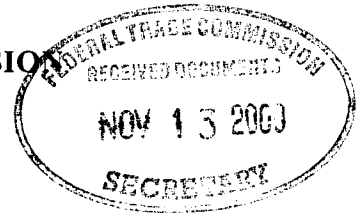


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



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

**COMPLAINT COUNSEL'S MOTION TO COMPEL ADMISSIONS BY
HOECHST MARION ROUSSEL, INC., IN RESPONSE TO
COMPLAINT COUNSEL'S FIRST REQUESTS FOR ADMISSIONS**

Pursuant to Section 3.38 of the Federal Trade Commission's Rules of Practice, complaint counsel moves for an order deeming certain requests for admissions admitted or compelling respondent to provide proper responses to the requests. The bases of this motion are set forth in the accompanying Memorandum in Support of Complaint Counsel's Motion to Compel Admissions by Hoechst Marion Roussel, Inc.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Markus H. Meier".

Markus H. Meier
Jon M. Steiger
Robin Moore

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: November 13, 2000

Foods Co., Dk. 9112, 1979 FTC Lexis 597, at * 4 (Oct. 15, 1979) (order ruling on request for admissions). Even if a party lacks direct knowledge of a fact, an admission is proper if it does not intend to place that fact in issue. *See Beatrice Foods*, 1979 FTC Lexis 597, at * 4. Further, if a partial or qualified answer is possible in good faith, it should be given. *See* Rule 3.32(b), 16 C.F.R. § 3.32(b). On the other hand, denials must “fairly meet the substance of the requested admission.” *Id.* If a responding party cannot honestly either admit or deny a request, it must “set forth in detail” its reasons. *Id.* Proper responses to requests for admissions should therefore serve to expedite trial and focus the parties’ and the judge’s attention on those matters truly in dispute. *See Beatrice Foods*, 1979 FTC Lexis 597, at * 4. Hoechst’s improper responses fail to serve these purposes and should be rejected.

Improper Objections That Certain Requests Call for a Legal Conclusion

Hoechst improperly objects to Requests 6, 112-116, and 127¹ on the basis that the requests call for legal conclusions. However, the admissions requested by complaint counsel at most call for an application of law to facts, and therefore are expressly allowed under the Commission’s Rules of Practice. *See* Rule 3.32(a), 16 C.F.R. § 3.32(a). Unless a request concerns a matter of law unrelated to the facts of the case, a “legal conclusion” objection should be overruled. *See Audiotext Communications Network, Inc. v. US Telecom, Inc.*, No. 94-2395-

¹ Hoechst also improperly asserts privilege in its objection to Request 127. This request is based on an e-mail, produced to the FTC in discovery, from Hoechst’s outside counsel’s to Andrx’s outside counsel. Accordingly, this communication does not enjoy work-product or attorney client privileges. *See Jenny Craig, Inc.*, Dk. 9260, 1994 FTC LEXIS 68, at * 4-5 (May 16, 1994) (order on motion to compel production of documents); *United States v. Jacobs*, 117 F.3d 82, 90 (2d Cir. 1997); *Chubb Integrated Systems, Ltd. v. National Bank of Washington*, 103 F.R.D. 52, 67 (D.D.C. 1984).

GTV, 1995 WL 625744, at * 6 (D. Kan. Oct. 5, 1995) (overruling objections to requests under parallel Fed. R. Civ. P. 36 where “[t]he court finds no request which seeks an admission of a matter of law unrelated to the facts of the case”).

Each of the requests to which Hoechst objects on this basis relate directly to the facts of this case. For example, Request 6 states:

Admit that the HMR/Andrx Stipulation and Agreement occurred in, or affected, interstate commerce.

Hoechst admitted in Requests 1-5 that it sells and distributes pharmaceutical products in the United States and contracts with customers in the United States, and that the warehouses that Hoechst ships to are located in states other than those where the product is produced. Request 6 merely asks Hoechst whether it will contest that these facts suffice to show that the Stipulation and Agreement occurred in, or affected, interstate commerce. Such a request is exactly the type of admission that Rule 3.32 allows as appropriately narrowing the litigated issues. *See* Fed. R. Civ. P. 36 advisory committee notes to 1970 amendments (“an admission that an employee acted in the scope of his employment” is proper). Hoechst’s objections on the ground that the requests call for a legal conclusion should be overruled.

