

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

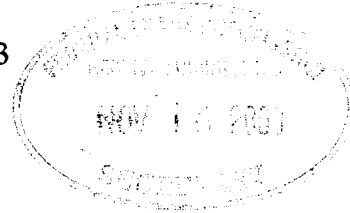
HOECHST MARION ROUSSEL, INC.,
a corporation,

CARDERM CAPITAL L.P.,
a limited partnership,

and

ANDRX CORPORATION,
a corporation.

Docket No. 9293



**MOTION *IN LIMINE* TO PRECLUDE SELECTED TESTIMONY
BY SCOTT LODIN**

Complaint counsel moves for an order precluding selected testimony by Andrx Corporation witness Scott Lodin. The bases of this motion and the terms of the relief sought are set forth in the accompanying Memorandum in Support of Complaint Counsel's Motion to Preclude Selected Testimony by Scott Lodin.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Markus H. Meier".

Markus H. Meier
Geoffrey D. Oliver
Jon M. Steiger

Counsel Supporting the Complaint

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

Dated: November 16, 2000

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**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S
MOTION *IN LIMINE* TO PRECLUDE
SELECTED TESTIMONY BY SCOTT LODIN**

Respondent Andrx Corporation (Andrx) repeatedly has blocked discovery of certain issues it affirmatively has raised in its defense of this litigation. Andrx has withheld discovery of the only evidence on these issues – oral and written communications among in-house and outside counsel – by claiming the attorney-client privilege and work-product protection. At the same time, Andrx proposes to offer evidence on these very issues. Andrx's counsel – Mr. Scott Lodin, General Counsel of Andrx, and Mr. Louis Solomon, outside counsel representing Andrx in the negotiation of the agreement at issue in this litigation – testify whenever it is in Andrx's interest to do so, but assert privilege and refuse to testify when complaint counsel seeks to test the bases of their testimony. Andrx cannot have it both ways. Andrx's approach severely prejudices complaint counsel by prohibiting probing on certain points central to Andrx's defenses. Having chosen to assert privileges against discovery, Andrx must abide by the just consequences of that

decision. Andrx should be prohibited from presenting the testimony of Mr. Lodin¹ on those issues it has shielded from discovery: 1) Andrx's belief as to Hoechst's likelihood of success had it filed a motion for a preliminary injunction; 2) whether or not Andrx had reasonable alternatives to entering into the Stipulation and Agreement in its final form; and 3) the effects of the second and third sentences of Paragraph 2(A) of the Stipulation and Agreement.

Complaint counsel alleges that Andrx entered into an agreement (the "Stipulation and Agreement") with respondent Hoechst Marion Roussel, Inc., that, at the time it was entered into, was likely to restrain competition significantly by reducing the incentive of Andrx to (1) introduce to market its FDA-approved generic version of Cardizem CD, (2) introduce to market any other generic version of Cardizem CD, without regard to whether it arguably infringed any of Hoechst's patents, and (3) relinquish its right to a period of exclusivity in order to permit any other FDA-approved manufacturer to introduce to market its generic version of Cardizem CD.

Andrx admits that it entered into the Stipulation and Agreement, but asserts that the agreement was not anticompetitive because, *inter alia*, Andrx's intent in entering into the agreement was to achieve certain legitimate business objectives. Specifically, Andrx asserts that it intended the Stipulation and Agreement as a whole to settle the preliminary injunction portion of a pending patent infringement lawsuit, Andrx Answer, ¶¶ 22, 45 (April 13, 2000); Andrx Statement of the Case at 3 (Sept. 13, 2000), even though no motion for a preliminary injunction was pending at the time. Mr. Lodin also asserts that the purpose of the Stipulation and Agreement was to mitigate the risk of going to market in the face of potential liability for patent

¹ While justice also requires preclusion of the testimony of Mr. Solomon, such an order appears to be unnecessary because Andrx has not designated him as a witness at trial. Complaint counsel reserves the right to seek preclusion if Mr. Solomon decides to testify at trial.

