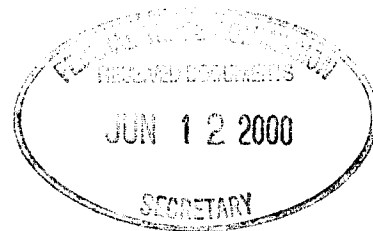


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



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

TO: The Honorable D. Michael Chappell
Administrative Law Judge

**COMPLAINT COUNSEL'S MEMORANDUM
IN OPPOSITION TO ANDRX'S MAY 30TH MOTION**

By its motion of May 30th, Andrx asks this Court to enter an order that would:

1. Grant Andrx unlimited access to the Federal Trade Commission staff's non-public, pre-complaint investigative files in this matter;
2. Declare that complaint counsel violated certain confidentiality restrictions as well as the protective order in this case by disclosing an FTC staff letter to third parties; and
3. Prohibit complaint counsel and other FTC staff from communicating certain information to third parties without Andrx's consent or this Court's approval.

As set forth in detail below, we oppose Andrx's motion, and ask this Court to deny it in all respects, because:

1. Andrx improperly seeks access to the FTC's entire investigative files without regard to any of the FTC's legitimate and well-recognized claims of privilege;

2. Complaint counsel has not violated any confidentiality restrictions or the protective order entered in this case; and
3. An order prohibiting complaint counsel from communicating with third parties absent Andrx's consent or this Court's approval is unwarranted and unnecessary.

I. Andrx Improperly Seeks Access to the FTC's Entire Investigative Files Without Regard to Any of the FTC's Legitimate and Well-Recognized Claims of Privilege

Before addressing the substance of the first point in Andrx's May 30th Motion, it must be made clear that we already have given Andrx copies of all non-privileged documents from the FTC's investigative file that gave rise to the complaint. These materials include:

- 20 boxes of documents, consisting of those materials produced by all third parties during the investigation. (Produced to Andrx on May 8, 2000.)
- 13 boxes of documents, consisting of those materials produced by Hoechst during the investigation. (Produced to Andrx on May 4, 2000.)
- 2 boxes of documents in response to Andrx's first request for production, consisting of correspondence, civil investigative demands, subpoenas, and other non-privileged materials, such as pleadings, articles, news reports, etc., compiled by FTC staff during the investigation. (Produced to Andrx on May 11, 2000.)
- 1 box of documents, including: (1) materials responsive to Aventis' second request for production; (2) materials that were inadvertently omitted from our prior productions; and (3) unsolicited materials we recently received from a third party since the complaint issued. (Produced to Andrx on May 31, 2000.)

Thus, as of May 31, 2000, we have produced all non-privileged documents from the investigative file to Andrx.¹ What is at issue here is Andrx's attempt to circumvent, in one fell swoop, all of

¹ The only exception is a document that Hoechst withheld -- on a claim of privilege -- during the investigation, but which was produced in an earlier FTC investigation. As we indicated in our April 27, 2000 motion concerning the protective order, we believe Hoechst's production of this document, which it asserts was inadvertent, waives any privilege claim. We have consulted with Hoechst regarding the possible production of this document to Andrx, and have committed not to produce the document without first giving Hoechst the opportunity to file a motion on the issue.

the FTC's legitimate and well-recognized claims of privilege in order to gain unlimited access to the FTC's internally created documents. These privileged documents include, among other things, staff memoranda to the Commission recommending Commission action, staff legal analyses prepared in anticipation of this litigation, and staff attorney notes and summaries of interviews with third parties.

A. Andrx's motion is an attempt to circumvent the FTC's legitimate and well-recognized claims of privileges

Andrx seeks to circumvent the FTC's legitimate, and well-recognized, claims of privilege in two ways: (1) by misconstruing the rulings and reasoning in the *Arco*² and *Intel*³ cases, both of which dealt with the unusual situation in which the Commission was simultaneously pursuing an adjudicative action and an investigation of the same parties in related matters; and (2) by setting up a false dichotomy of FTC staff functions -- between investigations and prosecution -- and inferring from this false dichotomy a general waiver of privilege.

1. Andrx seriously misconstrues the rulings in *Arco* and *Intel*

Neither *Arco* nor *Intel* granted respondents any right to access privileged materials created by FTC attorneys during the course of an investigation. Indeed, complaint counsel are not aware of any ruling granting respondents access to the types of materials that Andrx seeks to discover here. Contrary to suggestions in Andrx's May 30th motion, *Arco* and *Intel* did not deal with respondent's right to access FTC investigative files or the waiver of FTC privileges.

