “personal knowledge” underlying that conclusion. Such testimony is not only irrelevant to any of the claims and defenses raised by the parties to this action, it is barred by: (1) the State’s express statutory policy against requiring high-ranking state officials, including commissioners and their deputies, from being compelled to provide testimony in civil and criminal proceedings (see Conn. Gen. Stat. § 4-13a); and (2) the executive privilege that shields state officials from being compelled to testify about their pre-decisional mental and deliberative processes.

**A. High Ranking Public Officials are not Ordinarily Subject to Deposition.**

The Defendant seeks to take the depositions of the Commissioners concerning events directly linked to the performance of their official duties. More particularly, the Defendant seeks to probe the bases for the Commissioners' decision to request the Attorney General to commence the present action. Under Connecticut law and analogous federal case law, such depositions are not appropriate under the circumstances of this case.

Through the enactment of Conn. Gen. Stat. § 4-13a, the Connecticut General Assembly has placed limitations on a litigant's ability to compel testimony from high ranking officials, including elective officers, commissioners and their deputies. The statute provides, in pertinent part, that commissioners and their deputies, if subpoenaed to appear before any court in any matter involving the state, may delegate "any assistant having knowledge of the facts in issue to appear for [them]," unless a judge of the court issues a summons that requires their personal appearance. Conn. Gen. Stat. § 4-13a.

The purpose of this statutory provision is plain. High ranking state officials such as the Commissioners are obviously very busy people who, by the very nature of their offices, are frequently targeted by litigants for depositions and other forms of discovery. Equally obvious is the fact that many litigants might be eager to take up the valuable time of commissioners and their deputies with requests for testimony, thereby attempting to leverage state agencies into bending to their will. To prevent such practices, the General Assembly wisely enacted Conn. Gen. Stat. § 4-13a to protect heads of agencies and their deputies from such oppression and harassment and to permit them to carry out the important functions of their respective offices.

Although there appears to be very little, if any, case law discussing Conn. Gen. Stat. § 4-13a, “[b]ecause Federal Rule of Civil Procedure 26 provides the same authority to federal courts for the issuance of protective orders and for the same reasons, federal case law is appropriate authority for determining protective orders pursuant to Practice Book § 13-5.” Pavlo v. Slattery, 2004 Conn. Super. LEXIS 372, at \*11 (Conn. Super. Ct. Feb. 20, 2004); see also Automation Systems Integration v. Autoswage-Products, Inc., 1996 Conn. Super. LEXIS 1154, at \*8 (Conn. Sup. Ct. May 6, 1996) (“Since Practice Book § 221 [now § 13-5] is nearly identical to Federal Rule of Civil Procedure 26(c), it is appropriate for this court to look to federal case law for guidance. . . .”); Filstein v. Filstein, 1994 Conn. Super. LEXIS 3149, \*14 (Conn. Sup. Ct. Dec. 9, 1994) (“Prac. Bk. Section 221 [now 13-5] substantially parallels Rule 26(c) of the Federal Rules of Civil Procedure and, therefore, federal precedents are germane.”)

There is a large, well-developed body of federal case law discussing, at length, the general prohibition against deposing high ranking government officials. See, e.g., Kyle Engineering Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979); Peoples v. United States Department of Agriculture, 427 F.2d 561, 567 (D.C. Cir. 1970). As the analogous federal case law explains, there are only limited exceptions to this rule. Such a deposition is not called for unless the deposition is “essential to prevent prejudice or injustice to the party who would require it...” Wirtz v. Local 30, International Union of Operating Engineers, 34 F.R.D. 13, 14 (S.D. N.Y. 1963) (copy attached). Such a deposition is not called for unless the department head has special personal knowledge of relevant facts. Union Savings Bank of Patchogue, N.Y. v. Saxon, 209 F. Supp. 319, 319 - 320 (D. D.C. 1962). Such a deposition is not called for unless there are questions of intent which cannot be resolved without direct testimony of the department

head. Halperin v. Kissinger, 606 F.2d 1192, 1209 - 1210 n. 120 (D.C. Cir. 1979), aff'd, 452 U.S. 713, 101 S.Ct. 3132 (1981). Finally, such a deposition is not called for in the absence of other compelling reasons. Weir v. United States, 310 F.2d 149, 154 - 155 (8th Cir. 1962); California State Board of Pharmacy v. Superior Court, 78 Cal. App. 3d 641, 644 - 645, 144 Cal. Rptr. 320, 322 - 323 (1978); Civiletti v. Municipal Court of Los Angeles, 116 Cal. App. 3d 105, 172 Cal. Rptr. 83, 86 (1981).