infringement, Lodin Dep. Tr., pp. 27, line 15 to 28, line 16 (Oct. 31, 2000), even though Andrx now claims that it had decided not to enter until after final resolution of the patent infringement litigation. In fact, it appears that, in addition to trying to obtain a license following the final resolution of the patent infringement litigation, Andrx's purpose at the time it entered into the Stipulation and Agreement was simply to collect money in exchange for agreeing to stay off the market.²

Perhaps for that reason, Andrx repeatedly has refused to reveal certain contemporaneous discussions of the primary drafters and negotiators of the Stipulation and Agreement that would reveal their true purposes and intentions in negotiating and signing the agreement. Mr. Lodin – Andrx's General Counsel and primary fact witness concerning the creation of the Stipulation and Agreement – claims that the Stipulation and Agreement had purely innocent purposes. However, when questioned about certain contemporary conversations or written communications that would either confirm or disprove his assertions, Mr. Lodin removes his businessman-witness hat, puts on his lawyer hat, and claims privilege. By asserting privilege for selected conversations and written communications regarding the purposes of the Stipulation and Agreement and the alternatives available, Andrx has blocked complaint counsel's efforts to test the truthfulness of Mr. Lodin's testimony on particular matters.

What was Andrx's evaluation of whether its product infringed a valid Hoechst patent? Did Andrx think that Hoechst would have had any realistic chance of prevailing if it had filed a motion for a preliminary injunction? Did Andrx consider simply litigating the preliminary

² Andrx's conduct was unlawful even if it subsequently used a portion of that money for purposes it believes to be procompetitive, as it now asserts. *See In re Cardizem Antitrust Litigation*, 105 F. Supp. 2d 682, 685 (E.D. Mich. 2000).

injunction issue? Andrx and Messrs. Lodin and Solomon claim privilege and withhold relevant documentary evidence. Did Andrx have any less restrictive alternatives to the Stipulation and Agreement available? For example, why did Andrx insist on set payments of \$10 million per quarter, rather than simply assessing damages (if any) after the fact? Neither Mr. Lodin nor Mr. Solomon will reveal whether he discussed any alternatives. Were the specific provisions of the Stipulation and Agreement necessary to achieving Andrx's basic purpose? Messrs. Lodin and Solomon refuse to disclose what they discussed at the time.

Andrx's privilege claims not only obstruct complaint counsel's discovery of information necessary for the cross-examination of Mr. Lodin, but also serve to prevent this Court from being able to evaluate the veracity of Andrx's asserted defenses. It would be patently unfair to allow Andrx to block any examination of the underlying evidence on the issues listed above and then to present self-serving argument and selective testimony on these same issues. Having deliberately chosen to assert privilege to prevent full discovery of contemporaneous evidence on certain of its defenses, Andrx should be precluded from presenting the untestable "testimony" of Mr. Lodin concerning those issues.

Argument

A. A Party That Blocks Discovery Into a Matter Cannot Thereafter Itself Assert the Matter As An Affirmative Defense

Courts have routinely held that a party cannot assert legal privileges to frustrate discovery into a matter and then affirmatively place that matter at issue in the litigation. A party must choose between asserting privilege and keeping the matter secret, on the one hand, and offering a

claim or defense, thereby opening the matter up to discovery, on the other. “It would be grossly unfair to allow the defendant to produce certain selected documents which it feels support its defense while withholding from the plaintiff possibly damaging communications which tend to disprove the defendant’s theory.” *FMT Corporation, Inc. v. Nissei ASB Co.*, No. 1: 90-cv-786-GET, 1992 U.S. Dist. LEXIS 21500, at * 7-8 (N.D. Ga. June 10, 1992) (citing cases).

