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

TO: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSELS' MEMORANDUM IN
SUPPORT OF THEIR MOTION TO STRIKE CERTAIN
AFFIRMATIVE DEFENSES SET FORTH IN RESPONDENTS' ANSWERS

On March 16, 2000, the Federal Trade Commission, having "reason to believe" that Respondents Hoechst Marion Roussell, Inc. (HMRI), Carderm Capital, L.P. (Carderm), and Andrx Corporation (Andrx) were engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, authorized the issuance of an administrative complaint pursuant to its authority under 15 U.S.C. 45(b). The purpose of this proceeding is to determine whether Respondents' conduct, as charged in the complaint, was likely to restrain significantly competition. Each of the Respondents have filed answers to the complaint, and in their answers, each have raised numerous affirmative defenses.[1] Complaint counsel moves to

[1] Andrx's Answer identifies 19 affirmative defenses (4/12/00); HMRI's Answer (4/10/00) and Carderm's Answer (4/20/00) each raises 14 affirmative defenses.

strike certain of these affirmative defenses. Specifically, complaint counsel challenges Andrx Affirmative Defense numbers 2, 7, 8, 12, 14, 15, 17, 18, and 19; HMRI Affirmative Defense numbers 2, and 13; and Carderm Affirmative Defense numbers 2, and 13.

ARGUMENT

Although the Federal Trade Commission's Rules of Practice are silent on the subject of motions to strike affirmative defenses, it is clear that such motions may be filed, and granted, under the appropriate circumstances. *See Warner-Lambert Co.*, 82 F.T.C. 749 (1973); *Kroger Co.*, 1977 FTC Lexis 70 (1977). Such a motion is appropriate where the defense is "unmistakably unrelated or so immaterial as to have no bearing on the issues" and "prejudices Complaint Counsel by threatening an undue broadening of the issues." *Dura Lube Corp.*, 2000 FTC Lexis 1, 34 (Jan. 14, 2000) (Chappell, ALJ); *see also Rush-Hampton Indus., Inc.*, 1984 FTC Lexis 94 (April 6, 1984); *United States v. Walerko Tool and Engineering Corp.*, 784 F. Supp. 1385, 1387 (N.D. Ind. 1992) (a motion to strike "serves a useful purpose by eliminating insufficient defenses and saving the time and expense that otherwise would be spent litigating issues that will not affect the outcome of the case").

The affirmative defenses challenged herein are legally insufficient and irrelevant to the ultimate question of violation under the FTC Act, and would lead to unnecessary and burdensome discovery.[2] Consistent with the standard articulated by this Court, these affirmative defenses should be stricken.

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[2] Many of Respondents' other so-called "affirmative defenses" are not affirmative defenses at all. Nonetheless, since these other defenses are unlikely to lead to a broadening of the issues, complaint counsel does not move to strike them in this motion.

A. Respondents Cannot Challenge the Commission's "Reason to Believe"and Public Interest Determinations

Respondents advance various affirmative defenses claiming that the Commission lacked a "reason to believe" that their conduct violates the Federal Trade Commission Act and that this administrative proceeding is not "to the interest of the public." *See Andrx Affirmative Def. Nos. 7, 8, 18, 19; HMRI Affirmative Def. No. 2; Carderm Affirmative Def. No. 2.* By challenging the sufficiency of the Commission's pre-complaint deliberations rather than the merits of the allegations found in the complaint, each of these defenses raises issues and arguments that go far beyond the scope of this proceeding, and should be stricken.[3]

This Court's concern is whether the alleged violation has in fact occurred, not the mental processes of the Commissioners in issuing the complaint. Section 5(b) of the Federal Trade Commission Act provides for the issuance of a complaint "whenever the Commission shall have reason to believe" that a corporation is engaged in practices that violate the Act and "if it shall to the Commission that a proceeding by it in respect thereof would be to the interest of the public." 15 U.S.C. § 45(b).

> It has long been settled that the adequacy of the Commission's "reason to believe" a violation of law has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-

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[3] Among the reasons advanced by Andrx for why this proceeding is not "to the interest of the public" is the fact that the conduct alleged in the complaint is over. While this is true, the abandonment of an unlawful practice prior to issuance of a complaint is not a defense to liability. *FTC v. Goodyear Tire & Rubber* Co., 304 U.S. 257, 260 (1938) ("Discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot"); *see also Zale Corp.*, 78 F.T.C. 1195, 1240 (1971), *aff'd*, 473 F.2d 1317 (5th Cir. 1973); *Revco D.S., Inc.*, 67 F.T.C. 1158, 1252 (1965).

complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.

