

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

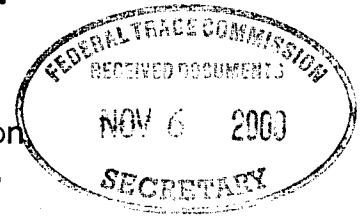
HOECHST MARION ROUSSEL, INC., a corporation
CARDERM CAPITAL L.P., a limited partnership,

and

ANDRX CORPORATION, a corporation.

DOCKET NO. 9293

**MOTION OF RESPONDENT ANDRX CORPORATION
FOR LEAVE TO FILE ANNEXED "SUPPLEMENTAL
SUBMISSION IN FURTHER SUPPORT OF MOTION
TO COMPEL DEPOSITION TESTIMONY OR TO PRECLUDE"**



Pursuant to § 3.22(c) of the FTC Rules of Practice of Adjudicatory

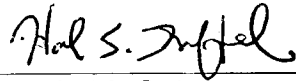
Proceedings, respondent Andrx Corporation ("Andrx") respectfully seeks leave to file the attached Supplemental Submission in Further Support of Motion to Compel Deposition Testimony or to Preclude (filed October 24, 2000). The basis for this motion is that Complaint Counsel's opposition to the underlying motion misstates the record in this case and correction accordingly is required.

For the foregoing reasons, Andrx respectfully requests that this Court permit the filing of the annexed supplemental submission or provide Andrx with such other and further relief as this Court deems just and proper.

Dated: November 3, 2000

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,
FRISCHER & SHARP

By: 

Louis M. Solomon
Hal S. Shaffel
Colin A. Underwood
Jonathan D. Lupkin
45 Rockefeller Plaza
New York, New York 10111
(212) 956-3700

Counsel for Respondent Andrx Corporation

**ANDRX'S SUPPLEMENTAL SUBMISSION IN FURTHER SUPPORT
OF MOTION TO COMPEL DEPOSITION TESTIMONY OR TO PRECLUDE**

Respondent Andrx Corporation ("Andrx") makes this supplemental submission in further support of its motion to compel deposition testimony from specific FTC staff members who directly participated in communications between the staff and respondents that Complaint Counsel itself has put at issue or, alternatively, to preclude Complaint Counsel from adducing any evidence concerning those communications.

In its opposition to Andrx's motion, Complaint Counsel seeks to block the limited depositions being sought based on blatant misstatements about the record in this case.

I. Complaint Counsel's Principal Argument About The Requested Discovery Being Untimely is Wrong As A Factual Matter

Complaint Counsel argues against the discovery at issue principally by claiming -- incorrectly -- that it was not timely served. In the very first sentence of its brief, Complaint Counsel asserts that the discovery was served "past the date for issuing discovery to the parties." (Complaint Counsel Mem. at 1). Complaint Counsel goes on to predicate its entire brief on statements that the depositions were noticed "after discovery closed" (*id.* at 2); Andrx "failed to act within the scheduling order's time limits" (*id.* at 2); and Andrx "failed to seek discovery until weeks after the close of discovery." (*id.* at 6).

Complaint Counsel, however, misstates the record -- and misleads the Court -- by arguing that the discovery is untimely. Complaint Counsel is wrong, citing to and annexing an outdated Scheduling Order that has been superseded. In fact, the revised Scheduling Order (dated October 19, 2000), which had been entered approximately two weeks before Complaint Counsel's opposition, provides for a cut-off

for serving discovery of October 25, 2000, which is eight days after Andrx served the discovery at issue. See 11/17/00 Letter and accompanying Notice of Deposition, annexed hereto as Appendix A. Indeed, Andrx specifically had this discovery in mind when it agreed with Complaint Counsel to obtain the Court's permission, through the revised Scheduling Order, to extend the deadline for serving discovery.¹

