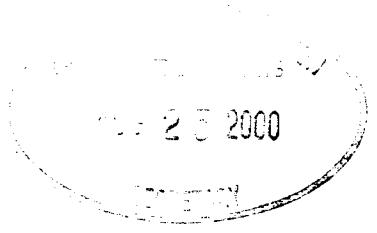


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



\_\_\_\_\_)  
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

**ORDER ON COMPLAINT COUNSEL'S MOTION  
TO COMPEL ANDRX TO PRODUCE DOCUMENTS**

**I.**

Complaint Counsel filed its Motion to Compel Discovery from Respondent Andrx Corporation ("Andrx") on July 7, 2000. Andrx filed its opposition on July 25, 2000. Oral arguments of counsel were heard on August 3, 2000. After the August 3, 2000 hearing, the parties submitted letters indicating areas where they had reached agreement on disputed issues.

Complaint Counsel's motion originally sought to compel production of documents responsive to Request Numbers 3, 5, 7, 8, 12, 16 and 17. By letter dated August 7, 2000, Complaint Counsel informed the Court that, based on its understanding of Andrx's commitment to produce documents responsive to specifications 5, 7 and 8, Complaint Counsel agreed to withdraw its motion with respect to specifications 5, 7 and 8. Because the parties were unable to resolve their differences, Complaint Counsel asked the Court to compel Andrx to produce documents responsive to specifications 3, 12, 16 and 17.

Andrx's opposition argues that Complaint Counsel's motion should be denied, first, because the motion was not filed within the time frame established by the Scheduling Order entered in this case on April 26, 2000 ("Scheduling Order"); and second, because the requests ask for information that is irrelevant and for information that Complaint Counsel has been unwilling to provide to Andrx.

For the reasons set forth below, Complaint Counsel's Motion to Compel is GRANTED in part and DENIED in part.

## II.

On May 3, 2000, Complaint Counsel issued to Andrx its First Request for Production of Documents and Things Issued to Andrx Corporation ("First Request"). Andrx served its Response to Complaint Counsel's First Request for Production of Documents ("Response to Document Request") on June 1, 2000.

The Commission's Rules do not impose a deadline for serving objections to document requests, but state that a party making a request for production of documents shall specify a reasonable time for production. 16 C.F.R. § 3.37(a). The Scheduling Order requires the parties to provide responses or objections within 20 days of service of requests and Complaint Counsel's First Request instructed Andrx to produce documents within 20 days. By serving its Response to Document Request on June 1, 2000, Andrx failed to comply with the requirements of the Scheduling Order.

The Commission's Rules do not establish a deadline for filing motions to compel responses to discovery requests, but state that "[i]f a party fails to respond to or comply as requested with a request for production . . . , the discovering party may move for an order to compel production . . ." 16 C.F.R. § 3.38(a)(2). The Scheduling Order requires the parties to file motions to compel responses to discovery requested within 5 days of impasse and 20 days after service of the responses and/or objections to the discovery requests.

Andrx's Response to Document Request and Complaint Counsel's Motion to Compel were both filed outside the time frames established by the Scheduling Order. The parties are required to comply with the Scheduling Order, unless otherwise authorized by the Administrative Law Judge. However, fairness dictates that if Andrx has not waived its right to file objections, then Complaint Counsel has not waived its right to file a motion to compel. Accordingly, Complaint Counsel's motion will not be denied on grounds that it was not filed within the required time frame.

## III.

### A. Specification 3

Specification 3 requests minutes from Andrx meetings relating to its generic version of Cardizem CD from January 1, 1995 to the present time. Complaint Counsel represents that Andrx has agreed to provide only certain Board of Director meeting minutes from September 1997 through approximately June 1999. Complaint Counsel asserts Andrx has refused to provide all other responsive information, including: (1) Board of Director meeting minutes after June 1999; and (2) any minutes or notes from non-Board of Director meetings.

Andrx responds that Complaint Counsel is not entitled to Board of Director meetings beyond June 1999 because they are not relevant and that Complaint Counsel is not entitled to non-Board of Director meeting minutes or notes because Complaint Counsel did not seek them in their meet and confer sessions.

There is no reasonable basis for producing meeting minutes only through June 1999. Andrx has made its meeting minutes after June 1999 relevant through the defenses raised in its Answer and its proposed testimony. Andrx is hereby ordered to produce all nonprivileged minutes or notes from Board of Director meetings and from non-Board of Director meetings that relate to Andrx's generic version of Cardizem CD to the present time. Privileged information may be redacted. Since Complaint Counsel's First Request instructs Andrx to prepare a privilege log, Andrx must produce a privilege log for any documents withheld or redacted.

#### **B. Specification 12**

Complaint Counsel's motion asserts that Specification 12 requests Andrx's marketing, business, and strategic plans related to Cartia XT. Complaint Counsel represents that Andrx has agreed to produce documents responsive to Specification 12 for the time period up to the execution of the Termination Agreement. Complaint Counsel seeks to require Andrx to produce documents responsive to this specification through the present time.

Andrx responds that Specification 12 is overbroad, because, read literally, it would call for the production of millions of pages of clearly irrelevant documents. Andrx represents that during the various meet-and-confer conversations, Andrx offered and Complaint Counsel agreed to accept Andrx's production of documents sufficient to identify the pricing of Cartia XT as well as production of invoices, in machine readable form, for one week in December 1999 and one week in January 2000.

There is no reasonable basis for cutting off discovery of marketing, business, and strategic plans at the date of the execution of the Termination Agreement. Marketing, business, and strategic plans relating to Cartia XT are relevant to the allegations of the Complaint and to the defenses asserted in Andrx's Answer. However, as written, Specification 12 is overbroad. Andrx is hereby ordered to produce all nonprivileged marketing, business, and strategic plans relating to Cartia XT to the present time. Privileged information may be redacted.

#### **C. Specifications 16 and 17**

Specification 16 requests any settlement of any patent infringement action to which Andrx is or was a party, drafts of such settlements and any communications relating to such settlements. Specification 17 requests any licensing agreement or joint development agreement to which Andrx is or was a party.

Andrx has refused to produce responsive documents, asserting that it will do so only if Complaint Counsel agrees to produce other settlement agreements relating to patent litigation involving innovator and generic pharmaceutical companies that have come into the Commission's possession.


There is no legal basis for Andrx to make production of its documents contingent upon Complaint Counsel's production of documents. *In re Folding Carton Antitrust Litig.*, 76 F.R.D. 420, 427 (N.D. Ill. 1977) (ordering defendants to produce financial documents and rejecting argument that defendants would produce financial documents to plaintiffs only if plaintiffs produced analogous documents). See also *United States v. International Business Machines*, 453 F. Supp. 692, 693 (S.D.N.Y. 1978) ("The court considers defendant's quid pro quo argument to be without merit.").

Andrx is hereby ordered to produce any settlement of any patent infringement action to which Andrx is or was a party. However, Andrx will not be compelled to produce drafts of such settlements or any communications relating to such settlements. Andrx is further ordered to produce any licensing agreement or joint development agreement to which Andrx is or was a party. Andrx may redact any privileged information.

#### IV.

Andrx is hereby ORDERED to produce non-privileged documents as described in this Order as soon as practicable. Because Complaint Counsel's First Request instructs Andrx to prepare a privilege log, Andrx shall produce a privilege log for any documents withheld or redacted.

ORDERED:

  
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D. Michael Chappell  
Administrative Law Judge

Date: August 23, 2000