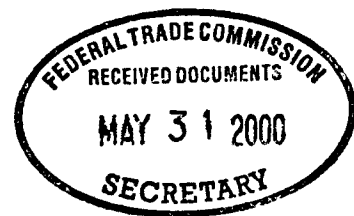


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



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'S MOTION FOR AN ORDER  
(1) GRANTING RESPONDENTS ACCESS TO DOCUMENTS AVAILABLE TO  
COMPLAINT COUNSEL; (2) DECLARING THAT COMPLAINT COUNSEL'S  
DISCLOSURE OF INFORMATION TO THIRD PARTIES VIOLATED  
STATUTORY AND REGULATORY CONFIDENTIALITY RESTRICTIONS  
AND THE PROTECTIVE ORDER ENTERED IN THIS MATTER; AND (3)  
PROHIBITING COMPLAINT COUNSEL FROM FURTHER DISCLOSING  
CONFIDENTIAL INFORMATION TO THIRD PARTIES**

Pursuant to § 3.22 of the Federal Trade Commission's Rules of Practice, Respondent Andrx Corporation hereby moves for an order (1) granting respondents access to the documents from the FTC staff's investigatory files, ascertained or generated during the pre-complaint investigation, because such materials have been made or are available to Complaint Counsel; (2) declaring that Complaint Counsel violated statutory and regulatory confidentiality restrictions, as well as the Protective Order entered by this Court in this matter, by releasing to third parties a letter from the non-public investigation containing confidential Andrx information; and (3) prohibiting Complaint Counsel and other FTC staff from further communicating information from the investigatory files in these proceedings to any third parties without Andrx's consent or, in the absence of consent, without this Court's approval.

The bases of this motion are set forth in Andrx's accompanying Memorandum in Support of its Motion for an Order (dated May 30, 2000).

Dated: New York, New York  
May 30, 2000

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,  
FRISCHER & SHARP

By: 

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Counsel for Respondent Andrx Corporation

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

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**HOECHST MARION ROUSSEL, INC.**, a corporation,  
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**ORDER GRANTING RESPONDENT ANDRX'S MOTION FOR AN ORDER (1)  
GRANTING RESPONDENTS ACCESS TO DOCUMENTS AVAILABLE TO  
COMPLAINT COUNSEL; (2) DECLARING THAT COMPLAINT COUNSEL'S  
DISCLOSURE OF INFORMATION TO THIRD PARTIES VIOLATED  
STATUTORY AND REGULATORY CONFIDENTIALITY RESTRICTIONS  
AND THE PROTECTIVE ORDER ENTERED IN THIS MATTER; AND (3)  
PROHIBITING COMPLAINT COUNSEL FROM FURTHER DISCLOSING  
CONFIDENTIAL INFORMATION TO THIRD PARTIES**

IT IS HEREBY ORDERED that Respondent Andrx's motion for an order (1) granting respondents access to the documents from the FTC staff's investigatory files, ascertained or generated during the pre-complaint investigation, because such materials have been made or are available to Complaint Counsel; (2) declaring that Complaint Counsel violated statutory and regulatory confidentiality restrictions, as well as the Protective Order entered by this Court in this matter, by releasing to third parties a letter from the non-public investigation, containing confidential Andrx information; and (3) prohibiting Complaint Counsel and other FTC staff from further communicating

information from the investigatory files in these proceedings, to any third parties without Andrx's consent or, in the absence of consent, without this Court's approval, is

GRANTED.