² *Federal Trade Commission v. Atlantic Richfield Co.*, 567 F.2d 96 (D.C. Cir. 1977) ("*Arco*").

³ *Intel Corporation*, FTC Dkt. No. 9288, 1999 FTC LEXIS 206 (March 2, 1999) (ALJ Timony).

Instead, these cases held that FTC staff prosecuting one matter could not supplement discovery in that adjudicative proceeding by accessing FTC files from a separate on-going investigation involving the same party. *Arco* and *Intel* both involved the unusual situation -- and one not presented here -- in which a matter was being investigated by FTC staff while a separate matter simultaneously was being pursued by Commission staff in administrative adjudication before an FTC administrative law judge.

The concern raised by the court and ALJ in both of these cases focused on the possibility that process authority granted by the Commission to conduct the investigation could be used for “back door” or “extrajudicial” discovery in the adjudicative proceeding, and thus could circumvent the proper supervisory role of ALJs in adjudicative proceedings.⁴ This potential was particularly acute in *Intel*, where the FTC’s investigative subpoena and civil investigative demand were directed to Intel after the last dates for issuing requests for production in the related adjudicative proceeding.⁵ The situation here is much different: there is no ongoing FTC investigation of Andrx or Hoechst and thus no danger that FTC staff could use discovery in any other investigation to circumvent the discovery process in this adjudication.

In any event, even if there were any such concerns, the remedy would be to limit the access of complaint counsel. Neither the rulings nor reasoning in *Arco* or *Intel* provide any

⁴ See, e.g., *Arco*, 567 F.2d at 103 (to allow unlimited access to investigative files where there simultaneously exists a related adjudicative proceeding “would seemingly tend to undercut the role of the Administrative Law Judge in any adjudicative proceeding”); *Intel*, 1999 FTC LEXIS 206 at *4 (“Here, complaint counsel’s access to and use of documents and information from the use of investigatory compulsory process issued after the discovery cut off dates in this adjudication . . . would raise a reasonable question of circumvention of my scheduling order.”)

⁵ *Intel*, 1999 FTC LEXIS 206 at *1.

support for the proposition that respondents can obtain access to privileged documents created by FTC attorneys during the course of the very investigative files that gave rise to the complaint.

2. Andrx sets up a false dichotomy of Commission function and seeks to infer from this a general waiver of privilege

As is discussed in greater detail below, the fact that the same FTC staff investigated and is prosecuting this matter does not serve as a general waiver of privilege. While Andrx is correct that the Federal Trade Commission as a whole embraces a number of separate functions, including that of investigator, prosecutor, and adjudicator,⁶ the relevant dichotomy as a matter of law is between Commissioners acting in their investigative capacity and Commissioners serving in their adjudicative capacity. It is the Commissioners' roles that change when a matter moves from investigation to adjudication, not that of the FTC staff. And it is the Commissioners who become third parties to the proceeding once a complaint issues, not FTC staff.⁷

Essentially the identical FTC staff investigated this matter in the first instance and is prosecuting this matter now -- this is the norm at the Commission.⁸ Contrary to Andrx's

⁶ See, e.g., *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79 (10th Cir. 1972) (“the Federal Trade Commission combines the functions of investigator, prosecutor, and judge and . . . Congress designed it in that manner”).

⁷ *Champion Spark Plug*, FTC Dkt. No. 9141, 1980 FTC LEXIS 200 (December 16, 1980) (ALJ Timony) (“Once the complaint is issued the Commission becomes a third party to the adjudicative proceeding, with complaint counsel becoming a party.”) It is clear from the context, that use of term “Commission” in *Champion* means the five Commissioners acting in their capacity as a reviewing authority rather than the FTC as a whole. Cf. *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 586 (D.D.C.1970) (drawing a distinction between the “Commission” meaning the entire FTC, including the Commissioners, administrative law judges, and staff, etc., and the “Commission” meaning the five FTC Commissioners sitting as a reviewing body).

⁸ See, e.g., *In the Matter of Subpoena Duces Tecum Addressed to Atlantic Richfield Co., et al.*, FTC File No. 741-0019, n.15 (June 2, 1978) [hereinafter “*Arco Statement*”] (observing that

implications, the FTC does not maintain separate investigative and prosecutorial staff, and the mere fact that the FTC's rules of practice has separate sections dealing with investigations and litigation is of no relevance here.