Improper Objections That Certain Requests Are Argumentative

Hoechst objects to Requests 33, 37, 38, 48, 49, and 102 on the grounds that they are “argumentative.” These objections mischaracterize the requests, which merely address the patent litigation in which Hoechst was embroiled at the time it entered into the Stipulation and

Agreement. For example, Request 48 states:

Admit that the District Court [in Hoechst's patent litigation] made no finding that Andrx's Original Formulation infringed the '584 patent.

This assertion is either true or false – either the court made a finding on infringement or it did not – and should be admitted or denied. The requests do not “create new evidence” as Hoechst suggests. Rather, in accordance with Rule 3.32, they merely allow complaint counsel to ascertain whether Hoechst intends to contest certain factual assertions. Whether the requests are “argumentative” has no bearing on this determination. Complaint counsel is therefore entitled to answers to these requests.

Improper Objections That Certain Requests Are Incomplete

Hoechst objects to Requests 98 and 130 on the ground that they are “incomplete.” These requests merely ask whether Hoechst intends to contest the meaning of certain terms in contracts to which Hoechst is a party. Accordingly, complaint counsel fails to see what Hoechst finds “incomplete” about the requests. Furthermore, “[i]t is not a proper answer to a request to say that the fact involved only tells part of the story.” *Beatrice Foods*, 1979 FTC Lexis 597, at * 6-7. Hoechst must answer unless it shows that answering these requests would inevitably lead to a false conclusion. *See id.* Hoechst cannot make any such showing, and complaint counsel is entitled to proper responses to these requests.

Improper Objections That Certain Requests Cover Settlement Discussions

Hoechst refuses to answer Requests 122-124,² arguing that they address discussions between FTC staff and Hoechst concerning possible settlement of the FTC's precomplaint investigation, and are thus protected from disclosure. This refusal is evasive and misleading. First, Hoechst asserts no recognized privilege that bars response to these requests.³ Furthermore, the admissions that complaint counsel seeks deal solely with the fact that settlement discussions occurred and any actions, outside of the settlement context, that Hoechst may have taken in response to those discussions; they do not reveal any positions taken by Hoechst during these discussions. Finally, Hoechst's general counsel has already testified generally about this topic. *See* Investigational Hearing Transcript of Edward H. Stratemeier, at 252-53 (June 8, 1999).

Improper Refusals to Admit or Deny

Hoechst also refuses to answer Requests 56, 59-61, 63, and 65, stating only that it "can neither admit nor deny th[e] request." These responses do not satisfy Hoechst's burden in justifying its objections. *See Audiotext Communications*, 1995 WL 625744, at * 2. Hoechst must set forth, "in detail" the reasons why it cannot admit or deny the request. Rule 3.32(b), 16 C.F.R. § 3.32(b). *See also Audiotext Communications*, 1995 WL 625744, at * 2; *Automotive*

² Hoechst also objects to Request 124 on the ground that it is vague and ambiguous in its use of the phrase "reflected at least some of the same terms." Complaint counsel questions the vagueness of this phrase and notes that to the extent Hoechst feels a need to define the terms it finds ambiguous in order to provide a truthful response, it is free to do so under Rule 3.32. *See also Audiotext Communications*, 1995 WL 625744, at * 6.

³ Arguments regarding the admissibility of settlement discussions are properly addressed when, and if, such discussions are presented to Your Honor.

Breakthrough Sciences, Inc., Dk. 9275, 9276, 2977, 1996 FTC Lexis 236, at * 2 (May 15, 1996) (order directing respondents to answer request for admissions).

Furthermore, these requests deal with information and documents that should readily be available to Hoechst. For example, Requests 56, 59-61, 63, and 65 seek admissions about the drafting of the Stipulation and Agreement. Given that the individual who negotiated this agreement for Hoechst is still employed by Hoechst and that Hoechst has the drafts of the agreement, a reasonable search of information “readily obtainable” by Hoechst, pursuant to Rule 3.32(b), should provide proper answers to these requests. Likewise, Requests 193-200 seek to have Hoechst admit that it received documents from a consulting group that Hoechst itself engaged for a study. With a reasonable search, Hoechst should be able to ascertain whether it received these documents: complaint counsel believes at least some of the Hoechst contact persons listed in the consulting group’s documents are still employed at Hoechst, and the documents were prepared for Hoechst.⁴

Seemingly Improper Denials

Finally, Hoechst has denied Requests 55, 58, and 81. Under Rule 3.32(b), a denial must “fairly meet the substance of the requested admission.” 16 C.F.R. § 3.32(b). Thus, “when good faith requires that a party qualify its answer or deny only part of the matter of which an admission is requested, the party shall specify as much of it as is true and qualify or deny the remainder.” *Id.* Complaint counsel believes these requests should, in good faith, be admitted. For example,

⁴ If Hoechst can neither admit nor deny any requests, it can only be because it possesses no evidence on the requested point, in which case Hoechst should be prohibited from offering any evidence on these points at trial.