Exxon Corp., 83 F.T.C. 1759, 1760 (Order Denying Reconsideration, June 4, 1974); *see also American Aluminum*, 84 F.T.C. 21, 51 (1974). For this reason, Administrative Law Judges routinely strike affirmative defenses challenging the Commission's "reason to believe" and public interest determinations. *See, e.g., Metagenics, Inc.*, 1995 FTC Lexis 2 (Jan. 5, 1995) (striking affirmative defense that the complaint is not in the public interest); *Synchronal Corp.*, 1992 FTC Lexis 61 (Mar. 5, 1992) (same); *Rush-Hampton Indus., Inc.* 1984 FTC Lexis 94 (April 6, 1984) (same).[4]

Apart from their legal insufficiency, these affirmative defenses raise practical concerns that would unfairly prejudice complaint counsel. The broad discovery necessary to establish these defenses would be substantial, and would divert complaint counsel, and ultimately this Court, from the only issue to be decided in this matter – whether the alleged conduct violates Section 5 of the FTC Act. Respondents, in their discovery requests, have already signaled this purpose. For example, Andrx is asking for documents that have nothing to do with the allegations in the complaint, but which instead relate only to its investigation into the pre-complaint publicity surrounding this matter and claim of improper disclosure of non-public information:

- Document Request No. 13 asks for: "communications between the FTC and any reporter";

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[4] *See also Boise Cascade Corp.*, 97 F.T.C. 246 (Interlocutory order denying motion to dismiss premised on Commission's failure to make statutorily required "reason to believe" and "public interest" determinations).

- Document Request No. 45 asks for: "regulations, rules, guidelines, procedures or protocols" for handling confidential materials in a non-public investigation; and

- Document Request No. 46 asks for: "actual or possible disclosure of any information. . . in a manner inconsistent with" such procedures.

This is not the forum for respondents to try the Commission by calling into question the integrity of the Commission's pre-complaint mental deliberations and procedures. Even if such allegations could be proven, these affirmative defenses provide no insight into "whether the alleged violation has in fact occurred." *Exxon Corp.*, 83 F.T.C. at 1760. Therefore, Andrx Affirmative Defense numbers 7, 8, 18, and 19; HMRI Affirmative Defense number 2; and Carderm Affirmative Defense number 2 should be stricken.

B. The Defense of Discriminatory Prosecution is Insufficient As a Matter of Law

Respondent Andrx contends that the Commission has unlawfully and arbitrarily singled out Andrx in issuing this complaint because others have engaged in similar conduct. *See Andrx Affirmative Def. No. 12.* This defense fails as a matter of law.[5]

It is well settled that the Commission may, within its broad discretion, choose to proceed against one, a few, or all members of an industry. *Moog Industries Inc., v. F.T.C.*, 355 U.S. 411, 413, *reh'g denied*, 356 U.S. 905 (1958) ("the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress"). The fact that others engage or engaged in similar practices as alleged in the complaint is not a defense.

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[5] The claim that the Commission arbitrarily singled out Andrx is also inconsistent with the facts. The public record clearly shows that, on the same day the Commission authorized the issuance of this complaint, it also accepted for public comment a consent order with Abbott Laboratories and Geneva Pharmaceuticals (File No. 9810395). Similar to the allegations here, the Commission charged that Abbott and Geneva unlawfully agreed to keep a generic product off the market in exchange for a sharing of monopoly profits.

C. Andrx's Equitable Defenses are Insufficient as a Matter of Law

Andrx asserts the affirmative defenses of laches, waiver, estoppel, and unclean hands. *See Andrx's Affirmative Defense No. 17.* The law is unequivocal that none of these equitable doctrines are available as a defense to an action brought by the government in the public interest. *See United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("It is well settled that the United States is not. . . subject to the defense of laches in enforcing its rights"); *Federal Trade Commission v. North East Telecommunications, Ltd.*, 1997-2 Trade Cas. (CCH) ¶ 71,884 at 80,234 (striking affirmative defense of laches since the "doctrine of laches is not available against the Government in a civil suit"); *Rentacolor, Inc.*, 103 F.T.C. 400, 418 (1983) (initial decision) (same); *Horizon Corp.*, 97 F.T.C. 464, 772, 860 (1981) (same); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951) (unclean hands is not a defense to antitrust liability); *Apex Oil Co. v. Joseph DiMauro*, 713 F. Supp. 587, 604 (S.D.N.Y. 1989) ("the law has remained constant that unclean hands is not a defense to an antitrust action"). Andrx's desire to pursue these affirmative defenses – in the face of long-standing controlling authority to the contrary – merely highlights its strategy to distract the parties, and this Court, on issues that bear no relation to the purpose of this proceeding – whether the "alleged violation has in fact occurred." Accordingly, Andrx Affirmative Defense number 17 should be stricken.