Dated: June \_\_\_\_\_, 2000

---

D. Michael Chappell  
Administrative Law Judge

**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'S MEMORANDUM IN SUPPORT  
OF ITS MOTION FOR AN ORDER (1) GRANTING RESPONDENTS  
ACCESS TO DOCUMENTS AVAILABLE TO COMPLAINT COUNSEL; (2) DECLARING  
THAT COMPLAINT COUNSEL'S DISCLOSURE OF INFORMATION TO THIRD  
PARTIES VIOLATED STATUTORY AND REGULATORY CONFIDENTIALITY  
RESTRICTIONS AS WELL AS THE PROTECTIVE ORDER ENTERED IN THIS  
MATTER; AND (3) PROHIBITING COMPLAINT COUNSEL FROM FURTHER  
DISCLOSING CONFIDENTIAL INFORMATION TO THIRD PARTIES**

**Solomon, Zauderer, Ellenhorn, Frischer & Sharp**  
45 Rockefeller Plaza  
New York, New York 10111  
(212) 956-3700

Respondent Andrx Corporation ("Andrx") submits this memorandum in support of its motion for an order (1) granting respondents access to the documents from the FTC staff's investigatory files, ascertained or generated during the pre-complaint investigation, because such materials have been made or are available to Complaint Counsel; (2) declaring that Complaint Counsel violated statutory and regulatory confidentiality restrictions, as well as the Protective Order entered by this Court in this matter, by releasing to third parties a letter from the non-public investigation, containing confidential Andrx information; and (3) prohibiting Complaint Counsel and other FTC staff from further communicating information from the investigatory files in these proceedings, to any third parties without Andrx's consent or, in the absence of consent, without this Court's approval.

### **Preliminary Statement**

Complaint Counsel has taken the position that respondents are not entitled to access all the materials obtained or generated as part of the pre-Complaint investigation that have been made or are available to Complaint Counsel. That one-sided approach is patently unfair and contrary to applicable law. But Complaint Counsel goes even further, claiming that it alone can select what information from the investigation to disclose to third parties or disseminate into the public domain. In violation of statutory and regulatory provisions, as well as the Protective Order entered in these proceedings, Complaint Counsel recently 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. The October 1999 Letter revealed the identity of Andrx witnesses who voluntarily provided information in reliance on express guarantees of confidentiality. Complaint Counsel therefore seeks to have it both ways: it both has denied Andrx access to information compiled during the pre-Complaint investigation and, at the

same time, claims the right unilaterally to determine what information from that confidential, non-public investigation to disclose to third parties or publicly disseminate.

By arrogating to itself the role of "gatekeeper" of the confidential information from the pre-complaint investigatory files, Complaint Counsel has disregarded the procedural rules and common sense notions of fairness. Moreover, given the two-and-a-half year head start the FTC has had in developing its case during the pre-complaint investigation, due process requires that, since Complaint Counsel has been given access to the files of the investigation, Complaint Counsel share the information derived from those files with respondents, who have been allowed less than six months to complete their discovery. Respondents also should have access to the investigatory files as part of a mechanism to protect against further misuses by Complaint Counsel of the confidential information in the files. There is a well-documented history in this case of FTC staff members leaking information from the investigation. By releasing the October 1999 Letter, Complaint Counsel itself has participated in those improper disclosures. As a safeguard, Complaint Counsel and respondents ought to reach agreement, prior to the release of information from the files, based on equal access to those files. In the event any disputes arise over the public disclosure of such information, the matter should be presented to the Administrative Law Judge for determination. When we raised this issue with Complaint Counsel, promptly after it came to our attention on May 24, 2000, Complaint Counsel agreed to refrain from making further disclosures from the confidential investigatory files pending resolution of this motion.

## Factual Background

### **A. Complaint Counsel Has Denied Respondents Fair Access To The Pre-Complaint Investigatory Files**

The pre-complaint investigation concerning this matter occurred over a period of approximately two-and-a-half years. During that period, the FTC, its employees, staff, or agents received information from a multitude of sources and generated its own information on this matter. In its Initial Disclosures, for example, Complaint Counsel identified over fifty entities, in addition to respondents, from which the FTC staff received information. Essentially all of the sources identified are large commercial entities, some of which Complaint Counsel describes as competitors or potential competitors of Andrx. (All of this information is referred to herein as "investigatory" files.)