The attorney-client privilege is intended to promote freedom of consultation between a client and his or her legal advisors by removing any fear that the legal advisors subsequently may be compelled to reveal the content of such consultations. See *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). However, “the privilege was intended as a shield, not a sword.”³ *Int’l Tel. & Tel. v. United Tel. Co. of Florida*, 60 F.R.D. 177, 185 (M.D. Fla. 1973). Where a party claims to have a defense based on evidence that is privileged, the party must choose either to waive its claim of privilege or to forgo asserting the matter in litigation. See *Belmont Textile Machinery Co. v. Superba*, 48 F. Supp. 2d 521, 523 (W.D.N.C. 1999) (defendant asserting an advice-of-counsel defense in patent litigation “must either (1) rely on such advice as a defense and thereby waive the attorney-client privilege as to the entire subject area or (2) relinquish the advice-of-counsel defense”) (citing *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991)).

Once a party chooses to shield a matter from inquiry pursuant to a privilege, that party is barred from subsequently introducing evidence on that matter. See *Mobil Oil Corp. v. Amoco*

³ Judges have taken the same position regarding work-product protection. See, e.g., Order Denying Motion *in Limine* or For a Protective Order, *Motor Up Corp.*, Dkt. 9291, 1999 FTC LEXIS 207 at * 7 (Aug. 5, 1999) (work-product doctrine cannot be used “as both a sword and shield”) (quoting *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 704 (10th Cir. 1998)).

Chemicals Corp., 779 F. Supp. 1429, 1485 n. 43 (D. Del. 1991) (“Amoco’s failure to clearly waive the privilege before the close of discovery prevented Mobil from taking any appropriate discovery regarding the [attorneys’] opinions The Court will grant Mobil’s motion *in limine* and will not consider the contents of the opinions in deciding the willfulness issue.”); *see also Int’l Tel. & Tel.*, 60 F.R.D. at 186 (“[T]he failure of a party to allow pre-trial discovery of confidential matter which that party intends to introduce at trial will preclude the introduction of that evidence.”) (citing Fed. R. Civ. P. 37(b)(2)(B)).

Even if the proposed testimony itself does not directly refer to privileged evidence, a defendant must choose between introducing testimony and asserting privilege if cross-examination of the testifying witness must fairly intrude on privileged matters. In *Bilzerian*, for example, the criminal defendant sought a ruling that he could testify regarding his belief in the lawfulness of his actions – without asserting a reliance on counsel defense or actually introducing the content or existence of privileged communications – and not be subjected to cross-examination on relevant privileged communications that he had with his attorney. *See* 926 F.2d at 1291.

The Court of Appeals for the Second Circuit affirmed the trial court’s refusal to permit the defendant to both offer his proposed testimony and assert privilege for related communications. The court of appeals held that when privileged communications are “directly relevant” to an opponent’s testing of issues affirmatively raised by a party, fairness prohibits allowing the party to both testify regarding those issues and use the attorney-client privilege to block discovery of those communications. *Id.* at 1292. *See also Pereira v. United Jersey Bank*, Nos. 94 Civ. 1565 (LAP) and 94 Civ. 1844 (LAP), 1997 WL 773716, at * 3 (S.D.N.Y. Dec. 11,

1997) (summarizing Second Circuit law as holding that a party cannot assert both a privilege and “a position ‘the truth of which can only be assessed by examination of the privileged communication’”). Thus, even if a party’s proposed testimony does not directly incorporate privileged information, “[a] defendant may not use the privilege to prejudice his opponent’s case” and still expect to testify freely. *Bilzerian*, 926 F.2d at 1292. See also *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (citing *Bilzerian*).

B. Andrx Deliberately Relies Upon Legal Privileges to Frustrate Discovery Into Their Affirmative Defenses

Andrx’s invocation of legal privileges has frustrated discovery into issues raised by Andrx itself in this case and has denied complaint counsel and Your Honor access to evidence crucial to test certain Andrx assertions. Apart from the drafts of the Stipulation and Agreement itself, Andrx has produced no contemporaneous documentary evidence regarding its purposes and justifications for entering into the Stipulation and Agreement as written. Complaint counsel therefore has questioned the relevant witnesses – Andrx’s General Counsel, Mr. Lodin, and outside counsel, Mr. Solomon – regarding contemporaneous conversations and other evidence relating to Andrx’s intent and purposes. These witnesses, however, have refused to answer questions on three categories of information relevant to why Andrx agreed to the Stipulation and Agreement as written: 1) Andrx’s belief as to Hoechst’s likelihood of success had it filed a motion for a preliminary injunction; 2) whether or not Andrx had reasonable alternatives to entering into the Stipulation and Agreement in its final form; and 3) the effects of the second and third sentences of Paragraph 2(A) of the Stipulation and Agreement.