Request 55 states:

Admit that in July 1997, representatives of Hoechst and Andrx met to discuss a possible agreement relating to the HMR/Andrx Patent Infringement Litigation.

Complaint counsel believes the substance of this statement and the other statements are true and asks that Hoechst be compelled to explicitly state what part of the requests it denies.

Conclusion

Hoechst bears the ultimate burden of showing that its objections are justified. *See* Rule 3.38(a)(1), 16 C.F.R. § 3.38(a)(1); *Audiotext Communications*, 1995 WL 625744, at * 2. As discussed above, Hoechst does not carry this burden. Therefore, in accordance with Rule 3.38(a)(1), these requests should be deemed admitted or, in the alternative, Hoechst should be compelled to properly respond to the requests.

Respectfully Submitted,



Markus H. Meier
Jon M. Steiger
Robin Moore

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: November 13, 2000

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

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a corporation,

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and

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a corporation.

Docket No. 9293

Declaration of Markus H. Meier

Pursuant to 16 C.F.R. § 3.22(f), Markus H. Meier declares as follows:

1. I am an attorney with the Federal Trade Commission and serve as complaint counsel in the Matter of Hoechst Marion Roussel, Inc., Carderm Capital L.P., and Andrx Corp., Docket No. 9293. I submit this declaration to represent that complaint counsel has attempted to confer with Hoechst in a good faith effort to resolve by agreement the issues raised in complaint counsel's motion to compel admissions by Hoechst in response to complaint counsel's first request for admissions. Complaint counsel and Hoechst have been unable to reach such an agreement.
2. On September 25, 2000, complaint counsel issued to Hoechst our First Requests for Admissions. Hoechst responded to this request on October 18, 2000, objecting to or refusing to admit or deny many of the requests.
3. On October 30, 2000, I telephoned Michael L. Koon, counsel for Hoechst, and informed him that a number of Hoechst's responses were insufficient. In that telephone call, Mr.

Koon and I agreed to discuss Hoechst's responses at a later meeting. As discussed in the telephone call, I sent Mr. Koon a letter on November 2, 2000, identifying a number of categories describing the shortcomings in Hoechst's responses and identifying the responses we believed were inadequate. We held a meet and confer on November 7, 2000.

4. In responses to some of our concerns, Hoechst submitted an amended response to our request for admissions on November 10, 2000. This amended response, however, did not resolve our differences relating to Hoechst's responses to certain requests which are subject to the attached motion.

I declare under penalty of perjury that the foregoing is true and correct.



Markus H. Meier

Dated: November 13, 2000

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

In the Matter of

HOECHST MARION ROUSSEL, INC.,
a corporation,

CARDERM CAPITAL L.P.,
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ANDRX CORPORATION,
a corporation.

Docket No. 9293

**ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO
COMPEL ADMISSIONS BY HOECHST MARION ROUSSEL, INC.**

IT IS HEREBY ORDERED that complaint counsel's motion to compel admissions by Hoechst Marion Roussel, Inc., in response to complaint counsel's first request for admissions is GRANTED. The following requests are hereby deemed ADMITTED: 6, 33, 37-38, 48-49, 55-56, 58-61, 63, 65, 81, 98, 102, 112-116, 122-124, 127, and 130.

Dated: _____, 2000

D. Michael Chappell
Administrative Law Judge

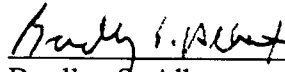
CERTIFICATE OF SERVICE

I, Bradley S. Albert, hereby certify that on November 13, 2000, I caused a copy of complaint counsel's Motion to Compel Admissions by Hoechst Marion Roussel, Inc., in Response to Complaint Counsel's First Requests for Admissions to be served upon the following persons via facsimile and/or first class mail.

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Bradley S. Albert