There is substantial overlap between the FTC personnel involved in the investigatory stage and Complaint Counsel. At least four people are serving in both roles. Despite Andrx's repeated requests, Complaint Counsel has refused to give respondents access to the investigatory files. By June 1, 2000, Andrx intends to make a motion to compel against Complaint Counsel addressed to particular document requests. Here, the issue is different and implicates a broader problem of Complaint Counsel having a monopoly over the investigatory files and the resulting informational disparity between the parties.

By Scheduling Order dated April 26, 2000, respondents were given fewer than six months to start and complete their discovery and prepare for a trial commencing in early December 2000. The short time-frame makes it imperative that respondents obtain the information that the FTC compiled in an investigation lasting well over two years and made available to Complaint Counsel. Among other things, Complaint Counsel has not provided information generated by the investigatory staff, including documentation memorializing witness interviews or other factual



information, which may contain factual material supportive of respondents' positions. Complaint Counsel also has not identified all entities or individuals who provided information to the investigatory staff. Such sources, too, may have information supportive of respondents' positions.

As Andrx has stated to Complaint Counsel, the risk is that evidence potentially important to respondents will remain unknown to them -- information made fully available to Complaint Counsel.

**B. The FTC's Breaches of Confidentiality**

Complaint Counsel has advised Andrx, astonishingly, that it believes it is vested with discretion to decide what information to disclose to third parties or publicly disseminate out of the non-public investigatory files. In addition to claiming that discretion generally, Complaint Counsel has acknowledged that it recently disseminated the October 1999 Letter. In compliance with the Protective Order, Andrx is not attaching a copy of the October 1999 Letter because it is Confidential Material protected from disclosure. The letter, however, was provided by Complaint Counsel -- without any advance notice to respondents -- to counsel for plaintiffs in the consolidated action brought against Andrx and HMR in the U.S. District Court for the Southern District of Michigan. The letter revealed confidential information about the identify of Andrx witnesses who voluntarily supplied information in reliance on statutory protections of confidentiality. The letter has now been publicly filed by the plaintiffs in the Michigan action.

The dissemination of the October 1999 Letter is not an isolated incident. At the initial scheduling conference on April 24, 2000, respondents brought to the attention of the Administrative Law Judge the issue of leaks and other improper ex parte communications from the FTC staff. See 4/24 Tr. at 34-38. In particular, respondents raised the comments of Molly Boast, the Deputy Director of the FTC's Bureau of Competition, who spoke on April 6, 2000, at a panel of

the American Bar Association, about the HMR-Andrx Stipulation in the context of these proceedings. In addition, Andrx has described numerous leaks to the press by the FTC staff during the non-public investigation, the dissemination by FTC staff members of confidential information about Andrx, and the FTC staff's communication of their internal deliberations to a purported competitor of Andrx. See Andrx's Memorandum in Opposition to Complaint Counsel's Motion to Strike Certain Affirmative Defenses, (dated May 19, 2000), at pp. 19-21. The information communicated by the FTC staff included information that Andrx supplied to the FTC solely upon assurances that the information would be maintained within the Commission and in confidence.

In response to the evidence of improper disclosures by the FTC staff, Complaint Counsel committed, on the record, to take steps to ensure that the FTC would cease publicizing confidential material about this proceeding. See 4/24 Tr. at 38. The disclosure of the October 1999 Letter demonstrates that the improper disclosures have continued.