B. Commission law is clear: (1) Complaint counsel has the right to access the FTC's entire investigative record; (2) Respondents have no right to equal access; and (3) Complaint counsel's access does not waive any privileges

As set forth in the Commission's *Arco* Statement interpreting FTC Rule of Practice § 3.43(c), complaint counsel in a Commission proceeding has an absolute right to access the entire investigative file -- and much more.

It has long been, and continues to be, the Commission's interpretation of its rules for adjudicative proceedings that Commission counsel in such a proceeding may properly have access to, and use for that proceeding, documents or information otherwise properly obtained by the Commission -- whether through compulsory process or otherwise, whether confidential or not -- and that such access and use may occur without leave of the ALJ and without notice to the respondent.⁹

Respondents like *Andrx*, in turn, may discover factual information and third party documents from the FTC's investigative files, but have no right to equal access to privileged materials created by FTC attorneys. "[N]othing in the Constitution mandates that [respondents] are entitled to 'any evidence' in the hands of complaint counsel, or that [respondents] are entitled to discovery 'equal' to the discovery of complaint counsel."¹⁰ ALJ Timony, interpreting the

it is the "usual fact" that at least some of the complaint counsel likely would have worked on the investigation giving rise to the complaint).

⁹ *Arco* Statement at pp. 51-52 (footnote omitted).

¹⁰ *Standard Oil Co. v. FTC*, 475 F. Supp. 1261, 1275 (N.D. Ind.1979). See also *The Sperry and Hutchinson Co. v. FTC*, 256 F. Supp. 136, 144 (S.D.N.Y.1966) ("It is true that the Commission has had facilities for investigation not available to a private litigant, as is customarily the case with Government agencies . . . [but to] hold . . . that a respondent is therefore entitled to what appears tantamount to a complete disclosure of the Commission's files

Commission's *Arco* Statement in *Exxon Corporation*, reached this same conclusion: "I do not read the Commission's [*Arco*] statement as requiring respondents' access to all materials which complaint counsel have examined with the Commission."¹¹

Further, contrary to what *Andrx* asserts in its May 30th motion, complaint counsel's access to the FTC's investigative file does not waive complaint counsel's right to assert any and all applicable privileges for those materials. This too is spelled out by the Commission in the *Arco* Statement:

[T]he apparent constitutional principle we are asked to consider is that a respondent in a Commission adjudicative proceeding is entitled as a matter of due process to be aware of all evidence, information, leads, etc. to which opposing Commission counsel have access. But any such right is squarely in conflict with a number of well-established limitations on a litigant's right to such knowledge which have not been thought to raise due process problems. For example, the principles underlying the work-product doctrine and the attorney-client and other privileges, for reasons reflecting sound public policy, limit a litigant's right to be aware of what opposing counsel may know.¹²

Finally, as ALJ Timony observed in quashing a subpoena designed to circumvent the FTC's legitimate claims of privilege, to deny complaint counsel the right to assert all legitimate

would be to fashion a new rule in administrative proceedings of very wide implications which would not be in the public interest. No authority has been cited to me which approves such a rule and I have found none.")

¹¹ *Exxon Corporation*, FTC Dkt. No. 8934, 1980 FTC LEXIS 121, *7 (February 8, 1980).

¹² *Arco* Statement at 25 (footnote omitted). See also *Standard Oil*, 475 F. Supp. at 1275 ("There are a number of well-established limitations on a litigant's discovery rights that have not been thought to offend due process. For example, the principle underlying the work-product doctrine and the attorney-client privilege and other privileges")

privileges to protect the wholesale disclosure of the FTC's investigative files "would seriously interfere with the free flow of ideas and information at the Commission."¹³

C. Given that Andrx already possesses all non-privileged materials from the FTC's investigative file, allowing Andrx access to anything more at this time would be improper and unjustified

"The precise contours of discovery of the Commission which respondents will be afforded . . . cannot be defined until actual issues of privilege are presented."¹⁴ Andrx's May 30th motion present no such "actual issues" of privilege. Moreover, to overcome any of the FTC's privileges, Andrx must make a showing of need and unavailability.¹⁵ But, instead of even attempting to make such a showing, Andrx complains only that the FTC staff has had an unfair "head start" in discovery. Andrx's tired refrain ignores the reality that most of the factual evidence to be presented in this case comes out of respondents' own files and from its own employees. Andrx also conveniently ignores the fact that it has been substantially involved for more than two years defending, before the Commission and in courts around the country, the same stipulation and agreement which forms the basis of the antitrust charges here. For years, Andrx and Hoechst have been marshaling factual evidence and developing legal theories to try (unsuccessfully) to convince a fact finder that their conduct does not run afoul of the antitrust laws. Indeed, the Hoechst-Andrx agreement already has been the subject of a number of judicial opinions, including the recent decision by the U.S. District Court for the Eastern District of

¹³ *Flowers Industries*, FTC Dkt. No. 9148, p. 2 (Order Granting, In Part, Motion to Quash Subpoena) (September 11, 1981) (ALJ Timony).