Andrx asserts in this litigation that its purposes in entering into the Stipulation and Agreement were to mitigate the risks of going to market despite the ongoing patent infringement lawsuit, to reduce litigation costs, and to obtain a license.⁴ Andrx also makes various inconsistent assertions about whether each of the specific provisions of the agreement was individually necessary to achieve the purposes of the agreement and the Hatch-Waxman Act.⁵ Andrx thereby places at issue its assessment of the risks of a preliminary injunction, the various options available to it – legal and otherwise – and the import of certain provisions of the Stipulation and Agreement. Specifically, Andrx’s position is based on a series of statements and inferences, many of which are internally inconsistent:

- Andrx would not have entered the market before resolution of the patent infringement suit;
- Hoechst nevertheless would have sought a court-ordered preliminary injunction in the absence of the Stipulation and Agreement;
- the court might have decided that Hoechst was likely to prevail on the merits of its patent infringement suit and that precluding Andrx from entering the market would be in the public interest;
- Andrx was in substantial need of funds (although it claims it would not have entered the market to earn revenue);

⁴ Andrx Answer, ¶ 45 (“As a direct result of signing the Stipulation, the parties avoided significant and otherwise unavoidable risks of proceeding with a motion for preliminary injunction and reduced their transaction and litigation costs”); Andrx Statement of the Case at 3 (the Stipulation and Agreement “was equivalent to a stipulated preliminary injunction”); Lodin Dep. Tr., pp. 23, line 23 to 24, line 12.

⁵ Compare Andrx Statement of the Case at 9 (“the provisions in the Stipulation being challenged are . . . independently necessary to implement the Congressional intent in passing the Hatch-Waxman Act”) with Lodin Dep. Tr., pp. 130, line 22 to 131, line 5 (Nov. 1, 2000) (evaluating the challenged Stipulation and Agreement provisions “in the context of this full agreement” and “with the licenses and all of the other provisions”).

- Andrx had available no less restrictive alternatives than the Stipulation and Agreement as drafted;
- the Stipulation and Agreement was no more restrictive of competition than a court-ordered preliminary injunction;
- entering into the Stipulation and Agreement involved considerable cost-savings and other efficiencies; and
- those cost savings and efficiencies benefitted consumers.

The primary, if not the sole, evidence on certain of these issues consists of contemporaneous conversations and written communications among Mr. Lodin, Mr. Solomon, and Andrx patent counsel.⁶ Mr. Lodin, however, is the only witness that Andrx expects to call to testify about its purpose and intent in entering into the Stipulation and Agreement.⁷ Andrx Revised Witness List (Nov. 2, 2000).

Mr. Lodin states that he is the Andrx representative most knowledgeable about the purpose of the Stipulation and Agreement. Lodin Dep. Tr., p. 10, lines 10-14. In the time period leading up to the Stipulation and Agreement, he claims to have been greatly concerned with issues such as mitigating the risks to Andrx of going to market with a generic version of Cardizem CD in the face of potential liability for patent infringement. *Id.*, pp. 27, line 15 to 28, line 16. If this is so, Mr. Lodin must have considered at great length Andrx's likely chances of prevailing in the patent litigation; Andrx's prospects for success if it litigated a preliminary

⁶ Mr. Solomon testified that he and Mr. Lodin drafted the Stipulation and Agreement on behalf of Andrx, and that patent counsel was also involved in the negotiations. Solomon Inv. Hrg., p. 16, lines 14-21, and p. 22, lines 3-15 (Aug. 31, 1999).

