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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'S MOTION TO PRECLUDE
COMPLAINT COUNSEL FROM INTRODUCING EVIDENCE OF CERTAIN
CONVERSATIONS BETWEEN RESPONDENTS AND FTC STAFF MEMBERS**

Pursuant to § 3.38 of the Federal Trade Commission's Procedures and Rules of Practice, 16 C.F.R. § 3.38, respondent Andrx Corporation respectfully requests that the Administrative Law Judge issue an order precluding Complaint Counsel from introducing evidence at trial concerning the subject matter of certain discussions between FTC staff members and Respondents in or around May and June of 1999.

The bases for this motion are set forth in the attached Memorandum of Law in Support of Motion to Preclude Complaint Counsel from Introducing Evidence of Certain Conversations Between FTC Staff Members and Respondents.

Dated: New York, New York
November 16, 2000

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,
FRISCHER & SHARP

By: Hal S. Shaftel

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Counsel for Respondent Andrx Corporation

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**RESPONDENT ANDRX'S MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO PRECLUDE COMPLAINT COUNSEL FROM
INTRODUCING EVIDENCE OF CERTAIN CONVERSATIONS
BETWEEN FTC STAFF MEMBERS AND RESPONDENTS**

Pursuant to § 3.38 of the Federal Trade Commission's Procedures and Rules of Practice, 16 C.F.R. § 3.38, respondent Andrx Corporation ("Andrx") respectfully submits this memorandum of law in support of its motion to preclude Complaint Counsel from introducing evidence at trial concerning the subject matter of certain alleged discussions between FTC staff members and respondents in or around May and June of 1999. The basis for this motion is Andrx's inability to obtain important discovery on that subject matter from Complaint Counsel.

Complaint Counsel has sought discovery from both respondents Andrx and Hoechst Marion Roussel, Inc. ("HMR") regarding conversations that respondents separately had with certain FTC staff members in or around May or June of 1999, during which issues concerning the investigation were discussed. See e.g., Complaint Counsel's First Requests For Admissions To Respondent Andrx Corporation, nos. 107-109, 112, (dated September 25, 2000); Complaint Counsel's First Request For Admissions To Respondent Hoechst Marion Roussel, Inc.

(dated September 25, 2000) Nos. 122 - 124; 6/8/99 Deposition of Edward Stratemeyer at (HMR's in-house General Counsel), pp. 249-53.

In light of Complaint Counsel's inquiries into these discussions, Andrx served Complaint Counsel with a notice of deposition calling for the depositions of the particular FTC staff members involved in the discussions.¹ In response, Complaint Counsel objected and refused to provide the discovery. Accordingly, Andrx thereafter filed a motion to compel the deposition testimony on October 24, 2000. Complaint Counsel filed its opposition on October 31, 2000, and on November 3, 2000, Andrx filed a motion for leave to file a supplemental submission in support of its motion to compel.

By order dated November 8, 2000 (the "November 8 Order"), this Court denied Andrx's motion to compel deposition testimony from the FTC staff members regarding the discussions with respondents. The Court did so on the grounds that the information sought is not "crucial to the preparation of the case." November 8 Order, at 2.

The November 8 Order is a discovery order and does not deal with the issue of evidence at trial. As made clear by § 3.31(c)(1) of the FTC Rules of Practice, 16 C.F.R. 3.31(c)(1), the standard for assessing the propriety of discovery is far broader than finding evidence admissible at trial: "Information may not be withheld from discovery on the grounds that the information will be inadmissible at the hearing." Thus, the fact that Complaint Counsel obtained discovery on certain discussions with respondents, while Andrx has not been permitted

¹ The FTC staff members on the call included Bradley Albert, Geoffrey Oliver, Robin Moore, Daniel Kotchen and Elizabeth Mullin, who were identified on the deposition notice.

to obtain parallel discovery from Complaint Counsel on the same topic, does not determine whether Complaint Counsel can introduce evidence at trial on the issue. If anything, the November 8 Order recognizes, by its terms, that it is not approving the use at trial of the information at issue, since the order states the information has not been shown as being "crucial to the preparation of the case." November 8 Order, at 2.

Under the circumstances here, Andrx will be substantially and unfairly prejudiced at trial if the FTC, having resisted discovery on the same subject, is allowed to adduce evidence about the alleged discussions with respondents in May/June 1999. The FTC had discussions with respondents HMR and Andrx separately. As a result, Andrx was not involved in the purported discussions with HMR and, accordingly, itself is not in a position to provide testimony concerning those discussions. It would deprive Andrx of fundamental due process if Complaint Counsel were permitted to adduce testimony from HMR witnesses about their discussions with FTC staff and use that testimony against Andrx -- without Complaint Counsel having provided Andrx with discovery on the same topic from the FTC staff who personally participated in the discussions with HMR. Simply because Andrx and HMR are both respondents does not mean Andrx must accept testimony of HMR witnesses about certain alleged discussions between the FTC staff and HMR, and therefore the subject should be off limits at trial given that Complaint Counsel has refused to provide discovery from the FTC about the alleged discussions.

Even to the extent any issues overlap between the FTC's separate discussions with, on the one hand, HMR and, on the other hand, Andrx, the HMR and Andrx witnesses may not necessarily have the same recollections. Because all of the witnesses potentially testifying to the subject matter of discussions with the FTC will not necessarily have the same recollections,

the testimony of FTC staff members involved in the discussions is appropriate to clarify the record. Given that Complaint Counsel has refused to provide testimony, it would work an injustice on Andrx if only selective testimony about the May/June 1969 conversations were introduced at trial.²

If Complaint Counsel were allowed to introduce testimony at trial about alleged discussions between the FTC staff and HMR without having provided Andrx with the opportunity to depose FTC witnesses involved in the discussions, Andrx would be seriously impaired in its ability to prepare its case and present its defense based on an incomplete record. Thus, Complaint Counsel should be precluded from introducing such testimony at trial.

Conclusion

For the foregoing reasons, Andrx respectfully requests that the Court grant its motion to preclude Complaint Counsel from offering evidence at trial concerning the subject

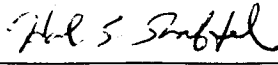
² Indeed, the November 8 Order was expressly predicated on the view that "there does not appear to be a factual dispute over . . . the details of the conference call" between the FTC and Andrx. November 8 Order, at 2. However, that assumes a single call with only Andrx witnesses as the individuals providing testimony. At trial, Complaint Counsel apparently may attempt to adduce testimony from both HMR and Andrx witnesses about various discussions, giving rise to contested issues about what was the purpose or effect of the discussions.

matter of alleged discussions between FTC staff members and respondents in May and June of 1999.

Dated: New York, New York
November 16, 2000

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,
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**PROPOSED ORDER ON RESPONDENT ANDRX CORPORATION'S
MOTION TO PRECLUDE COMPLAINT COUNSEL FROM
INTRODUCING EVIDENCE OF CERTAIN CONVERSATIONS
BETWEEN RESPONDENTS AND FTC STAFF MEMBERS**

On November 16, 2000, pursuant to Section 3.38 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.38, respondent Andrx Corporation ("Andrx") filed a motion for an order precluding Complaint Counsel from introducing evidence at trial concerning the subject matter of certain discussions between FTC staff members and Respondents in or around May and June of 1999.

Respondent Andrx's motion is hereby GRANTED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated: November __, 2000

