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,	)	Docket No. 9293
and	)	
ANDRX CORPORATION, a corporation.	)	

TO: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT HOECHST MARION ROUSSEL, INC.'S MOTION TO COMPEL INTERROGATORY RESPONSES

Hoechst Marion Roussel, Inc., takes the unusual position in its motion to compel interrogatory responses that some of complaint counsel's contention interrogatory responses disclose too much information. Hoechst demands "simple" yes or no responses to the interrogatories at issue (Nos. 1, 11, and 16) when such responses would be misleading. Interrogatory responses should help narrow the issues at trial and "reduce the possibility of surprise."[1] Complaint counsel's responses do just that by disclosing in a clear and full manner exactly what we will contend at trial on the topics raised by the interrogatories at issue. Hoechst's motion should therefore be denied.

[1] *TK-7 Corp.*, Dkt. 9224, 1990 WL 606554 at * 1 (March 9, 1990).

Interrogatory Number 1

Complaint counsel's response to Interrogatory No. 1, which asks whether the Stipulation and Agreement was a "but for" cause of Andrx staying off the market, states: "complaint counsel contend that [at the time Hoechst and Andrx entered the Stipulation and Agreement] there was substantial evidence that Andrx intended to bring to market its generic version of Cardizem CD upon FDA approval."[2] The response then identifies in detail the bases for this contention.[3] Hoechst complains that our response to the interrogatory should have been limited to a simple yes or no.[4] But such a response would be incomplete and misleading. At the hearing in this matter, we will not try to reconstruct what hypothetically would have happened had respondents not entered into the challenged agreement. Nor need we do so. Instead, we will show that before Hoechst and Andrx entered the agreement there was substantial evidence that Andrx intended to bring its product to market upon final FDA approval, and that after the Stipulation and Agreement, Andrx's incentives to do so were eliminated.

Rather than mislead Hoechst and this Court, or merely object and refuse to answer, complaint counsel chose to identify and describe the bases for our contention regarding how Andrx's intention to enter the market was affected by the Stipulation and Agreement. Far from making Hoechst "guess[]" at our contentions,[5] our response fully educates Hoechst as to the

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[2] Complaint Counsel's Supplemental Objections and Responses at 3 (Nov. 11, 2000).

[3] *See id.* at 3-4.

[4] Hoechst Motion to Compel Response to Interrogatory Nos. 1, 11, and 16 at 4 (Nov. 13, 2000).

[5] *Id.* at 4.

position we will take at trial concerning the relationship between the Stipulation and Agreement and the likelihood that Andrx would compete prior to resolution of the patent infringement suit. Complaint counsel's response narrows the issues and reduces the possibility that Hoechst will be surprised at trial, and is therefore proper.[6]

Interrogatory Number 11

Complaint counsel's response to Interrogatory No. 11, which asks for our contention on the validity of Hoechst's '584 patent, states in part: "Andrx and Hoechst were engaged in a dispute in which the validity and enforceability of the '584 Patent was directly at issue. . . . [N]either the court in the Southern District of Florida nor any other court has found the '584 Patent to be not invalid."[7] Again, Hoechst wants a simple yes or no response even though, as with Interrogatory No. 1, such a response would be incomplete and misleading. Since the issue of whether the '584 patent is valid was never resolved by the District Court for the Southern District of Florida, or by any other court, we can take no position on the patent's validity, nor need we.

As we have laid out in our motion *in limine* to preclude patent infringement evidence, we do not believe that this Court should engage in a retrospective resolution of the patent infringement dispute between Hoechst and Andrx.[8] What is important to this proceeding is that this issue was "hotly contested" by respondents during their patent infringement case and has not

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[6] *See TK-7 Corp.*, 1990 WL 606554 at * 1.

[7] Complaint Counsel's Supplemental Objections and Responses at 11-12.

[8] *See* Motion *in Limine* to Preclude Respondents' Introduction of Evidence Offered to Show Patent Infringement (Nov. 16, 2000).

been resolved.[9] In our interrogatory response, we clearly set forth this contention, which we will put forward at the hearing. Accordingly, our response fully and fairly discloses our contention concerning the validity of the '584 patent.

Interrogatory Number 16

Interrogatory No. 16 seeks complaint counsel's contention regarding the competitive benefits of allowing unidentified patent-infringing products to be sold. This purely hypothetical interrogatory bears no relation to the facts at issue in this litigation because there are no patent-infringing products at issue in this litigation, and for that reason the interrogatory is objectionable. Certainly, Hoechst alleged that Andrx's original product infringed its '584 patent, but Andrx repeatedly asserted that its product did not infringe.[10] "Interrogatories calling for an opinion based on hypothetical facts are improper."[11] Complaint counsel's objection to Interrogatory No. 16 on the grounds that it is a hypothetical should therefore be granted.[12]

Despite the improper nature of this interrogatory, complaint counsel provided and supported in great detail our contention that, "[t]he fact that Hoechst had asserted that Andrx's

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[9] Hoechst Statement at 4.

[10] Hoechst plays one of its more common games with this interrogatory, jumping from the fact that it alleged that the Andrx product infringed its patent, to asserting that this litigation concerns "Andrx's infringing product." Hoechst Motion to Compel at 6. There has never been a finding as to whether Andrx's original product infringed any Hoechst patent.

[11] *Mobil Oil Corp. v. Dep't of Energy*, Dkt. 81-CV-340 (HGM), 1982 WL 1135, at * 3 (N.D.N.Y. March 8, 1982). *Cf. Storck USA, L.P. v. Farley Candy Company, Inc.*, No. 92 C 552, 1995 WL 153260, at * 3 (N.D. Ill. April 6, 1995) (denying motion to determine sufficiency of answers to requests for admissions because party "will not be required to admit to such hypothetical admissions").

[12] *See* Complaint Counsel's Supplemental Objections and Responses at 18,

product infringed a particular patent claiming Cardizem CD does not provide a legitimate justification for respondents' agreement not to compete; nor does it justify depriving consumers [sic] the benefits of a competitive marketplace."[13] This response helps Hoechst "determine what evidence will be needed at the trial and . . . reduce[s] the possibility of surprise at the trial," and is therefore entirely proper.[14]

For the reasons discussed above, Andrx's motion to compel responses to Interrogatory Nos. 1, 11, and 16 should be denied.

Respectfully Submitted,

Markus H. Meier
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Counsel Supporting the Complaint

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

Dated: November 21, 2000

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[13] Complaint Counsel's Supplemental Objections and Responses at 19; *see also id.* at 18-20.

[14] *TK-7 Corp.*, 1990 WL 606554 at * 1

CERTIFICATE OF SERVICE

I, Markus H. Meier, hereby certify that on November 21, 2000, I caused a copy of complaint counsel's opposition to Hoechst Marion Roussel, Inc.'s motion to compel interrogatory responses to be served upon the following persons via overnight delivery.

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