⁷ Andrx also lists an unnamed witness from respondent Hoechst Marion Roussel, Inc., as testifying about the purpose and intent of the Stipulation and Agreement. Andrx Revised Witness List at 3-4.

injunction motion against Hoechst; the various alternatives to a preliminary injunction available to Andrx; and the relative benefits, costs and other disadvantages of agreeing to the Stipulation and Agreement as entered. If Mr. Lodin is to be believed, he would have discussed these issues at length with Mr. Solomon, patent counsel, and others. Indeed, these conversations and written communications would have formed the basis for Andrx's decision to enter into the Stipulation and Agreement. Most importantly, these are the conversations and written communications in which Andrx would have discussed and determined what provisions must be included in the Stipulation and Agreement in order to fulfill its purported goals.

These conversations and written communications are therefore crucial to testing Andrx's position regarding the existence of a legitimate business justification for the Stipulation and Agreement. Complaint counsel should be allowed to explore them fully. However, as discussed below, Andrx has repeatedly concealed precisely these communications to the extent they concern the following issues.

- Did Andrx think Hoechst would have been successful had it filed a motion for preliminary injunction?

Andrx defends the Stipulation and Agreement as being no more restrictive of competition than a preliminary injunction. Andrx Statement of the Case at 3. Of course, this assertion is only relevant if Andrx believed that the court would have granted a preliminary injunction; *i.e.*, that the court would have ruled that Hoechst's '584 patent was likely to be found valid, that Andrx's product was likely to be found to infringe, and that the public interest favored enjoining Andrx from entering the market. However, Andrx had at least two opinions of patent counsel apparently concluding that the Andrx product did not infringe the '584 patent. Lodin Inv. Hrg.,

pp. 39, line 1 to 40, line 16 (April 27, 1999); *see also* Answers to Questions Concerning Press Release, Bates Nos. 9683-9684. Mr. Lodin has stated Andrx has no intention of disclosing the contents of these letters, Lodin Inv. Hrg., p. 42, lines 2-4, and Andrx has in fact not produced them.

When Mr. Lodin was asked general questions about whether Andrx believed its product infringed the '584 patent, Mr. Solomon – Andrx's outside counsel in this litigation and in negotiating the Stipulation and Agreement – instructed Mr. Lodin not to disclose “any substance of the legal advice you gave the client or that was given to you to give to the client or was given by a patent counsel to the client.” Lodin Inv. Hrg., p. 39, lines 15-19. Mr. Solomon also claimed privilege as to whether or not Andrx believed at the time the Stipulation and Agreement was entered that its product infringed a valid Hoechst patent. Solomon Dep. Tr., pp. 45, line 5 to 45, line 4 (Nov. 15, 2000). Furthermore, Messrs. Lodin and Solomon refuse to testify with respect to conversations or written communications each had regarding the likelihood that Andrx would prevail if it chose to litigate a motion for a preliminary injunction. Lodin Dep. Tr., pp. 37, line 21 to 39, line 20; *see also* Solomon Dep. Tr., p. 54, lines 16-24; pp. 55, line 24 to 56, line 17.

- Did Andrx have any less restrictive alternatives available?

Andrx also states that it had no available alternative that was less restrictive than the Stipulation and Agreement. Andrx Statement of the Case at 9 (“there essentially is no other way to implement the purpose of the Hatch-Waxman Act”). Complaint counsel cannot test this assertion, however, because Mr. Lodin refuses to testify as to the substance of conversations or written communications he had with others regarding whether Andrx had other alternatives, such as simply waiting for and litigating a motion for a preliminary injunction. Lodin Dep. Tr., pp.

30, line 19 to 35, line 13. Likewise, Mr. Solomon refused to testify with respect to any alternatives that he discussed with Andrx representatives. Solomon Dep. Tr., p. 73, lines 9-25. For example, Mr. Solomon refused to testify as to contemporaneous discussions within Andrx about the purpose of receiving \$10 million quarterly interim payments from Hoechst under Stipulation and Agreement ¶ 4(A), rather than an after-the-fact assessment of damages. Solomon Dep. Tr., p. 64, lines 1-15.

- Were the specific provisions of the Stipulation and Agreement necessary to achieving Andrx's basic purpose?