What makes Complaint Counsel's misstatements particularly egregious is not simply that Complaint Counsel relies on and annexes an inoperative Scheduling Order, but that it ignores all of the discovery that it continues to schedule post-dating the discovery cut-off in effect. Over Andrx's repeated objections, Complaint Counsel has deferred scheduling depositions beyond the November 10 cut-off -- without seeking permission, as Andrx has requested, from the Court to do so. See correspondence annexed hereto as Appendix B. Indeed, Complaint Counsel has refused to put up its key expert for deposition prior to November 10, which is the very last date for discovery, or its other purported expert before November 17, a date a week after the close of discovery. Andrx has conditioned its willingness to proceed with discrete discovery after the cut-off on Complaint Counsel owning up to its procrastination -- which has been seriously prejudicial to respondents -- and obtaining Court approval.

Thus, Complaint Counsel in essence takes the position that it can proceed with whatever discovery it wants to schedule after the discovery cut-off, while seeking to

¹ Specifically, the revised Scheduling Order sets forth October 25 as the deadline for filing subpoenas duces tecum. As Andrx advised Complaint Counsel (see Appendix A), it was willing to serve subpoenas if Complaint Counsel requested that Andrx formally do so. Complaint Counsel did not, and Andrx therefore scheduled the depositions by notice of deposition. If subpoenas were required, the discovery is timely; alternatively, if not subpoenas required, then there is no deadline in the operative Scheduling Order with respect to noticing the depositions at issue.

hold Andrx, quite remarkably, to deadlines that have been superceded by subsequent order. If permitted, that approach would result in a severe miscarriage of justice.

II. Complaint Counsel Distorts The Basis For The Limited Depositions

Complaint Counsel argues that it can take depositions of Andrx and HMR counsel because they are "fact witnesses' who are the lead negotiators and architects of the Stipulation and Agreement that underlies the pending matter" (Complaint Counsel Mem. at 4). In contrast, Complaint Counsel wants to make the FTC staff attorneys immune from providing depositions -- although no such prohibition is found in the rules. Complaint Counsel ought not be heard to complain that, by the requested discovery, Andrx would improperly "burden . . . attorneys who are actively involved in the present case" (Complaint Counsel Mem. at 2), while Complaint Counsel itself is proceeding with depositions of respondents' counsel.

In any event, the distinction Complaint Counsel draws between the FTC staff attorneys and respondents' counsel fails. Here, Complaint Counsel itself injected into this case certain communications in May-June 1999 between the FTC staff attorneys and respondents. The FTC staff from whom depositions are sought are "fact witnesses" -- indeed, direct participants -- with respect to those 1999 communications -- no different than the Andrx and HMR counsel who allegedly are fact witnesses with respect to certain issues in this case.

Nor can Complaint Counsel, for its part, credibly claim that the limited depositions of FTC staff members are not relevant to this case. These are the very staff members who personally participated in communications that Complaint Counsel has not only made subject to written discovery requests directed to respondents but also

deposition questioning. Under these circumstances, it would be patently lopsided to allow Complaint Counsel to obtain discovery on the subject of the 1999 communications and, at the same time, resist providing any on the very same subject.

III. Complaint Counsel Did Not Provide Timely Notice of Interjecting The 1999 Discussions Into This Case

Complaint Counsel attempts to portray Andrx as having delayed somehow in seeking the depositions of the FTC staff members. As discussed above, it is indisputable that Andrx served and noticed the discovery within the timeframe established under the Scheduling Order for doing so.

It is particularly telling that the FTC, in its Complaint filed In the Matter of Abbott Laboratories, Docket No. C-39415 ("Abbott"), which was made public at the same time as the pleading in this case, specifically alleged that "aware of the Commission's investigation, the respondents canceled their Agreement." See Abbott Complaint, ¶ 33. In contrast, the pleading in this case does not contain a similar allegation that the HMR/Andrx Stipulation was aborted because of alleged pressure from the FTC. The pleading in this case was modeled on Abbott, and it therefore was advertent on the FTC staff's part to leave a similar allegation about alleged governmental pressure out of this case. Because of that omission, respondents had no reason to seek discovery on the issue any earlier.