Under these cases, the burden is on the proponent of the deposition to demonstrate relevance and necessity of the testimony, and the prejudice, injustice or other compelling reason why the deposition of the high-ranking government official should be taken. Capitol Vending Co. v. Baker, 36 F.R.D. 45, 46 (D. D.C. 1964); California State Board of Pharmacy, 144 Cal. Rptr. at 322 - 323. Even then, department heads and similar high-ranking officials should not ordinarily be compelled to testify without a substantial showing by the proponent of the deposition. An example would be that the relevant testimony to be elicited is unavailable from a lesser ranking officer. Halderman v. Pennhurst State School and Hospital, 96 F.R.D. 60, 64 (E.D. Pa. 1982); Sneaker Circus, Inc. v. Carter, 457 F. Supp. 771, 794 n. 33 (E.D. N.Y. 1978), aff'd mem., 614 F.2d 1290 (2d Cir. 1979). The proponent of the deposition must also show that the information sought is not available through some other discovery mechanism. Sykes v. Brown, 90 F.R.D. 77, 78 (E.D. Pa. 1981); Wirtz v. Local 30, International Union of Operating Engineers, 34 F.R.D. at 14; Davis v. United States, 390 A.2d 976, 981 (D.C. Ct. App. 1978); Weir v. United States, 310 F.2d at 154-55.

The legal principles cited above have been utilized by courts to protect Governors from being subjected to deposition. See, e.g., Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir. 1982),

cert. denied sub nom, Schenberg v. Bond, 459 U.S. 878, 103 S.Ct. 174 (1982) (deposition of Governor denied where plaintiffs failed to show exceptional circumstances or that Governor possessed relevant information); Deukmajien v. Superior Court, Marin County, 143 Cal. App. 3d 632, 191 Cal. Rptr. 905 (1983) (notice of taking Governor's deposition quashed). They have also been utilized to protect cabinet members or agency heads from being subjected to deposition. E.g., Wirtz v. Local 30, International Union of Operating Engineers, 34 F.R.D. at 14 (Secretary of Labor's deposition not necessary to prevent prejudice or injustice); Halderman v. Pennhurst State School and Hospital, 96 F.R.D. at 64 (deposition of Secretary of State Department would not be compelled where necessary and relevant information was available from a lesser-ranking officer); Cornejo v. Landon, 524 F. Supp. 118, 122 (N.D. Ill. 1981) (protective order issued since no showing deposition was necessary to prevent injustice and information could be obtained elsewhere).

**B. The Commissioners' Testimony is Not Necessary to Prevent Prejudice or Injustice to the Defendant Because the Desired Testimony is Irrelevant and, to the Extent the Commissioners are Capable of Providing Relevant Testimony, Such Testimony Can and Will Be Provided by Other State Witnesses.**

Under the aforementioned principles, the Defendant would need to make a substantial showing to justify deposing the Commissioners. First, the Defendant would need to show that the information sought from the Commissioners meets one of the narrow exceptions to the general rule barring such testimony and that the proposed deposition is likely to lead to the discovery of admissible, non-privileged evidence. Second, the Defendant would need to show that such information is not available from lesser ranking officials than the Commissioners.

Defendant can make neither showing. First, the Defendant is unable to demonstrate that either of the Commissioners is uniquely capable of testifying about relevant facts, the absence of which would result in prejudice or injustice to the Defendant. Defendant's purported justifications for taking the Commissioners' depositions – to discover the bases (factual or otherwise) for their conclusion(s) that there was cause under Conn. Gen. Stat. § 42-110m for bringing this action in the first instance – is, by itself, patently insufficient grounds for requiring their appearances at depositions. While the Defendant may be entitled to inquire whether the Commissioners, in fact, made the finding that there was “reason to believe” that the Defendant had violated CUTPA, there is no precedent for permitting a defendant to a civil enforcement action to require the instigating public official, in this case the Commissioners, to testify regarding facts relied upon in recommending an enforcement action.