Andrx asserts that the terms of the Stipulation and Agreement were necessary to satisfy their claimed procompetitive goals and the requirements of the Hatch-Waxman Act. Andrx Statement of the Case at 9. However, the overbreadth of the Stipulation and Agreement calls into question this assertion. The Stipulation and Agreement's deviation from Andrx's stated purposes is shown most clearly by the provisions, such as the second sentence of Paragraph 2(A), that include within the scope of the agreement not only Andrx's FDA-approved product, which was subject to Hoechst's claims of patent infringement, but also any "bioequivalent or generic version of Cardizem CD" (including a potentially non-infringing product). By requiring Andrx to forgo all future payments and to repay all amounts received from Hoechst if Andrx introduced any such product to the market, the Stipulation and Agreement, had it remained in effect, would have eliminated Andrx's incentive to market its reformulated version of its product. Neither Mr. Lodin nor Mr. Solomon were willing to testify as to contemporaneous discussions of the phrase "bioequivalent or generic version of Cardizem CD" that would allow testing of Andrx's position that this phrase was a necessary of the agreement. Lodin Dep. Tr., pp. 132, line 20 to 133, line

17; pp. 134, line 19 to 135, line 16; *see also* Solomon Dep. Tr., pp. 70, line 15 to 71, line 18.

Likewise, in the third sentence of Paragraph 2(A), the Stipulation and Agreement required Andrx to forgo all future payments and repay all amounts received from Hoechst in the event that it relinquished its right of exclusivity. Had the parties not abandoned the agreement after the FTC began questioning them about it, this provision would have eliminated any incentive of Andrx to enter into a deal with another generic manufacturer whereby Andrx would relinquish its right of exclusivity, thus permitting the other generic manufacturer to bring its product to market. Not surprisingly, Andrx has also refused to reveal the substance of any contemporaneous discussions about this provision, thereby preventing complaint counsel from probing the accuracy of Andrx's claim as to its necessity. Lodin Dep. Tr., p. 140, lines 20-24; *see also* Solomon Inv. Hrg., pp. 155, line 21 to 156, line 9.

C. Andrx Should Be Precluded from Offering Testimony by Scott Lodin on Certain Topics Related to Andrx's Asserted Business Justifications

A motion *in limine* is appropriate "to exclude anticipated prejudicial evidence before the evidence is actually offered." Order Denying Motion *in Limine* or For a Protective Order, *Motor Up Corp.*, Dkt. 9291, 1999 FTC LEXIS 207 at * 1 (Aug. 5, 1999) (quoting *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Testimony from Mr. Lodin on subjects regarding which Andrx has denied discovery would be prejudicial to complaint counsel because Andrx has blocked all of complaint counsel's attempts to obtain the underlying evidence necessary to test the proposed testimony. Andrx has raised as an affirmative defense the argument that the Stipulation and Agreement had a legitimate business purpose. *See supra* n. 4. Mr. Lodin and others are more than willing to claim, as fact witnesses, that the Stipulation and Agreement had a benign or

neutral purpose. But at the first probing questions or requests for documents from complaint counsel on these issues, Mr. Lodin and others put on their lawyer hats, assert privilege, and block discovery. Andrx has deliberately chosen to assert privilege on the issues identified above, knowing full well that complaint counsel would be prejudiced in its ability to test the accuracy and veracity of Andrx's arguments.

Whether Mr. Lodin's testimony will actually reveal privileged information is irrelevant. Mr. Lodin's refusals to provide information "directly relevant" to his expected testimony is unfair and prejudices complaint counsel. *Bilzerian*, 926 F.2d at 1292. Andrx chose to shield certain information relevant to Mr. Lodin's proposed testimony from discovery, it should therefore be barred from presenting testimony to which that information relates. *See Motor Up Corp.*, 1999 FTC LEXIS 207 at * 7-8 (holding respondents cannot maintain privilege over evidence that is at issue because defenses rely on information contained in evidence).

