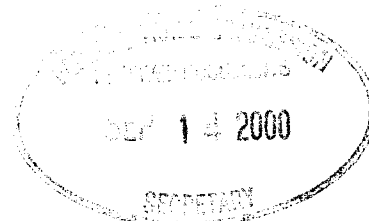


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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 STRIKE

I.

Complaint Counsel filed its Motion to Strike Certain Affirmative Defenses Set Forth in Respondents' Answers ("motion to strike") on April 28, 2000. Respondent Aventis Pharmaceuticals, Inc. ("Aventis"), formerly known as Hoechst Marion Roussel, Inc. ("HMR"), Respondent Carderm Capital L.P. ("Carderm"), and Respondent Andrx Corp. ("Andrx") (collectively, "Respondents") filed oppositions on May 19, 2000.

Complaint Counsel filed a motion to file a reply brief and its reply brief in support of its motion to strike on May 26, 2000. Andrx, Aventis and Carderm each filed oppositions to Complaint Counsel's motion to file a reply brief on May 30, 2000, May 31, 2000, and June 1, 2000, respectively. Complaint Counsel's motion to file a reply brief is GRANTED.

Andrx next filed a motion to file a surreply brief and its supplemental submission in opposition on June 5, 2000. Complaint Counsel did not oppose this motion. Andrx's motion to file a surreply, filed June 5, 2000, is GRANTED.

Complaint Counsel next filed a motion to file a supplemental reply brief and its supplemental reply brief in support of its motion to strike on June 12, 2000. Aventis filed a motion to strike Complaint Counsel's motion to file a supplemental reply brief on June 15, 2000.

Complaint Counsel's motion to file a supplemental reply brief is GRANTED. Aventis' motion to strike Complaint Counsel's June 12, 2000 reply brief is DENIED.

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 agreements. Complaint Counsel's August 7, 2000 letter stated that it had decided to withdraw its motion to strike with respect to Andrx's affirmative defense numbers 2, 14, and 15 and to Aventis' and Carderm's affirmative defense number 13. With this modification, Complaint Counsel's motion to strike challenges Andrx's affirmative defense numbers 7, 8, 12, 17, 18, and 19, and Aventis' and Carderm's affirmative defense number 2.

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

II.

The Commission's Rules of Practice do not specifically provide for motions to strike, but the Commission has held that under appropriate circumstances such motions may be granted. See *In re Warner-Lambert Co.*, 82 F.T.C. 749 (1973); *In re Kroger Co.*, 1977 FTC LEXIS 70, *2 (Oct. 18, 1977). However, motions to strike are generally disfavored. *In re Home Shopping Network, Inc.*, 1995 FTC LEXIS 259, *4 (July 24, 1995); *In re Volkswagen of America, Inc.*, No. 9154, slip op. at 2 (July 8, 1981)(Mathias, ALJ).

A motion to strike defenses or portions of an answer will be granted when the answer or defense (1) is unmistakably unrelated or so immaterial as to have no bearing on the issues and (2) prejudices Complaint Counsel by threatening an undue broadening of the issues, by requiring lengthy discovery, or by imposing an undue burden on Complaint Counsel. *In re Dura Lube Corp.*, 2000 FTC LEXIS 1, *34 (August 31, 1999).

III.

A. Reason to Believe and Public Interest Determinations

Aventis' and Carderm's affirmative defense number 2 assert that the Commission has no reason to believe that Respondents violated the Federal Trade Commission Act. In its brief and in oral argument, Aventis has asserted the "reason to believe" standard requires the Commission to have a well-grounded reason to believe that each of the elements defining the alleged offense, including a showing that the conduct had a substantial anticompetitive effect in the marketplace, exist.

Andrx advances four affirmative defenses asserting that this administrative proceeding is not "to the interest of the public." In summary, Andrx's affirmative defense numbers 7 and 8 assert that this proceeding is not in the public interest because: it seeks relief that would deprive consumers of lower-priced generic pharmaceutical products; and the conduct that is subject of the Complaint is over. Andrx's affirmative defense numbers 18 and 19 assert that this proceeding is not in the public interest because: it arose from an improper and illegal publicity campaign surrounding the Commission's non-public investigation; and improper disclosures have been made by or with assistance from Biovail Corporation International which was represented by a former Deputy Director of the Bureau of Competition of the Federal Trade Commission.

Complaint Counsel asserts that the adequacy of the Commission's reason to believe and public interest determination are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts and that the issue to be litigated is not the adequacy of the Commission's pre-complaint information but whether the alleged violation has in fact occurred. Complaint Counsel further asserts that these defenses are not only legally insufficient, but also unduly broaden discovery.

Respondents assert that the defenses should not be stricken because the Supreme Court long ago held that the reason to believe and public interest determinations are subject to judicial review. Further, Respondents assert that Complaint Counsel has failed to establish that maintenance of these defenses would unduly burden or prejudice Complaint Counsel.

For the reasons set forth below, Complaint Counsel's motion to strike Aventis' and Carderm's affirmative defense number 2 is GRANTED. Complaint Counsel's motion to strike Andrx's affirmative defense numbers 7, 8, 18, and 19 is DENIED.