¹⁴ *Exxon* at *6.

¹⁵ *Flowers* at 1.

Michigan finding that the Hoechst-Andrx agreement to allocate markets “constitutes a restraint of trade that has long been held to be illegal *per se* under established Supreme Court precedent.”¹⁶

Finally, Andrx already has made clear (in its various responses to complaint counsel’s motion to strike certain affirmative defenses) the real reason it seeks access to the FTC’s privileged, internal materials: Andrx wishes to challenge the Commission’s reason to believe that a violation of the law has occurred. But, as ALJ Timony recognized in granting a motion to quash a respondent’s subpoena seeking discovery intended to challenge the Commission’s reason to believe: “This is an issue committed to agency discretion which will not be judicially reviewed.”¹⁷

For all of these reasons, part one of Andrx’s May 30th motion -- seeking to circumvent the FTC’s legitimate and well-recognized privileges -- should be denied.

II. Complaint Counsel Has Not Violated Any Confidentiality Restrictions or the Protective Order Entered in this Case

In part two of its May 30th motion, Andrx argues that complaint counsel has recently violated statutory confidentiality restrictions and the protective order by providing third parties with an FTC staff letter setting forth Andrx’s right to purchase the investigational hearing transcripts of its employees and agents taken during the investigation. Complaint counsel has

¹⁶ See *In re Cardizem Antitrust Litigation*, MDL No. 1278, slip op at 1 (E.D. Mich. June 6, 2000) (Memorandum Opinion and Order Granting Plaintiffs’ Motions for Partial Summary Judgment). See also *Biovail Corp. Int’l v. Hoechst*, 49 F. Supp. 2d 750 (D.N.J.1999), and *Andrx Pharmaceuticals, Inc. v. Friedman*, 83 F. Supp. 2d 179 (D.D.C. 2000).

¹⁷ *Flowers* at p. 3 (citing cases).

abided by, and will continue to abide by, all statutory rules governing confidentiality as well as the protective order entered in this case. Non-public information will be kept non-public.

The letter in question, a copy of which is included as attachment A, is the FTC's, not Andrx's. It was written by the FTC's investigative staff. It was not obtained by the Commission through compulsory process or in lieu thereof, nor does it contain any trade secrets or confidential commercial or financial information. Instead, the letter simply sets forth Andrx's right to purchase the investigational hearing transcripts of its employees that were taken during the investigation of this matter. In so doing, it identifies the employees and agents who appeared for investigational hearings.¹⁸

The information in the letter by and large already is in the public domain, or will shortly be made so:

- The fact of the FTC's investigation into the Hoechst-Andrx agreement has been known for more than a year, and certainly was known since the Commission issued the complaint, well before the FTC staff's letter was released.
- The fact that Andrx employees and agents appeared at investigational hearings was known well before the FTC staff's letter was released. In fact, Andrx acknowledged this in a May 11, 2000 memorandum of law in opposition to a motion to compel the production of the FTC investigational hearing transcripts, filed in the private litigation.¹⁹

¹⁸ In its motion, Andrx suggests that disclosure of the names "is contrary to the case law and even [complaint counsel's] own position in other adjudicative proceedings." (May 30th Motion at p.12.) The cases cited by Andrx involve claims by the FTC of the informant's privilege, a matter not at issue here.

¹⁹ See *In re Cardizem Antitrust Litigation*, MDL No. 1278 (E.D. Mich. filed May 11, 2000) (Andrx's Memorandum of Law in Opposition to Plaintiff's Motion to Compel the Production of Documents).

- The identity of Andrx's employees and agents is known, and all those deposed but one has been identified on one or more of the initial disclosures that were filed in this case well before the FTC staff's letter was released.
- Each of the Andrx employees and agents who appeared for an investigational hearing will soon appear on complaint counsel's preliminary witness list (to be filed on June 14; that is, in two days), and the fact that complaint counsel intends to rely on excerpts from each investigational hearing transcript will appear on complaint counsel's preliminary exhibit list to be filed later this year.