Some of the federal decisions involving cabinet members and other federal officials responsible for initiating or instigating civil enforcement actions are instructive. In Wirtz, 34 F.R.D. at 14, for instance, the Secretary of Labor (the “Secretary”) brought an enforcement action against a labor union with respect to the conduct of a union election under Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959. The defendant labor union moved under Fed.R.Civ.P. 37(d) to dismiss the action for the Secretary's failure to appear at a deposition. The Secretary cross-moved under Fed.R.Civ.P. 30(b) to vacate the notice of deposition in so far as it required the Secretary's personal appearance.

In ruling for the Secretary, the court expressly rejected any claim that the Secretary could be questioned about the details of his investigation or, more importantly for present purposes, his determination that there was probable cause to bring the enforcement action. Id. “Like

indictment by a Grand Jury, the Secretary is the initiator or instigator of an action against a labor organization . . . but as such his action establishes nothing as to the merits of the action. As in other statutes, an action is commenced if the Secretary ‘finds probable cause.’ His determination as to this is conclusive; defendant cannot question in this Court either his investigation or his determination of probable cause.” Id. (emphasis added) (citing Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950); Madden v. Int’l Hod Carriers Union, 277 F.2d 688 (7<sup>th</sup> Cir. 1960)).

As a result, the court found that the only possible questions which could be asked directly of the Secretary were (1) whether there was, in fact, an investigation prior to the commencement of the action; and (2) whether there was a finding of probable cause. Id. Because the labor union failed to establish that the Secretary’s personal testimony was necessary to establish either of these limited facts, the court vacated the notice of deposition to the extent it purported to require the Secretary’s personal appearance. Id.

Other courts have held, in the context of civil rights suits initiated by the United States, that the Attorney General’s determination of “reasonable cause” under the Title VII of the Civil Rights Act of 1964 is neither relevant to the resolution of a civil rights action nor a proper subject for discovery. See, e.g., United States v. Building and Construction Trades Council of St. Louis, Missouri, AFL-CIO, 271 F. Supp. 454, 458 (E.D. Mo. 1966) and 271 F. Supp. 447, 452-53 (E.D. Mo. 1966); United States v. Mitchell, 313 F. Supp. 299 (E.D. Ga. 1970) (applying the same rule to the language of Title VIII).

Like the defendants in Wirtz and the civil rights cases, Aventis is unable to demonstrate any need for the Commissioners’ testimony in this case. Section 42-110m(a) merely provides

that if the Commissioner “has reason to believe” a person or entity has violated CUTPA, he may initiate a sovereign enforcement action or request the Attorney General to do so on behalf of the State. See Conn. Gen. Stat. § 42-110m(a); see also n.2, supra. Nothing in the statute, its legislative history or the case law suggests that the legislature intended to authorize a defendant to such an action to challenge the State’s authority to bring suit on the basis that Commissioner’s belief was mistaken or ill-founded. At most, a defendant to such an action may be entitled to learn whether, in fact, the Commissioner made a preliminary finding that there was reason to believe the defendant engaged in conduct violative of CUTPA – a fact the State is able to demonstrate without the need for any deposition testimony, much less that of a former or sitting Commissioner. Moreover, in the event this Court finds that the Defendant is entitled to deposition testimony concerning the very narrow question of whether (not why) the Commissioners found that there was reason to believe the Defendant violated CUTPA, the Commissioners should be permitted, consistent with the spirit of Conn. Gen. Stat. § 4-13a and the federal case law discussed above, to designate a witness (other than the Commissioners or their deputies) capable of testifying to that very narrow issue.