An order requiring Andrx to waive privilege and to produce documents and witnesses to testify with respect to these matters would not be appropriate and would not be sufficient to remedy the prejudice caused to complaint counsel. Counsel for Andrx are aware of the conflict between their claims of privilege and the arguments they seek to assert in litigation, and have made a deliberate decision to continue to assert privilege. At the hearing held in this matter on October 5, 2000, Mr. Meier asserted complaint counsel's position that respondents could not use privilege as both a sword and a shield, and that in order to permit Mr. Lodin (and any other counsel representing Andrx at the time of the negotiation of the Stipulation and Agreement) to testify as a fact witness with respect to the purposes and intentions in his mind during the negotiation of the Stipulation and Agreement, Andrx would have to waive privilege. Hearing

Transcript at 28-34. Despite having been put on full notice of complaint counsel's position, Andrx reasserted its claims of privilege in the subsequent depositions of Messrs. Lodin and Solomon.

At this late date, it is no longer an option to order Andrx to waive privilege. After discovery of other witnesses has already closed, after experts have completed and been deposed on their reports, and shortly before the start of trial, it is too late to wait for Andrx to produce relevant documents and then repeat the depositions of Mr. Lodin, Mr. Solomon, and any other relevant witnesses, and still expect complaint counsel to be able to make any meaningful use of contemporaneous evidence concerning Andrx's true purpose in negotiating and entering into the Stipulation and Agreement. *See Mobil Oil*, 779 F. Supp. at 1485 n. 43. Therefore, the only appropriate remedy at this time is to order Andrx to abide by the choice it has already knowingly made, and to preclude the introduction of evidence by Mr. Lodin with respect to issues on which he and others have asserted privilege to thwart discovery.

Conclusion

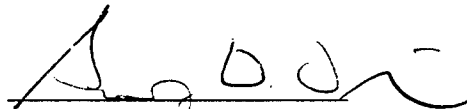
Andrx cannot have it both ways. The most basic principles of discovery hold that Andrx cannot deliberately, continuously block attempts to discover the factual basis for specific assertions, and then expect to be able affirmatively to raise those assertions during the course of litigation. Having chosen to rely on legal privileges repeatedly to deny all attempts at discovery of these issues over the course of the past 18 months, Andrx must now accept the consequences of its choice.

For the reasons set forth above, complaint counsel respectfully requests this Court to preclude Mr. Lodin from testifying with respect to the following issues, on which Andrx has denied discovery:

- Andrx's belief as to Hoechst's likelihood of success had it filed a motion for a preliminary injunction;
- whether or not Andrx had reasonable alternatives to entering into the Stipulation and Agreement; and
- the effects of the second and third sentences of Paragraph 2(A) of the Stipulation and Agreement.

Andrx has rendered Mr. Lodin's testimony on these issues untestable and it therefore should be precluded.

Respectfully Submitted,



Markus H. Meier
Geoffrey D. Oliver
Jon Miller Steiger

Counsel Supporting the Complaint

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

Dated: November 16, 2000

**UNITED STATES OF AMERICA
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a corporation.

Docket No. 9293

**ORDER GRANTING COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO
PRECLUDE SELECTED TESTIMONY BY SCOTT LODIN**

IT IS HEREBY ORDERED that complaint counsel's motion *in limine* to preclude selected testimony by Scott Lodin is GRANTED, and that Scott Lodin shall be PRECLUDED from offering testimony on the following issues:

- Andrx's belief as to Hoechst's likelihood of success had it filed a motion for a preliminary injunction;
- whether or not Andrx had reasonable alternatives to entering into the Stipulation and Agreement; and
- the effects of the second and third sentences of Paragraph 2(A) of the Stipulation and Agreement.

Dated: _____, 2000

D. Michael Chappell
Administrative Law Judge


CERTIFICATE OF SERVICE

I, Geoffrey D. Oliver, hereby certify that on November 16, 2000, I caused a copy of complaint counsel's Motion *in Limine* to Preclude Selected Testimony By Scott Lodin and supporting materials to be served upon the following persons via hand delivery or facsimile and overnight delivery.

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