What Andrx fails to recognize in its May 30th motion is that things that may be confidential and non-public during an investigation may not remain so after a complaint issues and the adjudicative proceeding progresses. This is why we have protective orders. Thus, all of Andrx's references to FTC rules governing confidentiality during the pre-complaint phase no longer apply to the disclosure of the FTC staff letter at issue here.²⁰

Further, to the extent that the protective order entered in this matter is implicated at all, it should be noted that complaint counsel has made no claim of confidentiality or request for *in camera* treatment for this letter or any similar correspondence generated during the investigation. In fact, under the terms of the protective order, the letter would not be eligible for *in camera* treatment in this proceeding, even if such were sought. Moreover, Andrx recently has appended a number of similar FTC documents that were generated during the investigation to its motion for leave to file supplemental materials in its opposition to complaint counsel's motion to strike affirmative defenses.

The real reason Andrx may be upset that the FTC staff's letter was provided to a third party is because the letter contradicts representations regarding Andrx's right to access the

²⁰ Assuming *arguendo* that the FTC's pre-complaint confidentiality rules did apply to the disclosure of this letter, disclosure would not be prohibited under any exemptions to the Freedom of Information Act. See 5 U.S.C. § 552(b).

transcripts that Andrx made to a federal district court judge. In the private, federal multi-district litigation in Michigan, Andrx filed a memorandum of law on May 11, 2000 opposing plaintiffs' motion to compel the production of the FTC investigational hearing transcripts. In so doing, Andrx told the judge that "[s]ince the decision whether or not to release any transcripts is at the discretion of the FTC, it cannot be said that Andrx controls these depositions."²¹ The FTC letter, in contrast, makes clear that Andrx does control these transcripts because it has been permitted to acquire them since October 5, 1999.

III. An Order Prohibiting Complaint Counsel from Communicating with Third Parties Absent Andrx's Consent or this Court's Approval is Unwarranted and Unnecessary

As set forth above, no confidential, non-public information has been shared with third parties. Complaint counsel has abided by, and will continue to abide by, any and all statutory rules governing confidentiality as well as the protective order entered in this case. As the protective order entered in this matter is sufficient to protect Andrx's legitimate claims of confidentiality, no further supervision -- especially by Andrx -- is warranted or necessary.

* * * * *

²¹ See *In re Cardizem Antitrust Litigation*, MDL No. 1278, n.3 (E.D. Mich. filed May 11, 2000) (Andrx's Memorandum of Law in Opposition to Plaintiff's Motion to Compel the Production of Documents).

For all these reasons, Andrx's May 30th motion should be denied in all respects.

Respectfully Submitted,



Markus H. Meier

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: June 12, 2000

Attachment A



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

Bradley S. Albert

Direct Dial
202-326-3670

October 5, 1999

BY FAX ((212) 956 4068)

Louis M. Solomon
Solomon, Zauderer, Ellenhorn, Frischer, & Sharp
45 Rockefeller Plaza
New York, New York 10111

Re: Andrx Corporation and Hoechst Marion Roussel, File No. 981-0368

This letter constitutes authorization for Andrx Corporation and the parties below, or their attorney(s), to obtain the investigational hearing transcripts of Karen Rice (April 21, 1999), Angelo Malahias (April 21, 1999 and April 22, 1999), Randall Glover (April 27, 1999) Scott Lodin (April 27, 1999) and Louis Solomon (August 31, 1999) from For The Record, Inc., 603 Post Office Road, Suite 309, Waldorf, MD 20602 (phone: (301) 870 8025; fax: (301) 870 8333).

Pursuant to §§ 2.9 and 2.10 of the Commission's Rules of Practice, we request that, within thirty (30) days of receiving the transcript, you have the testifying party review it, make any necessary correction, state the reason for each correction, and sign and return to us the corrected version of the transcript.

Thank you for your cooperation in this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Bradley S. Albert by BSM".

Bradley S. Albert

Attorney

Healthcare Services and Products Division

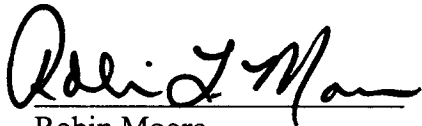
CERTIFICATE OF SERVICE

I, Robin Moore, hereby certify that on June 12, 2000, I caused a copy of the Complaint Counsel's Memorandum in Opposition to Andrx's May 30th Motion to be served upon the following persons via facsimile and overnight delivery.

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Robin Moore
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