## **ARGUMENT**

### **I.**

#### **RESPONDENTS SHOULD HAVE ACCESS TO THE INVESTIGATORY FILES AVAILABLE TO COMPLAINT COUNSEL**

To ensure fairness and due process, the FTC's own rules separate the investigative and adjudicative phases of a proceeding See 16 C.F.R. § 2.1 *et seq.* (rules governing "investigations and inquiries") and §3.1 *et seq.* (separate "rules . . . govern procedure in adjudicative proceedings"). As the D.C. Circuit stated in FTC v. Atlantic Richfield Co., 567 F.2d 96, 102 (D.C. Cir. 1977):

It is recognized that the Federal Trade Commission and the other regulatory agencies have two separate functions to perform, investigative and adjudicative. It is also recognized that the regulatory agencies have an obligation to keep those roles separate insofar as is possible, in order to

insure the judicial fairness of adjudicative proceedings and also the unrestricted vigor of investigative proceedings. Indeed, such confidence as the public and the courts have in the integrity of the FTC and other agencies' adjudicative processes may be said to rest in great part on their effort and success in keeping separate these two diverse functions.

See also id. at 99. ("The Commission has, in stating its rules of practice, clearly separated the rules relating to nonadjudicative procedures (such as investigations) from those dealing with adjudicative proceedings").

Given that dichotomy of functions, the FTC staff's making investigatory files available to Complaint Counsel -- acting in the separate prosecutorial role -- waives any potential privileges otherwise applicable to that information. The information obtained during the non-public investigation, as a matter of statute and regulation, may be confidential as to third parties, but not to Andrx and the other respondents as parties to these proceedings. Indeed, any other result would be patently unfair because Complaint Counsel would have the advantage of a two plus year head-start in preparing its case, while Andrx would not have, given the short six-month period before trial, a fair opportunity ever to catch up.

Here, the entirety of the investigatory files have been made available exclusively to Complaint Counsel. In turn, Complaint Counsel has taken the position that it can, at its own discretion and pace, select what information it will keep confidential, produce to respondents, and disclose to third parties. The law, however, is to the contrary, and Complaint Counsel is not vested with authority to "cherry pick" what information it wants to disclose and how to use it.

Finding that the separation of investigative and adjudicatory functions is a "very important issue" (569 F.2d at 100), the D.C. Circuit in Atlantic Richfield Co. acknowledged the "persuasive argument" (id. at 103) that Complaint Counsel is not entitled to pre-Complaint investigatory files without sharing them with respondent. In arguing otherwise, the FTC relied on 16

C.F.R. § 3.43(c), which merely provides that "[i]nformation obtained in investigations . . . may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence . . ." (emphasis added). Expressing skepticism at the FTC's position, the Court stated:

Such an interpretation would appear to be inconsistent with all the rest of Part 3, Subpart D, which endeavors to create for the Administrative Law Judge control over the adjudicatory process, including all aspects of discovery, and to make the FTC adjudicatory process as fair to each side in every respect as in a federal court. Secondly, the literal words of this particular rule do not mention transfer from one branch of the FTC to the other, but, rather, seem merely to provide or authorize the offering in evidence and the public disclosure of information obtained by any means. The phraseology does not indicate that the Administrative Law Judge is to be bypassed, for the free and unauthorized transfer from one branch of the FTC to another would appear to negate all the authority and responsibility of the Administrative Law Judge, all the notice and opportunity to object, which is the object of the preceding portion of Part 3 re adjudicative proceedings. Id. at 104.

Pending clarification from the FTC as to the application of its rules, the Court of Appeals in Atlantic Richfield directed "the prosecution staff . . . to return immediately to the investigative staff" the investigatory files transferred to it. Id. at 106.

The Commission has expressed the view that Complaint Counsel is not prohibited from accessing investigatory files -- however, that does not address the issue of equal access by both Complaint Counsel and respondents.<sup>1</sup> Here, the fair application of the rules requires that respondents have precisely the same access to the investigatory files as Complaint Counsel has been given. By granting equal access, the due process concerns expressed in Atlantic Richfield over the

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<sup>1</sup> See Exxon Corporation, FTC Docket No. 8934, 1980 FTC LEXIS 121 (February 8, 1980) \*6 (noting Commission "policy of not preventing Complaint Counsel in an adjudicative proceeding from having access to other Commission files").

unfairness of giving Complaint Counsel exclusive access to information is reconciled with the FTC's position that Complaint Counsel should not be precluded from having access to the files.