D. Other Defenses Raised by Respondents are Irrelevant and Immaterial to the Issue in this Proceeding and Should be Stricken

In other affirmative defenses, respondents assert that the Complaint is barred because: (1) it is contrary to the public policy in favor of encouraging negotiated resolution of litigation (*Andrx Affirmative Def. No. 14; HMRI Affirmative Def. No. 13; Carderm Affirmative Def. No.*

13); (2) Andrx acted in good faith to litigate its patent infringement suit with Hoechst *(Andrx Affirmative Def. No. 15)*; or (3) Andrx acted consistent with the Hatch-Waxman Act and the regulations promulgated thereunder. *Andrx Affirmative Def. No. 2.* Again, the asserted defenses are "so immaterial as to have no bearing on the issue" to be decided by this Court, and therefore should be stricken as a matter of law.

First, complaint counsel does not dispute that the law generally favors settlements as a mechanism to resolve disputes. *Standard Oil Co. v. United States*, 283 U.S. 163, 171 (1931). Nonetheless, it is clear that such agreements – even in the context of partially settling a patent dispute – are not immune from the application of the antitrust laws. *See United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963) (finding a patent settlement unlawful because its dominant purpose was to exclude competition from the relevant market in violation of the antitrust laws); *Duplan Corp. v. Deering Miliken Inc.*, 444 F. Supp. 648, 682-84 (D.S.C. 1977), *aff'd in relevant part on the opinion below*, 594 F.2d 979, 981 (4th Cir. 1979) (affirming the district court's finding that a 1964 patent settlement agreement "was the core of a scheme to stabilize and maintain production royalties. . . and to monopolize the United States market" in violation of the antitrust laws), *cert. denied*, 444 U.S. 1015 (1980). *Cf. In re New Mexico Natural Gas Antitrust Litigation*, 1982-1 Trade Cas. ¶ 64,685 at 73,719 (D.N.M. 1982) ("a private settlement accomplished without Court participation should not be afforded *Noerr-Pennington* protection").

It is equally clear that complaint counsel bears no burden to prove that Andrx engaged in bad faith litigation of its patent infringement suit in order to establish a violation of section 5 of the FTC Act. Even assuming Andrx could establish that it did everything possible to move

forward its patent litigation, such a showing would have no evidentiary value in assessing whether the Stipulation and Agreement entered into between the respondents, which forms much of the basis of the Commission's complaint in this matter, constitutes an unfair method of competition.

Finally, Andrx would have this Court believe that if it could show that its conduct did not violate Food and Drug law[7] than it would have also shown that it did not violate antitrust law. This is simply wrong. The complaint alleges only a violation of Section 5 of the Federal Trade Commission Act. The Federal Trade Commission has sole responsibility for, and jurisdiction to, enforce this Act. *New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 257 (1986). Whether or not respondents' conduct is consistent or inconsistent with some other federal law or regulation has no bearing whatsoever on the legality of respondents' conduct under Section 5 of the FTC Act. *See Metagenics, Inc.* 1995 FTC Lexis 2 (January 5, 1995) (striking affirmative defense based on Respondents claim that their conduct were permissible under "applicable legal authorities" including FDA regulations). Allowing this affirmative defense to stand would only unnecessarily complicate and delay this proceeding by embroiling the parties, and this Court, in the fruitless exercise of discovering and interpreting the meaning and intent of the Hatch-Waxman Act and FDA regulations.

For these reasons, Andrx's Affirmative Defense numbers 2, 14, and 15 should be stricken.

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[7] As used in this memorandum, the phrase Food & Drug law includes the Federal Food, Drug and Cosmetics Act (21 U.S.C. §§ 301 *et seq.*), the Drug Price Competition and Patent Restoration Act of 1984 (Hatch-Waxman Amendments), and Food and Drug Administration (FDA) regulations.

CONCLUSION

For the foregoing reasons, Complaint counsel requests that Andrx Affirmative Defense numbers 2, 7, 8, 12, 14, 15, 17, 18, and 19; HMRI Affirmative Defense numbers 2, and 13; and Carderm Affirmative Defense numbers 2, 13 be stricken.

Respectfully Submitted,

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Bureau of Competition
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Dated: April 28, 2000

CERTIFICATE OF SERVICE

I, Bradley S. Albert, hereby certify that on April 28, 2000, I caused a copy of the Complaint Counsels' Motion to Strike Certain Affirmative Defenses Set Forth in Respondents' Answers, Memorandum in support thereof, and proposed Order, to be served upon the following persons via facsimile and overnight delivery.

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