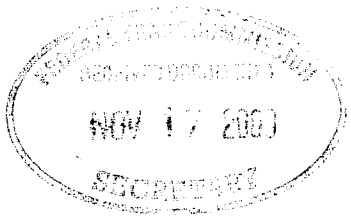
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of	
HOECHST MARION ROUSSEL, INC., a corporation,	Docket No. 9293
CARDERM CAPITAL L.P., a limited partnership,	
and	
ANDRX CORPORATION, a corporation.	

RESPONDENT HOECHST MARION ROUSSEL, INC.'S MOTION *IN LIMINE* TO EXCLUDE REFERENCES TO SETTLEMENT DISCUSSIONS

Respondent Hoechst Marion Roussel, Inc. ("HMR") moves this Court *in limine* to order that Complaint Counsel and all other persons involved in this case on its behalf, be instructed not to directly or indirectly, during opening or closing statements, interrogation of witnesses, argument or objections, or at any other time during the trial of this matter, present or elicit any evidence concerning discussions between HMR and Andrx and their respective agents, officers and employees, on the one hand, and Federal Trade Commission Staff, on the other, relating to the possible settlement of the FTC investigation underlying this litigation (*In the Matter of Andrx Corporation and Hoechst Marion Roussel, Inc.*, FTC Matter No. 981-0368).

In Paragraph 28 of the Complaint, the Commission alleged the facts surrounding the termination of the Stipulation and Agreement:

> 28. On September 11, 1998, Andrx submitted a Supplemental ANDA to the FDA reflecting a modified formulation of its generic Cardizem CD product. Andrx filed a Paragraph IV Certification, stating its belief that Hoechst MRI had no legitimate basis to claim patent infringement by the product reflected in the Supplemental

> ANDA. Andrx's Supplemental ANDA received FDA approval on June 8, 1999. On or around that same day, Andrx and HMRI entered into a second agreement, essentially abrogating the Stipulation and Agreement and clearing the way for Andrx to go to market. Andrx began marketing a generic version of Cardizem CD on or around June 23, 1999.

In its Statement of the Case, however, Complaint Counsel asserted "respondents terminated [the HMR/Andrx Stipulation and Agreement] under pressure from the FTC." (Complaint Counsel's Statement of the Case, at 12.)

The evidence to be presented at trial mirrors the factual assertions in Paragraph 28 of the Commission's Complaint; the parties terminated the Stipulation and Agreement only after and because Andrx developed a non-infringing reformulation of its generic drug product in a manner contemplated and permitted by the Stipulation. Since Complaint Counsel cannot adduce any direct and admissible evidence to support its new assertion that the Stipulation was terminated solely as the result of FTC pressure, HMR believes Complaint Counsel will ask this Court to draw negative inferences from confidential settlement negotiations between HMR, Andrx and Commission Staff.

The specific "evidence" HMR anticipates Complaint Counsel may attempt to use can be understood by reviewing Request Nos. 122-124 of Complaint Counsel's First Requests for Admission to HMR. HMR anticipates Complaint Counsel will argue that May 1999 meetings involving HMR and Andrx caused the Stipulation and Agreement to be terminated. HMR anticipates the government will further argue that but for these meetings, the Stipulation and Agreement would have continued beyond the date when Andrx received FDA approval to begin marketing their non-infringing reformulated product. Put more succinctly, FTC is expected to argue that the settlement meetings are proof of culpable conduct by Respondents. This is just the sort of inference the rules seek to prohibit.

The settlement discussions between HMR, Andrx and Commission Staff in the underlying investigation are precisely the types of statements and conduct which the Commission and the courts routinely protect and declare are inadmissible to prove culpability.[1/] Under Rule 408 of the Federal Rules of Evidence,[2/] statements and conduct occurring in the context of settlement negotiations are inadmissible to prove liability.[3/] The rule prohibits references to statements made and conduct occurring during the course of settlement negotiations and discussions – including, in

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1/ *See, e.g., Boise Cascade Corp.*, 91 F.T.C. 1, 1978 FTC Lexis 549, at *241 n.17 (Jan. 11, 1978) (Commission decision on appeal of initial decision; "It would certainly be improper to use the fact that a settlement was attempted as evidence of any sort that a violation occurred."); *Amway Corp.*, 1978 FTC Lexis 260, at *5 (June 15, 1978) (ALJ order denying motion to dismiss; "If respondents had initiated such discussions [to settle the case there before the ALJ] that fact would, of course, not be evidence of an admission of liability," citing 29 Am. Jur.2d *Evidence* § 629); *Trebor Sportswear Co., Inc. v. The Limited Stores, Inc.*, 865 F.2d 506, 510 (2d Cir. 1989) (upholding district court determination that documents found to constitute evidence of a settlement offer regarding buyers' claims of breach of contract were inadmissible to prove validity of contractual claims; "In furtherance of the public policy of encouraging settlements and avoiding wasteful litigation, Rule 408 bars the admission of most evidence of offers of compromise and settlement."); *New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 16 F. Supp.2d 460, 473 (D.N.J. 1998) (excluding evidence of administrative consent order entered into with state environmental agency and actions taken pursuant thereto; "Courts agree that Rule 408 applies to civil consent decrees executed with government agencies," and Rule 408 "excluded not only the settlement offer or promise as evidence of liability, but also the furnishing of the consideration promised in the settlement offer."); *Penny v. Winthrop-University Hosp.*, 883 F. Supp. 839, 846 (E.D.N.Y. 1995) ("In a discrimination case where the employee has already been terminated and has threatened legal action, offers of settlement of the dispute on condition of waiver and release of the claim are inadmissible as evidence of discrimination under Fed. R. Evid. 408."); *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 550 (E.D.N.C. 1995) (granting motion *in limine* to exclude evidence of defendant's settlement of plaintiff's spouse's loss of consortium claim in plaintiff's personal injury claims; "under Rule 408, evidence of the settlement between Dawn Buckman and defendant is inadmissible to prove defendant's liability" on plaintiff's claims); *McPike, Inc. v. United States*, 15 Cl. Ct. 94, 98-99 (1988) (granting motion *in limine* to prohibit taxpayers from introducing in litigation for tax refund evidence that IRS had previously accepted taxpayers' alleged method of accounting, as such acceptance "was an integral and necessary part of a negotiated settlement" with the taxpayers, evidence of which was inadmissible by virtue of Rule 408; "To allow the plaintiffs to introduce testimony as to what the commissioner may have agreed to in prior audits could unnecessarily broaden the issues to be considered at trial, could introduce collateral issues not material in this case, and could require that the court allow the defendant an opportunity to introduce rebuttal evidence," and "[s]uch evidence would tend to confuse and obfuscate the central issues in this case").