Particularly under the circumstances in this case, it would be insufficient simply to assume respondents can seek and obtain the same information from third parties in under six months as the FTC already compiled over the course of two-and-a-half years. The informational imbalance also is heightened here because Complaint Counsel includes numerous staff members who actually participated in the investigation.<sup>2</sup>

The same principle of fair access to investigatory files was recognized in Intel Corporation, FTC Docket No. 9288, 1999 FTC LEXIS 206 (March 2, 1999) \*4, which imposed "a protective order preventing complaint counsel even from having access to or making use of the investigative subpoena documents" in order to "protect [respondent's] right to procedural due process." In prohibiting Complaint Counsel from obtaining information derived from investigative subpoenas served while the adjudicative proceeding was pending, the ALJ found:

A protective order is therefore necessary to prevent Complaint Counsel from using extrajudicial discovery to obtain an unfair and impermissible advantage, or at least, to prevent 'a basis for a respondent to fear that those powers are being abused.' Id. at \*4.

Nor does Complaint Counsel have any basis on which to assert privileges as to the investigatory files that it has access to. For example, in Champion Spark Plug Company, 1980 FTC LEXIS 200 at \*8, the ALJ found

Once the complaint is issued the Commission becomes a third party to the adjudicative proceeding, with Complaint Counsel becoming a party . . . [and requests for] documents in files of officers of Federal Trade Commission

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<sup>2</sup> Any argument that respondents can obtain discovery and thereby do not need access to otherwise privileged portions of investigatory files is not well-taken because of, among other things, the FTC rules, as amended in 1997, requiring expedited discovery and a disposition of the case within one year. Here, respondents are faced with initial disclosures identifying well over fifty potential witnesses and have been given fewer than six months to complete discovery. Respondents do not have a genuine opportunity to redo the work that the FTC did during its two and a half year investigation.

other than those of counsel supporting the complaint is, in effect, a demand directed at a third party.

By treating Complaint Counsel as a party and other FTC staff members separately as a third party, there is no basis for attaching any privileges to information transmitted between them. Therefore, any release of information from the FTC Staff to Complaint Counsel eliminates the work product, deliberative process, and any other privileges covering the material since it involves information from a third party.

Furthermore, as a matter of rudimentary due process, it is grossly unfair -- if not wholly improper -- to obtain discovery from third parties without sharing the information with the other parties. See, e.g., Richardson v. State of Florida, 137 F.R.D. 401, 403, 404 (M.D.Fla. 1991) ("issuance of an ex parte subpoena destroys the normal processes of discovery" and "it is inherent in Rule 45 [of the Federal Rules of Civil Procedure] that notice be given to another party when documents are to be obtained from a person who is not a party to the action"); Spencer v. Steinman, 179 F.R.D. 484, 487, 488 (E.D.Pa. 1998) ("It is settled that a party issuing a subpoena to a nonparty for the production of documents during discovery must provide prior notice to all parties to the litigation" and "parties...need notice in order to monitor the discover[y] and in order to pursue access to any information that may or should be produced"); Matter of Beiny, 132 A.D.2d 190, 522 N.Y.S.2d 511 (1<sup>st</sup> Dep't 1987) (sanctioning counsel for failing to provide adversary with notice of third party discovery).

Complaint Counsel here was intimately involved in the pre-complaint investigation or has now been given full access and advantage of all information ascertained and developed during what should have been the procedurally and functionally separate investigative stage of the proceedings. Respondents should similarly be given access to the investigational files in order to

insure that the FTC adjudicatory process comports with due process and is "as fair to each side in every respect as in a federal court." See FTC v. Atlantic Richfield Co., *supra*, at 104.