Complaint Counsel further contends that Andrx was aware that the 1999 communications have been put at issue by virtue of Complaint Counsel's interrogatory responses and statement of the case. (Complaint Counsel Mem. at 3-4.) Nowhere, however, did Complaint Counsel identify the particular communications that it now has

put at issue. All that Complaint Counsel points to are general snippets taken out of context, which do not provide fair or reasonable notice of the specific conversations that Complaint Counsel has sought to interject into the case.

Dated: November 3, 2000

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,
FRISCHER & SHARP

By: Hal S. Shaftel

Louis M. Solomon
Hal S. Shaftel
Colin A. Underwood
Jonathan D. Lupkin
45 Rockefeller Plaza
New York, New York 10111
(212) 956-3700

Counsel for Respondent Andrx Corporation

Appendix A

SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP

45 ROCKEFELLER PLAZA
NEW YORK, NEW YORK 10111
(212) 956-3700
FACSIMILE: (212) 956-4068

RICHARD T. SHARP
HARRY FRISCHER
DAVID N. ELLENHORN
MARK C. ZAUDERER
LOUIS M. SOLOMON
BERTRAND C. SELLIER
DAVID E. NACHMAN
EDWIN M. BAUM
HAL S. SHAFTEL
ROBERT L. MAZZEO
JONATHAN P. HUGHES
LEONARD S. BAUM
MARGARET A. DALE
COLIN A. UNDERWOOD
JOHN J. O'CONNELL
OF COUNSEL

WAYNE M. AARON
LISA M. BABISKIN
JESSICA L. BIER
DEAN T. CHO
ANDRE K. CIZMARIK
ROBERT S. FRENCHMAN
TERESA A. GONSALVES
STEVEN H. HOLINSTAT
MICHAEL S. LAZAROFF
SERGIO A. LLORIAN
JONATHAN D. LUPKIN
CAROLINE S. PRESS
SHARON M. SASH
JENNIFER R. SCULLION
CHARLES D. STAR
EMILY STERN

October 17, 2000

WRITER'S DIRECT DIAL
(212) 424-0758

VIA FACSIMILE

Markus Meier, Esq.
Federal Trade Commission
601 Pennsylvania Avenue, N.W.,
Room 3116
Washington, D.C. 20580

Re: In the Matter of Hoechst Marion Roussel, Inc., Carderm
Capital L.P., and Andrx Corporation, FTC Docket No. 9293

Dear Markus:

I enclose a notice of deposition, calling for the testimony of Bradley Albert, Jeffrey Oliver, Robin Moore, Daniel Kochen and Elizabeth Mullin. Please let us know whether you will take the position that subpoenas are required for these individuals and, if so, whether you will accept service on their behalf.

Sincerely,

Jonathan D. Lupkin

Enclosure

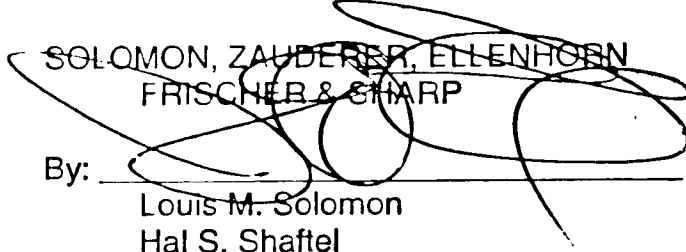
cc: All Counsel of Record

| | | | |
|------------------|------------------|------------|---|
| Robin Moore | October 26, 2000 | 10:00 a.m. | Solomon, Zauderer, Ellenhorn, Frischer & Sharp, 45 Rockefeller Plaza, New York, New York 10111 |
| Daniel Kochen | October 26, 2000 | 2:00 p.m. | Solomon, Zauderer, Ellenhorn, Frischer & Sharp, 45 Rockefeller Plaza, New York, New York 10111 |
| Elizabeth Mullin | October 27, 2000 | 10:00 a.m. | Solomon, Zauderer, Ellenhorn, Frischer & Sharp, 45 Rockefeller Plaza, New York, New York 10111 |

The aforementioned depositions will be conducted before some person authorized by law to administer oaths, and will continue from day to day until completed. The testimony will be recorded by stenographic means. You are invited to attend and cross-examine.

