

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 CORPORATION'S OPPOSITION TO
COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE A REPLY
IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES**

Respondent Andrx Corporation opposes the motion by Complaint Counsel for leave to file a reply brief in support of the Motion to Strike Affirmative Defenses. Leave should be denied for the following five reasons:

First, Complaint Counsel identifies no new facts, no new law, or any other reason why the Rules ("[t]he moving party shall have no right to reply") should be altered.

Second, Complaint Counsel makes no contention, and offers no proof whatsoever, that it will suffer any prejudice if the affirmative defenses stand, certainly none that cannot be addressed in the context of rulings on discovery. Complaint Counsel therefore pays lip service to but never makes the showing required by either prong of the standard confirmed in *Dura Lube* ("a motion to strike defenses . . . will be granted only when the answer of 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 or by imposing a burden on Complaint Counsel"). 2000 F.T.C. LEXIS 1, at *34 (emphasis added).

Third, in its opening brief Complaint Counsel sought to strike Andrx's affirmative defenses by arguing that Hatch-Waxman, the patent laws, and FDA regulations had "no bearing whatsoever on the legality of respondents' conduct" and that this Court would be engaging in "the fruitless exercise of discovering and interpreting the meaning and intent of the Hatch-Waxman Act and FDA regulations" (Opening Mem. 9). Now Complaint Counsel says that "it is important to place the Hoechst/Andrx agreement . . . in the context of the Hatch-Waxman and FDA implementing regulations" (Proposed Reply 6). Leave should not be granted to permit such flip-flopping.

Fourth, to the extent the proposed reply does not simply rehash incorrect arguments made in the opening brief, it engages in argumentation completely inappropriate to a motion to strike defenses: it prematurely attempts a motion for summary judgment based on a hotly disputed set of facts; it mischaracterizes Andrx's affirmative defenses; and it makes *ipse dixit* statements about facts it claims that Andrx can and cannot prove at the trial.¹ Should this Court accept the proposed reply, Andrx should be given leave to respond to these statements, which will simply beget more briefing and further protraction of what was an unnecessary delaying tactic to begin with.

Fifth, although completely ignoring Judge Penn's decision refuting the very basis for the complaint here, 83 F.Supp.2d 179 (D.D.C. 2000), Complaint Counsel twists some statements in a decision by the court in the Cardizem CD antitrust litigation. That decision merely denied a motion to dismiss based solely on allegations in complaints far different from

¹ The most serious of the factual distortions in the proposed reply is the statement that "complaint counsel is unaware of any evidence that the FTC was the source of pre-complaint publicity surrounding this matter" (at 3). We already know about and cited at least four specific instances of FTC-induced pre-complaint publicity (Andrx Opp. 18-20). The notion that this shameful misuse of power is not properly the subject of the very proceeding that is the product of the illicit conduct ignores both Andrx's constitutional rights as well as this Court's proper concern for the integrity of this proceeding.

those alleged by Complaint Counsel here. The decision has no precedential value at all and certainly provides no guidance as to whether Andrx should be allowed to prove its affirmative defenses.

Dated: May 30, 2000

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,
FRISCHER & SHARP

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CERTIFICATE OF SERVICE

I, Hal S. Shaftel, hereby certify that on May 30, 2000, I caused a copy of RESPONDENT ANDRX CORPORATION'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES to be served upon the following persons by Federal Express:

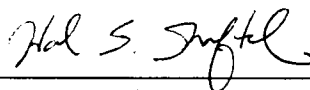
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