To the extent this Court is willing to accept the Defendant’s most recent justification for deposing the Commissioners – to discover “facts” within their “personal knowledge” – the Defendant simply cannot meet its burden under the aforementioned authorities. The Defendant has not, for instance, demonstrated that the Commissioners, as opposed to other lesser ranking State officials or other designated witnesses, are somehow uniquely capable of testifying to relevant facts or that the Defendant would be prejudiced or suffer injustice if it were unable to depose the Commissioners. In fact, the Defendant has already requested the State to designate

State witnesses to provide deposition testimony about an extremely broad range of topics in this case. At the same time it served the subject Notices of Depositions for the Commissioners, the Defendant also served on the State a Notice of Deposition purporting to require the State, pursuant to Practice Book § 13-27(h), to designate witnesses capable of testifying to virtually every conceivable issue raised by the parties' pleadings in this action. (See August 25, 2004 Notice of Deposition, attached hereto as Exhibit B). The Defendant has not and cannot demonstrate that it would be prejudiced if unable to depose the Commissioners as well. In short, the Commissioners are entitled to a protective order prohibiting their depositions.

**C. Even if the Commissioners' Testimony Concerning the Bases for the Determination of Probable Cause Were Relevant, Such Testimony is Privileged.**

Connecticut courts have recognized a testimonial privilege, which precludes testimony attributable to the "mental processes" of agency decision-makers. See, e.g., Stewart J. Leonard v. State of Connecticut Department of Consumer Protection, 1994 Conn. Super. LEXIS 2665, at \*4 (Conn. Super. Ct. Oct. 27, 1994) (copy attached) (granting the Commissioner of Consumer Protection's motion for a protective order barring the Commissioner's deposition in an administrative appeal because plaintiffs were "merely attempting to probe the mental decision-making process of the Commissioner."); Welch v. Zoning Board of Appeals, 158 Conn. 208 (1969); Adriani v. Commission on Human Rights and Opportunities, 228 Conn. 545, 548 (1994); Zinker v. Doty, 637 F. Supp. 138, 140 (D. Conn. 1986); see also United States v. Morgan, 313 U.S. 409 (1941); United States v. Hooker Chemicals & Plastics, 123 F.R.D. 3 (W.D.N.Y. 1988).

An analogous privilege has evolved under federal law which protects the pre-decisional deliberative thought processes of members of the executive branch of government. "The

deliberative process privilege, or executive privilege, ‘protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions.’” See Marisol A. v. Giuliani, 1998 U.S. Dist. LEXIS 3719, at \*17 (S.D.N.Y. March 23, 1998) (copy attached) (quoting Hopkins v. H.U.D., 929 F.2d 81, 84 (2d Cir. 1991); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975); Local 3, Int’l Brotherhood of Electrical Workers, AFL-CIO v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988); New York City Managerial Employee Ass’n v. Dinkins, 807 F. Supp. 955, 956 (S.D.N.Y. 1992); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff’d, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967).

“In addition to communications with others, the executive privilege extends to the mental processes by which an executive reaches a decision.” Giuliani, 1998 U.S. Dist. LEXIS, at \*19. As the court noted in Giuliani, the United States Supreme Court has clearly stated that the mental processes of executives should not be probed. Id. (citing Morgan, 313 U.S. 409, 422 (1941)) (holding that “the integrity of the administrative process must be [] respected,” and therefore discouraging the practice of calling high level officials as witnesses); Morgan v. United States, 304 U.S. 1, 18 (1938) (recognizing that it is “not the function of the court to probe the mental processes of the Secretary [of Agriculture] in reaching his conclusions”); Carl Zeiss Stiftung, 40 F.R.D. at 325-26). “Top executive [] officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.” Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985).

Here, the Defendant initially suggested that it sought to depose the Commissioners in order to probe their mental processes during the period leading up to the decision to request the

Attorney General to bring this action on behalf of the State. Such testimony clearly falls under the aforementioned executive privilege. There is good cause for applying that privilege in the instant matter. Permitting the Defendant to depose the Commissioners would give them free license, for no apparent reason, to harass top public officials about the reasons and rationales behind high-level executive decisions. In addition to serving no legitimate function in this litigation, such an exercise would potentially undermine the integrity of executive decision-making in this context and deter the diligent enforcement of CUTPA. See, e.g., Adoption Services of Connecticut v. Pivrotto, 2002 Conn. Super. LEXIS 2839, at \*9 (Conn. Sup. Aug. 21, 2002) (copy attached) (holding that a vexatious litigation claim against the commissioner of consumer protection for allegedly bringing a frivolous claim under Conn. Gen. Stat. § 42-110m was really an action against the State and thus barred under principles of sovereign immunity because, inter alia, “[i]f the plaintiff were to obtain a judgment against the commissioner in the present case, it would affect how the office of consumer protection would bring future lawsuits against businesses allegedly engaged in unfair trade practices.”) (Emphasis added).