## II.

### **COMPLAINT COUNSEL DISCLOSED CONFIDENTIAL MATERIAL IN VIOLATION OF STATUTORY AND REGULATORY PROHIBITIONS AND THE PROTECTIVE ORDER**

Under the FTC Act and the FTC's own Rules of Practice, investigatory hearings, and any information gained therein, are non-public. See, e.g. 16 C.F.R. § 2.8(c). To protect against the dissemination of confidential, non-public information, the information obtained by the FTC during a pre-Complaint investigation "shall not be disclosed" absent notification by the Commission of its intent to do so to the party supplying it and providing that party with the opportunity to object. 15 U.S.C. §57b-2(c) (emphasis added).

In entering the Protective Order on May 8, 2000, this Court recognized the statutory and regulatory framework of confidentiality on non-public investigative material. The Protective Order provides that "Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter" (defined specifically to mean this administrative proceeding). Protective Order, ¶ 3. Additionally, certain Discovery Material is designated "Confidential" and subject to heightened confidentiality restrictions under the Protective Order and, as such, may be only be disclosed in defined circumstances to specified individuals. See Protective Order, ¶ 3. The FTC investigational files, including the "information derived therefrom" pursuant to paragraph 1, are expressly determined to be Confidential under the terms of the Protective Order. The Protective Order states:

To the extent any such material is made part of this proceeding, all documents heretofore obtained by compulsory process or voluntarily from any Party, regardless of whether designated confidential by the Party, and transcripts of any investigational hearings, interviews and

depositions, which were obtained during the pre-complaint stage of this Matter shall be treated as Confidential Discovery Material.

Protective Order, ¶ 3. Accordingly, the transcripts of investigational hearings and any information contained therein are subject to the strict terms of the Protective Order and are not available for public disclosure.<sup>3</sup>

In this case, the FTC staff repeatedly has violated the confidentiality safeguards in the applicable statutory and regulatory scheme and now in the Protective Order. Andrx would not dwell on this subject except for Complaint Counsel's expressed position that it has discretion to determine what information may be disclosed from the investigatory files and to whom. Complaint Counsel violated its confidentiality obligations by disclosing the October 1999 Letter prepared as part of the non-public investigation. That disclosure, which described the identity of Andrx witnesses, violated the FTC Act, the Protective Order, and the applicable case law.

Contrary to the legal restrictions set forth in the FTC Act (see §57b-2(c)), Andrx received no warning or any other indication whatsoever that the letter identifying the names of its confidential witnesses would be released to third parties. The identity of Andrx's witnesses is subject to both a FOIA exemption and an FTC Act exemption from public disclosure. 5 U.S.C. § 552(b)(7)(D) (the "FOIA" statute) exempts from disclosure material compiled for law enforcement purposes to the extent that the production could reasonably be expected to disclose the identity of a confidential source; 15 U.S.C. §57b-2(f) specifically exempts material received during the investigative phase from disclosure under 5 U.S.C. § 552.

Complaint Counsel's dissemination of the October 1999 Letter also violated the Protective Order. The terms of the Protective Order make clear that the investigative transcript --

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<sup>3</sup> Additionally, the Protective Order does not automatically treat all investigative material as available for use by Complaint Counsel in this matter; rather, "[t]he material . . . shall only be available for use in this proceeding once an independent basis has been demonstrated for such use" Protective Order, ¶3 (emphasis added).



and the "information derived therefrom" -- are protected from public disclosure. In describing witness names and the dates of voluntary investigational testimony, the October 1999 Letter was part of the nonpublic investigation and contained confidential information, as demonstrated by the fact that the identity of the witnesses was elicited, on the record, by testimony.