2/ Compromise and Offers to Compromise. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration, in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

3/ The Federal Rules of Evidence are persuasive authority in Commission proceedings. *See, e.g., Herbert R. Gibson, Jr.*, 1978 FTC Lexis 375, at *2 n.1 (May 3, 1978); 2 U.S. Federal Trade Comm'n, *Operating Manual* ch. 10.6 (1991).

this case, statements concerning the possible resolution of the underlying federal administrative agency investigation.[4/] The rule applies to matters to be decided by the bench without input from a jury.[5/]

Rule 408 and the discussions and conduct at issue in this motion further important efficiencies that the Commission and this Court should avoid impairing – namely, the significant public interest in encouraging the negotiation and settlement of legal disputes.[6/] Moreover, any probative value allegedly attributable to such statements is substantially outweighed by the danger of unfair prejudice. The public policy encouraging frank settlement discussions embodied in Fed. R. Evid. 408 weighs decidedly in favor of the exclusion of such evidence.[7/]

4/ *See, e.g., Fiberglass Insulators, Inc. v. Dupuy,* 856 F.2d 652, 654-55 (4th Cir. 1988) (extending Rule 408 to settlement discussions in related litigation between the parties arising out of the same transaction; "The public policy of favoring and encouraging settlement makes necessary the inadmissibility of settlement negotiations in order to foster frank discussions. . . . Attorneys must be afforded wide latitude in the conduct of settlement negotiations if the rule is to have any effect.").

5/ *See, e.g., Option Resource Group v. Chambers Dev. Co.,* 967 F. Supp. 846, 849-50, 852 (W.D. Pa. 1996) (evidence of fact of compromise and settlement of SEC administrative investigation, as well as evidence of statements and conduct of the parties in the course of those negotiations, excluded from trial and not considered by court for summary judgment or other purposes by virtue of Fed. R. Evid. 408, and counsel prohibited from making any reference to them in any fashion, directly or indirectly, written or oral).

6/ *See, e.g., Affiliated Mfrs., Inc. v. Aluminum Co. of Am.,* 56 F.3d 521, 523, 526-30 (3d Cir. 1995) (affirming grant of motion in limine to exclude internal memoranda and other documents, as well as deposition testimony, as evidence of settlement negotiations pursuant to Fed. R. Evid. 408).

7/ *See, e.g., Alpex Computer Corp. v. Nintendo Co., Ltd.,* 770 F. Supp. 161, 167 (S.D.N.Y. 1991), *vacated in part on other grounds,* No. 86 Civ. 1749, 1994 WL 381659 (S.D.N.Y. July 21, 1994); *see* Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* § 7.05[1][a], at 7-66 (2000) (evidence of settlement discussions is excluded in part "because it is of such low probative value" as it "may be motivated by a desire to 'buy peace' rather than by an acknowledgment of the merits of a claim").

WHEREFORE, Respondent Hoechst Marion Roussel, Inc. respectfully prays that the Court grant this motion in its entirety and enter an order barring Complaint Counsel from presenting or eliciting any testimony or evidence of settlement discussions between HMR, Andrx and Commission Staff in the investigation underlying this Complaint.

Dated: November 16, 2000

Respectfully Submitted,

SHOOK HARDY & BACON L.L.P.

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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 GRANTING HOECHST MARION ROUSSEL, INC.'S MOTION IN LIMINE TO EXCLUDE REFERENCES TO SETTLEMENT DISCUSSIONS

IT IS HEREBY ORDERED that Respondent Hoechst Marion Roussel, Inc.'s Motion in Limine to Exclude References to Settlement Discussions is hereby GRANTED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: November __, 2000

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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

CERTIFICATE OF MAILING

I, Peter D. Bernstein, hereby certify that on November 16, 2000, a copy of Hoechst Marion Roussel, Inc.'S Motion *in Limine* to Exclude References to Settlement Discussions was served upon the following persons by hand delivery and/or Federal Express as follows:

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Federal Trade Commission
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Hon. D. Michael Chappell
Administrative Law Judge
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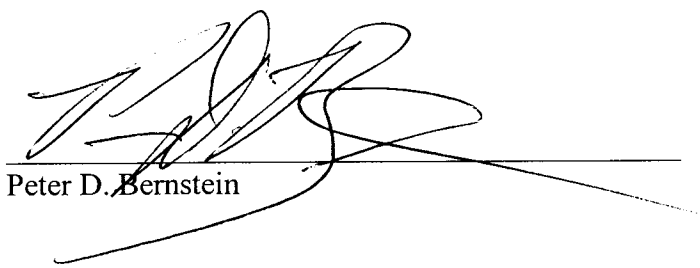

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