



**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

HOECHST MARION ROUSSEL, INC., a corporation,
CARDERM CAPITAL L.P., a limited partnership,

and

ANDRX CORPORATION, a corporation.

Docket No. 9293

**RESPONDENT ANDRX CORPORATION'S
OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO AMEND PROTECTIVE ORDER**

Respondent Andrx Corporation ("Andrx") submits this opposition to Complaint Counsel's Motion to Amend Protective Order Governing Discovery (dated May 3, 2000).

Only days after the parties submitted detailed comments on a draft form of Protective Order, which the Court then entered in final form on April 28, 2000, Complaint Counsel has proposed a new modification. By that modification, Complaint Counsel threatens to prejudice Andrx's ability to review the approximately 30 boxes of documents produced by third parties during the pre-complaint investigation, and to prepare its defense. In discussions over the scope of the Protective Order, Complaint Counsel resisted Andrx's reasonable request to allow a single business person, without "line" responsibility for the product at issue, to review confidential material after attesting to his obligation to maintain confidentiality. Now that Complaint Counsel has severely restricted the individuals with access to confidential material, it seeks to have literally every scrap of paper produced by third parties automatically designated as being

confidential. That is not only unreasonable, but seriously prejudicial to Andrx's legitimate rights and interests. What, in effect, Complaint Counsel seeks is the sort of "umbrella" prohibition rejected by applicable law. See, e.g., Bayer AG and Miles, Inc., v. Barr Laboratories, 162 F.R.D. 456 (S.D.N.Y. 1995) (holding that "umbrella protective orders," which designate all discovery as protected without review by counsel or the court, and without a "good cause" determination, are disfavored); Avirgan v. Hull, 118 F.R.D. 257 (D.D.C. 1987) (holding that movant for protective order must articulate specific, particular facts showing good cause for a blanket prohibition, and that there is a clearly defined, serious injury that will result from discovery sought).

Complaint Counsel ought not to have it both ways: it fairly cannot place severe restrictions on access to confidential documents so as to preclude client review, and also sweep essentially the entire universe of its documents into the category of confidential information. Indeed, if the third party referenced in Complaint Counsel's motion as allegedly raising confidentiality concerns is the same third party that contacted Andrx recently, its concerns are not about having a single Andrx business person review its documents -- it stated it did not care about that. It simply did not want its documents broadly disseminated in the public domain, which neither Andrx nor any other party seeks to do. The expressed willingness of the third party to have an appropriate Andrx business person review its documents demonstrates that Complaint Counsel's position on confidentiality has not been aimed at protecting the purported interests of third parties, but at hindering Andrx's counsel's ability to digest and comprehend the documents involved in this proceeding.

Given the extreme restrictions that Complaint Counsel insisted on imposing on access to confidential material, it should not be allowed to avoid the burden of sifting through the third party documents for specific documents that may be particularly sensitive and thereby appropriate for confidential designation. To do so will minimize the need for both parties and non-parties, as well as the Court, to engage in the potentially burdensome process for challenging improper designations.¹

Andrx for weeks has been requesting access to relevant documents in the Complaint Counsel's possession. To avoid further delay in obtaining those documents, Andrx believes that it would be sensible to address this matter by conference call with Your Honor. Both Complaint Counsel and the other respondents have expressed their willingness to proceed in that fashion. Although Complaint Counsel quotes respondent HMR's counsel as stating he could "live with" Complaint Counsel's proposed modification to the Protective Order, HMR's counsel has clearly stated that HMR does not dispute the legitimacy of Andrx's concerns about access to documents, given Andrx's internal structure.

¹ In its motion, Complaint Counsel claims that it is seeking to comply with Section 4.10(d) of the Federal Trade Commissions Rules of Practice. However, that is a red-herring. Section 4.10(d) seeks to safeguard against certain disclosures to the general public. Andrx is not seeking public disclosures; rather, it is objecting to having Complaint Counsel automatically designate essentially all third party documents as confidential and thereby beyond the access of the clients in this proceeding.

Dated: May 4, 2000

SOLOMON, ZAUDERER, ELLENHORN
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By:  _____

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CERTIFICATE OF SERVICE

I, Hal S. Shaftel, hereby certify that on May 4, 2000, I caused a copy of Respondent Andrx Corporation's Opposition to Complaint Counsel's Motion to Amend Protective Order to be served by overnight delivery (with a copy of facsimile except to the Secretary) on the following:

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