Although the State recognizes that there may be exceptions to the executive privilege, such as where the decision-making process itself is the subject of the litigation and the public official is uniquely capable of testifying to observable and relevant facts, no such exception exists here. The Defendant has not, for instance, asserted that the Commissioners made an administrative ruling that was biased or prejudiced. Nor has it asserted a claim or counterclaim against the Commissioners or the State for vexatious litigation, malicious prosecution or some other theory that might put into issue the Commissioners’ finding that there was reason to

believe the Defendant violated CUTPA.<sup>3</sup> As a result, no exception to the executive privilege applies and the Defendant is barred from probing the Commissioners' pre-decisional mental and deliberative processes.

**D. The Document Requests are Duplicative of Requests Previously Served on the State.**

The oppressive nature of these particular notices of deposition is highlighted by the fact that the Defendant has also attempted to: (1) obtain documents without complying with the procedures set forth in the Connecticut Practice Book; and (2) obtain the very documents that the State has either (a) agreed to produce in response to previous requests or (b) objected to on various grounds. Under Practice Book § 13-27(g), a request for documents may accompany a deposition notice to a party, but the party must be given the opportunity and time to respond or object as set forth in Practice Book §§ 13-9 and 13-10. The Defendant's demand that the Commissioners produce the requested documents at the time of their respectively noticed depositions, as opposed to within 30 days of the requests, would deprive the State of that opportunity.

Even more revealing is the fact that those requests are identical, not just to one another, but to document requests the Defendant served on the State in April of this year. Indeed, the State has filed several objections to these very requests – objections that are presently pending before this Court. In addition, the State has already begun the process of producing those

---

<sup>3</sup> Even were the Defendant to attempt to assert such claims, they would be premature at this time (the present litigation has not resolved in the Defendant's favor) and, in any event, barred under principles of sovereign immunity. *See id.* at \*14 (dismissing, for lack of subject matter jurisdiction, a vexatious litigation claim brought against the Commissioner of Consumer Protection for having allegedly commenced a frivolous action pursuant to Conn. Gen. Stat. § 42-110m).

documents responsive to the identical, non-objectionable document requests. Under the circumstances, it is difficult to imagine how the Defendant could possibly expect the Commissioners, both of whom are officers of the State, to comply with the duplicative document requests. The State, therefore, seeks an order protecting the Commissioners from the annoyance and undue burden of duplicating its production and litigation efforts with respect to these requests.

### **III. CONCLUSION**

The Defendant is not entitled to compel deposition testimony or the production of documents from the Commissioners. The State's Motion for a Protective Order should be granted.

STATE OF CONNECTICUT

RICHARD BLUMENTHAL  
ATTORNEY GENERAL

BY:

---

Robert W. Clark  
Assistant Attorney General  
(*Juris #423016*)  
55 Elm Street, P.O. Box 120  
Hartford, CT 06141-0120  
Tel: (860)808-5355/ Fax: (860)808-5391  
e-mail: Robert.clark@po.state.ct.us

CERTIFICATION

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER was mailed or electronically delivered in accordance with Conn. Prac. Bk. §10-12 on this 17th day of September, 2004, to all counsel of record in this and related cases, as follows:

Frank H. Santoro  
R. Cornelius Danaher, Jr.  
Danaher, Tedford, Lagnese & Neal  
700 Capitol Place  
21 Oak Street  
Hartford, CT 06106-8000  
(860)247-3666

Paul S. Schleifman  
Shook, Hardy & Bacon, LLP  
Hamilton Square  
600 14<sup>th</sup> Street, NW, Suite 800  
Washington, DC 20005-2004  
(202)639-5611

---

Robert W. Clark  
Assistant Attorney General