Dated: October 17, 2000

SOLOMON, ZAUDERER, ELLENHORN
FRISCHER & SHARP



By: _____
Louis M. Solomon
Hal S. Shaffel
Jonathan D. Lupkin
45 Rockefeller Plaza
New York, New York 10111
212-956-3700
212-956-4068 (Fax)

Attorneys for Respondent
Andrx Pharmaceuticals, Inc.

Appendix B

SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP

45 ROCKEFELLER PLAZA
NEW YORK, NEW YORK 10111
(212) 956-3700
FACSIMILE: (212) 956-4068

WAYNE M. AARON
LISA M. BABISKIN
JESSICA L. BIER
DEAN T. CHO
ANDRE K. CIZMARIK
ROBERT S. FRENCHMAN
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ROBERT L. MAZZEO
JONATHAN P. HUGHES
LEONARD S. BAUM
MARGARET A. DALE
COLIN A. UNDERWOOD
JOHN J. O'CONNELL
OF COUNSEL

October 25, 2000

WRITER'S DIRECT DIAL
(212) 424-0755

VIA FACSIMILE

Markus Meier, Esq.
Federal Trade Commission
601 Pennsylvania Avenue, N.W.,
Room 3116
Washington, D.C. 20580

Re: In the Matter of Hoechst Marion Roussel, Inc., Carderm
Capital L.P., and Andrx Corporation, FTC Docket No. 9293

Dear Markus:

Consistent with my prior correspondence and repeated statements in our discussions regarding scheduling, Andrx has, as you know, serious reservations -- indeed, objections -- to depositions extending beyond the November 10 cutoff. Believe me: we are not raising mere "logistics" or trying to be difficult. Rather, we are extremely concerned that much needs to get done before the December 5 hearing commences and it is therefore necessary to put the depositions behind us. That is why we are disappointed that Complaint Counsel did not agree to our requests to schedule depositions for this week and we lost valuable time.

In any event, we believe the parties must be respectful of the Scheduling Order that Judge Chappell entered providing for the November 10 cutoff. We therefore believe that if the parties are to agree to even isolated instances of depositions proceeding subsequent to November 10 (and we are very reluctant to do that), it is appropriate and in fact necessary to have the Judge revise the Scheduling Order. Other dates on the Scheduling Order (which we ought to discuss further) then will need to get adjusted accordingly. By way of one simple example, how can we have deposition designations due on

Markus Meier, Esq.
October 25, 2000
Page 2

November 16 if Complaint Counsel is still putting up a witness on November 17?
To that end, we believe that Complaint Counsel is the appropriate party to make
any application with regard to the deposition cutoff and corresponding adjustment
of other dates, since we, for our part, have been pressing hard for the completion
of the depositions before November 10.

Sincerely,



Hal S. Shaftel

HSS/klm

cc: Other Counsel (by facsimile)

SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP

45 ROCKEFELLER PLAZA
NEW YORK, NEW YORK 10111
(212) 956-3700
FACSIMILE: (212) 956-4068

WAYNE M. AARON
LISA M. BABISKIN
JESSICA L. BIER
DEAN T. CHO
ANDRE K. CIZMARIK
ROBERT S. FRENCHMAN
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CHARLES D. STAR
EMILY STERN
CAROLINE L. WERNER

RICHARD T. SHARP
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MARK C. ZAUDERER
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ROBERT L. MAZZEO
JONATHAN P. HUGHES
LEONARD S. BAUM
MARGARET A. DALE
COLIN A. UNDERWOOD
JOHN J. O'CONNELL
OF COUNSEL

