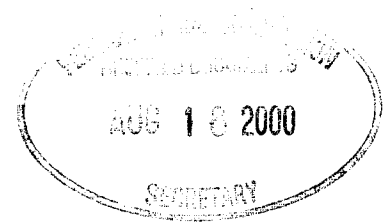


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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 RESPONDENT ANDRX'S MOTION TO COMPEL
COMPLAINT COUNSEL TO RESPOND TO INTERROGATORIES**

I.

On June 5, 2000, pursuant to Commission Rule 3.36, Respondent Andrx Corporation ("Andrx") filed a motion for an order compelling Complaint Counsel to respond to interrogatories. Complaint Counsel filed its opposition on June 19, 2000. Oral arguments of counsel were heard on August 3, 2000. For the reasons set forth below, Respondent's motion is DENIED except as stated herein.

Andrx seeks an order requiring Complaint Counsel to: (1) provide more complete responses to sixteen contention interrogatories (numbers 1, 3, 7 - 20), or in the alternative, be precluded from proceeding at trial on any bases beyond those set forth in the answers; (2) respond to interrogatories relating to agreements in other patent litigations (numbers 5 and 6); and (3) explain the Commission's reason to believe that this proceeding is in the interest of the public (number 4).

II.

Andrx asserts that Complaint Counsel's responses to Interrogatory Numbers 1, 3, 7 - 20 are incomplete and couched with language reserving the right to modify its contentions at some later point. Complaint Counsel's responses to Andrx's contention interrogatories are adequate at this stage of the litigation. Andrx's request for an order precluding Complaint Counsel from proceeding at trial on bases either inconsistent with or in addition to those set forth in its interrogatory answers is denied. However, Complaint Counsel is ordered to supplement its responses to these interrogatories as soon as it has any information inconsistent with, or in addition to, its previous responses, and no later than October 2, 2000. All parties are reminded of their duty to seasonably amend prior responses to interrogatories, requests for production or requests for admission, pursuant to Rule 3.31(e). 16 C.F.R. § 3.31(e). Parties shall not wait until the close of discovery to make supplemental responses.

III.

Interrogatory No. 5 asks Complaint Counsel to identify other settlements or partial settlements of patent litigation, of which the FTC is aware, involving an innovator or brand-name pharmaceutical company and a generic company that involved any form of: payment from a brand-name company to the generic company; or licensing and/or royalty arrangement between the brand-name company and the generic company.

The existence of other nonpublic FTC investigations into any such settlement agreements is shielded from discovery under the work product privilege, the investigatory files privilege, and the deliberative process privilege. *See* Order on Motions to Compel Discovery from Complaint Counsel Filed by Andrx and by Aventis, Docket 9293, issued August 18, 2000. These qualified privileges may be overcome by a demonstration of substantial need. *Id.* Andrx has not made the requisite showing at this stage of the litigation since Andrx may discover such agreements or information from sources other than from the FTC's confidential files. *Seeburg Corp.*, 70 F.T.C. 1809, 1812-13 (Oct. 25, 1966).

Complaint Counsel will not be compelled to answer Interrogatory No. 5. However, if Complaint Counsel intends to use any such agreement in the prosecution of this case or if any such agreement has been relied upon or reviewed by a testifying expert for Complaint Counsel, Complaint Counsel must disclose the existence of any such agreement by providing the names of all parties thereto. *See Dura Lube Corp.*, 2000 FTC LEXIS 1, *18-19 (Dec. 15, 1999).

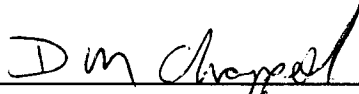
Interrogatory No. 6 asks Complaint Counsel to describe each basis for concluding whether or not any settlement identified in Interrogatory No. 5 is or was an unfair method of competition or unfair or deceptive act or practice in or affecting commerce. This interrogatory

inquires into the mental processes of attorneys and thus seeks privileged information. *Kroger Co.*, 1977 FTC LEXIS 55, *3-4 (October 27, 1977) (The Commission's or its staff's views, policy considerations, analyses, interpretations or evaluations are privileged work products not generally subject to pretrial discovery except in cases where good cause or special need therefor is established.). See also Order on Motions to Compel Discovery from Complaint Counsel filed by Andrx and by Aventis, Docket No. 9293, issued August 18, 2000. Accordingly, Complaint Counsel will not be compelled to answer Interrogatory No. 6.

IV.

Interrogatory No. 4, relating to the Commission's reason to believe that this proceeding is in the public interest, is outside the scope of discovery. *Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974). Andrx has not shown the compelling circumstances required to gain access to the Commission's deliberations. *Chock Full O' Nuts Corp., Inc.*, 82 F.T.C. 747, 748 (1973). Accordingly, Complaint Counsel will not be compelled to respond to this interrogatory.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: August 18, 2000