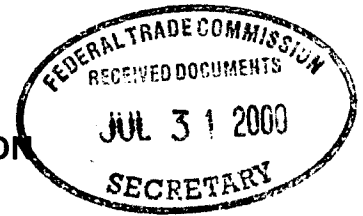


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



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 MEMORANDUM
IN OPPOSITION TO COMPLAINT COUNSEL'S
SECOND MOTION TO COMPEL**

Respondent Andrx Corporation ("Andrx") respectfully submits this memorandum in opposition to Complaint Counsel's Second Motion to Compel Andrx to Produce Documents, dated July 21, 2000.

This is Complaint Counsel's second motion relating to the same grossly overbroad set of document requests. In prior briefing, Andrx explained that, during the pre-Complaint investigation, Andrx fully cooperated with the FTC staff and produced all information the FTC deemed relevant -- plus more. See Andrx Corporation's Opposition to Complaint Counsel's Motion to Compel Andrx to Produce Additional Documents (dated 7/25/00) (the "Prior Opposition Mem.") at 14. The requests seek not just wholly irrelevant documents but essentially every scrap of paper in the company concerning one of Andrx's most significant products. Complaint Counsel in its second motion does not even attempt to demonstrate the relevancy of its extraordinarily sweeping and burdensome requests. Despite that failure, Complaint Counsel slips in a proposed order

requiring Andrx to produce documents responsive to all these overblown requests. For the reasons set forth in the prior briefing, there is no justification whatsoever for that proposed order. Rather than repeat prior arguments, Andrx's response below to the second motion is focused on its well-founded confidentiality concerns and Complaint Counsel's unreasonable -- indeed, irresponsible -- position with respect to confidentiality. Particularly because Complaint Counsel's sweeping requests potentially encompass patent secrets and other highly sensitive material, the manner which the material will be treated is critical. Accordingly, an appropriate mechanism to review Complaint Counsel's determination to disseminate any of Andrx's information into the public sphere -- which Andrx attempted to adopt by voluntary agreement with Complaint Counsel -- should be established prior to any additional production of commercially sensitive information by Andrx.¹

A. Overview of Discovery Record

Although not directly relevant to the motion, Complaint Counsel's distortions concerning the discovery record in this proceeding warrant at least a brief response. First, Complaint Counsel's claim that it "produced all of our non-privileged documents at the earliest possible time" (Complaint Counsel Mem. at 3.) is belied by the clear facts. Repeatedly, Complaint Counsel has resisted providing even basic information and forced respondents to engage in motion practice. Among other things, respondents have had to file motions directed at

¹ The prior briefing also set forth why Complaint Counsel's motion directed at its first request for documents is untimely, and the same argument applies as against this motion. See Prior Opposition, Mem. at 6-7. Indeed, the untimeliness of this motion is also based on the fact that the dispute over confidentiality was raised no later than the letter dated June 28, 2000, which set

basic files concerning other transactions being relied on by Complaint Counsel; documents concerning Complaint Counsel's "star witness" (Biovail); and serious deficiencies in Complaint Counsel's log of privileged documents. Second, Complaint Counsel's claim that Andrx seeks to "delay" discovery and "still has yet to produce a single document in litigation" (Complaint Counsel Mem. at 1) is outrageous. As Andrx has set forth in prior briefing, the FTC obtained from Andrx, during the course of two plus years of thorough investigation, every document the staff deemed relevant to this proceeding. Never did the FTC complain of any deficiency in Andrx's production; indeed Complaint Counsel was sufficiently satisfied with the disclosures already obtained from Andrx and the other respondents that, at the conference on April 24, 2000, it did not claim the need for any significant additional discovery and therefore did not take any action on scheduling a trial date.