Aventis' and Carderm's Affirmative Defense Number 2

The Federal Trade Commission Act ("FTC Act") imposes two prerequisites that must be satisfied before the Commission may issue a complaint: (1) the Commission must have reason to believe that a party has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce; and (2) it shall appear to the Commission that a proceeding by it would be "to the interest of the public." 15 U.S.C. § 45(b).

It is the Commission's position that:

> it has long been settled that the adequacy of the Commission's "reason to believe" a violation has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is

> not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.

In re Exxon Corp., 83 F.T.C. 1759, 1760 (1974). The Supreme Court, in *Federal Trade Commission v. Standard Oil Co.*, 449 U.S. 232 (1980), noted, without accepting, the Commission's position. *Id.* at 235 n.5. However, the Supreme Court expressly declined to reach the merits of whether the Commission possessed the requisite reason to believe or whether courts can review the Commission's reason to believe. Instead, the Supreme Court held that the issuance of a complaint is not "final agency action" under § 10(c) of the APA, and hence is not reviewable. *Id.* at 238. In so holding, the Supreme Court stated that "the issuance of the complaint is definitive on the question whether the Commission avers reason to believe that the respondent to the complaint is violating the Act." *Id.* at 241.

Though other court precedent presents conflicting standards, one principle that can be gleaned is that the Commission's reason to believe determination may be reviewed for abuse of discretion or in extraordinary circumstances. *Hill Bros. v. Federal Trade Commission*, 9 F.2d 481, 484 (9th Cir. 1926) (The Commission's reason to believe determination is not "a subject of controversy either before the commission or before the court, except in so far as the question of public interest is necessarily involved in the merits of the case . . . ."); *Standard Oil Co. v. Federal Trade Commission*, 596 F.2d 1381, 1386 (1979), *rev'd on other grounds* 449 U.S. 232 (1980) (citations omitted) (A determination by the FTC that there is "reason to believe" a violation of law has occurred is within the agency's discretion and is not reviewable, but "courts will review an agency action when the alleged abuse of discretion is the violation of 'constitutional, statutory, regulatory or other legal mandates or restrictions."); *Boise Cascade Corp. v. Federal Trade Commission*, 498 F. Supp. 772, 779 (D. Del. 1980) (The Commission's "reason to believe" determination is "committed to agency discretion" and thus is not reviewable in the absence of strong facial indications of bad faith). The Commission's own precedent recognizes that the Commission will review its reason to believe and public interest determinations in extraordinary circumstances. *In re Boise Cascade Corp.*, 97 F.T.C. 246, 247 n.3 (1981).

Aventis' and Carderm's Affirmative Defense Number 2 asserts only that the Commission has no reason to believe that the respondents violated the FTC Act. Aventis and Carderm have not presented strong facial indications of bad faith or the extraordinary circumstances necessary to review the Commission's determination that it had a reason to believe the Respondents violated the FTC Act. Accordingly, Aventis' and Carderm's Affirmative Defense Number 2 is legally insufficient. Further, any attempts to discover the Commission's reason to believe prejudices Complaint Counsel by threatening an undue broadening of discovery into improper areas. Therefore, Complaint Counsel's motion to strike Aventis' and Carderm's Affirmative Defense Number 2 is GRANTED.

Andrx's Affirmative Defense Numbers 7, 8, 18 and 19

The Supreme Court, in *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929), held that courts may review the Commission's determination that a proceeding is "to the interest of the public." *Id.* at 30. While the Commission exercises broad discretion in determining whether a proposed proceeding will be in the public interest, courts may review whether the public interest would be served by the issuance of an order.

> The specific facts established may show, as a matter of law, that the proceeding which it authorized is not in the public interest, within the meaning of the Act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint. If, instead, the Commission enters an order, and later brings suit to enforce it, the court should, without enquiry into the merits, dismiss the suit.

Id. See also *Moretrench v. Federal Trade Commission*, 127 F.2d 792, 795 (2d Cir. 1942) (the Supreme Court in *Klesner* "did indeed decide that the public interest in the controversy was a justiciable issue"). But see *Cotherman v. Federal Trade Commission*, 417 F.2d 587, 594 (5th Cir. 1969) (public interest determination reviewed only for abuse of discretion).

Because Andrx's affirmative defenses challenging the Commission's public interest determination raise issues that may be reviewed by courts, these defenses are not so legally insubstantial or unmistakably unrelated or so immaterial as to have no bearing on the issues. However, the Commission's determination that this proceeding is in the public interest cannot be litigated in this proceeding. *Exxon Corp.*, 83 F.T.C. at 1760. Although the Commission's public interest determination cannot be litigated here, due process requires that this issue be preserved. See *In re Ford Motor Co.*, 1976 FTC LEXIS 38, *1-2 (Dec. 3, 1976). However, any discovery into this area will be limited. For example, Respondents may not probe into the mental processes of the Commissioners. *Boise Cascade*, 498 F. Supp. at 779. Accordingly, Complaint Counsel's motion to strike Andrx's affirmative defense numbers 7, 8, 18, and 19 is DENIED.