October 23, 2000

WRITER'S DIRECT DIAL
(212) 424-0755

VIA FACSIMILE

Markus Meier, Esq.
Federal Trade Commission
601 Pennsylvania Avenue, N.W.,
Room 3116
Washington, D.C. 20580

Re: In the Matter of Hoechst Marion Roussel, Inc., Carderm
Capital L.P., and Andrx Corporation, FTC Docket No. 9293

Dear Markus:

This is a follow up to our phone conversation today with respect to deposition scheduling. It is disturbing that Complaint Counsel did not agree to a single deposition we proposed for this week. Given that the November 10 discovery deadline is fast approaching, deferring these dates is extremely problematic.

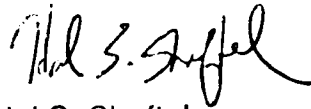
As for certain of the specific open dates you and I discussed, November 10 (the last date for discovery) is simply too late and unfair to respondents for taking your expert Richard Frank. However, we are agreeable (albeit it is far from optimal for us) to deposing Mr. Frank on November 2 or 3 or, as a last resort, 7. If we are unable to take Mr. Frank until November 7, then we will need to defer the depositions of our experts (Einer Elhauge and Jonathan Putnam) until November 14 and 15. We view that alternative as unappealing and are only amenable -- reluctantly -- to an exception to the discovery cutoff in this one particular instance.

With respect to Mr. Gerson, he will be available on November 1 in Jupiter, Florida; Dr. Sharkey will be available on November 8 in Tampa.

Markus Meier, Esq.
October 23, 2000
Page 2

We look forward to receiving your proposed stipulation concerning testimony of Lou Solomon. Please know we continue to believe that, as an appropriate way to proceed, Lou's deposition should be deferred and he will be made available for deposition in the event Andrx calls him to testify at the hearing in this proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read "Hal S. Shaftel". The signature is written in a cursive, flowing style.

Hal S. Shaftel

HSS/se
Encl.

cc: Other Counsel (by facsimile)

SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP

45 ROCKEFELLER PLAZA
NEW YORK, NEW YORK 10111
(212) 956-3700
FACSIMILE: (212) 956-4068

RICHARD T. SHARP
HARRY FRISCHER
DAVID N. ELLENHORN
MARK C. ZAUDERER
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JOHN J. O'CONNELL
OF COUNSEL

WRITER'S DIRECT DIAL
(212) 424-0755

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JONATHAN D. LUPKIN
CAROLINE S. PRESS
SHARON M. SASH
JENNIFER R. SCULLION
CHARLES D. STAR
EMILY STERN

October 21, 2000

VIA FACSIMILE

Markus Meier, Esq.
Federal Trade Commission
601 Pennsylvania Avenue, N.W.,
Room 3116
Washington, D.C. 20580

Re: In the Matter of Hoechst Marion Roussel, Inc., Carderm
Capital L.P., and Andrx Corporation, FTC Docket No. 9293

Dear Markus:

With so much to do, I do not want to spend time venting my frustration in a letter to you. However, time is short to take the outstanding depositions and I was disappointed yesterday that I had heard no response to Andrx's proposed deposition schedule; I had to track you down at the end of the day; and you were totally noncommittal when I did — indeed, you refused to make your experts available next week for depositions.

None of us have the luxury to wait on depositions. We are not going to let the schedule slip past the new November 10 deadline, since we then need to focus on many other pre-trial matters.

Along with this letter, we are sending you a revised witness list identifying two Andrx directors (Dr. Sharoky and Mr. Gerson) who we may call to testify at trial, in light of what we now know about your case and the knowledge of

Markus Meier, Esq.
October 21, 2000
Page 2

those two individuals. We will confer with you early next week about their availability for depositions before November 10.

Sincerely,

A handwritten signature in black ink, appearing to read "Hal S. Shaffel". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Hal S. Shaffel

HSS/bp
Encl.

cc: Other Counsel (by facsimile w/encl.)