**B. Complaint Counsel's Unreasonable
Position That It Can Disseminate
Andrx's Confidential Information**

Complaint Counsel has taken the position that it has largely unfettered discretion to disseminate Andrx's confidential information into the public sphere. Nothing, however, in the Protective Order or otherwise provides Complaint Counsel with such discretion over the handling of Andrx's confidential material. Nor should Complaint Counsel have that discretion, particularly given its close relationship with purported competitors of Andrx and other parties with interests adverse to Andrx.

forth Andrx's confidentiality concerns (See Complaint Counsel Mem. at 2) -- therefore, the 20-day deadline under the Scheduling Order for bringing a motion clearly was not satisfied here.

Indeed, Complaint Counsel already has released information Andrx deems confidential. The Protective Order expressly provides that it covers "material derived from the pre-complaint phase of this Matter." Protective Order, ¶3. In disregard of the Protective Order and other confidentiality restrictions, Complaint Counsel released to third parties a letter, dated October 5, 1999, from the FTC staff (Bradley S. Albert) to Andrx's counsel (Louis M. Solomon) (the "October 1999 Letter"), which was part of the non-public investigation prior to the filing of the Complaint. The October 1999 Letter disclosed the identity of Andrx witnesses who voluntarily provided information to the FTC staff during the non-public investigation in reliance on statutory and other express guarantees of confidentiality.

Given that incident, Andrx has serious concerns about Complaint Counsel's handling of confidential material. Those concerns are particularly heightened because Complaint Counsel seeks highly sensitive information. Complaint Counsel incorrectly asserts that a prior order "summarily rejected Andrx's position." (Complaint Counsel Mem. at 3.) That is simply wrong. In a prior motion dated May 30, 2000, Andrx sought various forms of relief, including, among other things, access to certain documents Complaint Counsel was withholding. By order dated June 15, 2000, the Court denied Andrx's motion without any discussion or explanation. Not only did that prior motion encompass issues wholly unrelated to confidentiality, but the Court did not provide the grounds or basis for its determination.

Rather than burden the Court with further motion practice regarding confidentiality and the application of the Protective Order, Andrx made a good faith effort to resolve the issue by agreement with Complaint Counsel. As a means for resolving disputes over the disclosure of confidential information, Andrx invited Complaint Counsel to agree to a reasonable, straightforward procedure. Under Andrx's proposal, the party claiming confidential status would be consulted before the release of any such material and, if there is a dispute, the matter would be brought to the ALJ for a ruling.

However, Complaint Counsel unreasonably refused to agree to Andrx's proposal. In response, all Complaint Counsel did was write a single sentence stating that it "intend[s] to fully abide by the terms of the Court's protective order." (See Complaint Counsel Mem. at 2.) Clearly, that was neither a satisfactory nor even productive response. Andrx does not know what Complaint Counsel means by claiming it will comply with its obligations when the scope and application of those obligations apparently is in dispute.

Given Complaint Counsel's conduct and collaboration with parties adverse to respondents, Andrx has objected to further supplementing its document production until there is clarification of the treatment of confidential material.² Complaint Counsel regrettably has manufactured an unnecessary dispute over the issue of confidentiality, thereby complicating and delaying the discovery process.

² The claim by Complaint Counsel that Andrx "frustrated our legitimate discovery from Hoechst" (Complaint Counsel Mem. at 3) is disingenuous. The documents being referenced are Andrx's documents, not Hoechst's. The documents were produced to Hoechst during the patent action between the parties and contain Andrx's commercially sensitive patent information. Pending clarification of Complaint Counsel's confidentiality obligations -- which Andrx has sought to

Conclusion

For the foregoing reasons, Complaint Counsel's motion should be denied and an appropriate mechanism established for allowing Andrx an opportunity to obtain the ALJ's review of Complaint Counsel's determination to disseminate publicly any of Andrx's confidential material.

Dated: July 31, 2000

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resolve by voluntary agreement without the need for judicial intervention -- production would place Andrx's trade secrets at serious risk.

CERTIFICATE OF SERVICE

I, Peter M. Todaro, hereby certify that on July 31, 2000, I caused to be served upon the following persons, by hand delivery, the following document: Respondent Andrx Corporation's Memorandum In Opposition to Complaint Counsel's Second Motion to Compel:

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