B. Discriminatory Prosecution

Andrx's Affirmative Defense Number 12

Complaint Counsel next seeks to strike Andrx's affirmative defense number 12, which asserts, among other things, that "[t]he FTC is acting unlawfully and arbitrarily in attempting to single out Andrx for challenge with respect to these commonplace provisions." Complaint Counsel challenges defense number 12 on the grounds that the Commission has broad discretion in choosing to proceed against one member of an industry. Complaint Counsel further asserts that this defense could lead to discovery that would substantially burden and prejudice Complaint Counsel.

Andrx responds that its defense number 12 is broader than a defense of discriminatory prosecution and that the Commission's decision to prosecute Respondents was an abuse of discretion which may be overturned. Andrx further asserts discovery will not be broadened because the same evidence concerning industry practices and other deals will be adduced, whether or not the defense remains as plead, because such evidence is necessary to assess the challenged agreement between Andrx and Aventis under a "rule of reason" analysis.

For the reasons set forth below, Complaint Counsel's motion to strike Andrx's affirmative defense number 12 is GRANTED in part and DENIED in part.

It is well settled that the Commission may, within its broad discretion, choose to proceed against one, a few, or all members of an industry. *Moog Indus., Inc. v. Federal Trade Commission*, 355 U.S. 411, 413 (1958) ("Although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency."). Though the FTC's discretion in proceeding against one competitor may be overturned for a patent abuse of discretion, *Moog,* 355 U.S. at 414, such circumstances are not present here. Therefore, the defense of selective prosecution is legally insufficient. *In re General Motors Corp.*, 103 F.T.C. 641, 644 n.1 (1984); *In re Synchronal Corp.*, 1992 FTC LEXIS 61, *3-4 (March 5, 1992).

Moreover, the defense of selective prosecution is not only legally immaterial, but also threatens discovery into an impermissible area that would prejudice Complaint Counsel. Andrx may not discover mental processes of FTC attorneys' and Commissioners' decision to prosecute Andrx or decision not to challenge agreements by other companies in the industry. *In re Chock Full O' Nuts Corp., Inc.*, 82 F.T.C. 747, 748 (1973); *In re Kroger* Co., 1977 FTC LEXIS 55, *3-4 (October 27, 1977).

Andrx's Affirmative Defense Number 12 will stand, except that Andrx's assertion that "[t]he FTC is acting unlawfully and arbitrarily in attempting to single out Andrx for challenge with respect to these commonplace provisions" is stricken. In this respect, Complaint Counsel's motion to strike Andrx's Affirmative Defense Number 12 is GRANTED in part and DENIED in part.

C. Equitable Defenses

Andrx's Affirmative Defense Number 17

Last, Complaint Counsel seeks to strike Andrx's affirmative defense number 17, which asserts, among other things, that "[t]he Complaint and the relief sought therein are barred by the doctrines of laches, waiver, estoppel, and unclean hands. . . ." Complaint Counsel challenges

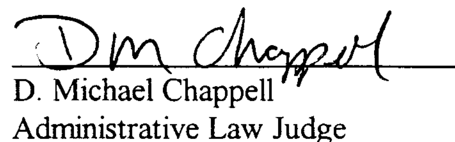
defense number 17 on the grounds that none of these equitable doctrines are available as a defense to an action brought by the government in the public interest. Andrx responds that equitable defenses can be asserted because this proceeding has not been brought in the public interest and because there may have been government misconduct.

For the reasons set forth below, Complaint Counsel's motion to strike Andrx's affirmative defense number 17 is DENIED.

Although it is a well settled, general principle that the United States is not subject to the defense of laches in enforcing its rights, *United States v. Summerlin*, 310 U.S. 414, 416 (1940), the equitable defenses of laches, waiver and estoppel may be asserted if the action of the government was not undertaken in the public interest. See *United States v. Reader's Digest Ass'n, Inc.*, 464 F. Supp. 1037, 1043 (D. Del. 1979), *aff'd* 662 F.2d 955 (3d Cir. 1981) (citing *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 80 (1934)). See also *Federal Trade Commission v. Hang-Up Art Enterprises, Inc.*, 1995 U.S. Dist. LEXIS 21444, *12 (C.D. Cal. 1995) (laches may be a defense if "affirmative misconduct" is shown). Further, although unclean hands is not a defense to antitrust liability, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951), an exception can be made "when the agency's conduct is egregious and the resulting prejudice rises to a constitutional level." *Federal Trade Commission v. Image Sales and Consultants, Inc.*, 1997 U.S. Dist. LEXIS 18902, *3-4 (N.D. Ind. 1997). In the instant case, where Andrx has made allegations and representations in pleadings and in open court that this proceeding is not in the public interest and that there may have been government misconduct, the equitable defenses will not be stricken at this time.

However, Andrx's defense number 17 threatens an undue broadening of the issues. Discovery on this defense will be limited. "[T]he mere fact that respondent alleges a matter as an affirmative defense does not necessarily open the door to unlimited discovery." *Ford Motor Co.*, 1976 FTC LEXIS 38, at *2. Complaint Counsel's motion to strike Andrx's affirmative defense number 17 is DENIED.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: September 14, 2000