In disclosing that information, Complaint Counsel's conduct is contrary to the case law and even its own position in other adjudicative proceedings. See, e.g., In the Matter of Olin Corp., Docket No. 9196 (complaint counsel claiming privilege with respect to the identities of persons who provided complaint counsel with information relevant to the proceeding, with the basis found in federal law, e.g., Roviaro v. U.S., 353 U.S. 53 (1957)); In the Matter of Champion Spark Plug Company, 1980 FTC LEXIS 200 at \*8 ).<sup>4</sup>

There is no justification for Complaint Counsel's patently improper disclosure of the October 1999 Letter except perhaps a misplaced zeal to try to help plaintiffs in class action litigation against respondents. This is not a proper role for Complaint Counsel to be playing when the Commission itself has gone out of its way to state publicly that it has made no determination that Andrx did anything wrong and that the purpose of this proceeding is "the development of a full factual record" in order to "allow the Commission to further consider the issues". Complaint Counsel surely had no justification for violating federal law, the Rules of the Commission, and the Protective Order entered by this Court.

When confronted with its conduct in releasing the October 1999 Letter, Complaint Counsel first candidly acknowledged that he was responsible for the disclosure but then tried to rationalize it by saying that there was nothing confidential in the Letter, which misses the point and

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<sup>4</sup> The D.C. courts have held that protected information in the grand jury context includes "the identities of witnesses" and that this information may not be disclosed. See Crooker v. IRS, 1995 U.S. Dist. LEXIS 7031 (D.D.C. 1995); Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice, 262 U.S. App. D.C. 166, 823 F.2d 574 (D.C.Cir. 1987).

in any event is wrong. When it was then pointed out that the Letter disclosed the names of Andrx's witnesses who had given confidential information to the FTC staff under an express promise of confidentiality as part of a non-public investigational hearings -- and, indeed, the very names of these persons is treated as confidential by the rules and case law -- Complaint Counsel then backslid to an argument that the Letter revealed the names of persons already disclosed in the Initial Disclosure. This, too, is flatly incorrect; not all the names are disclosed, and in any event no disclosure is made that these persons have been the subject of non-public investigational hearings. Complaint Counsel's casting about for an explanation for its improper conduct further demonstrates its clear violation of its confidentiality obligations. Andrx is entitled to a declaration to that effect.

### III.

#### **COMPLAINT COUNSEL SHOULD BE PRECLUDED FROM MAKING FURTHER DISCLOSURES OF INFORMATION FROM THE INVESTIGATIVE FILES ABSENT RESPONDENTS' CONSENT OR THIS COURT'S APPROVAL**

Complaint Counsel cannot decide for itself what information should be disclosed to third parties or the public generally. Nor does it provide any comfort whatsoever for Complaint Counsel to argue, as it has to Andrx, that it will exercise the discretion it claims to have in compliance with its statutory and other obligations. We have seen how Complaint Counsel exercises discretion, and the improper release of the confidential October 1999 Letter was the result. Given that there is no adequate remedy once an improper disclosure is made, it is critical to have an appropriate mechanism in place to safeguard against such a disclosure since it then becomes too late.

Accordingly, the rule should be adopted in these proceedings (which we thought the Protective Order already did) that either the investigatory information cannot be publicized at all or that respondents must be asked to consent to its disclosure. In the face of a disagreement over

confidentiality, Complaint Counsel should seek a ruling from the Administrative Law Judge authorizing the disclosure.

**Conclusion**

In light of the foregoing, the Court should issue an order (i) granting respondents access to all materials available to Complaint Counsel out of the FTC staff's investigative files pertaining to this matter; (ii) declaring that Complaint Counsel improperly disclosed information in violation of the statutory and regulatory restrictions and the Protective Order; and (iii) prohibiting Complaint Counsel, and any other FTC staff members, from further communicating information from the investigative files to any third parties without Andrx's consent or, alternatively, the Court's approval.

Dated: New York, New York  
May 30, 2000

SOLOMON, ZAUDERER, ELLENHORN,  
FRISCHER & SHARP

By  \_\_\_\_\_

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Andrx Corporation

## CERTIFICATE OF SERVICE

I, Hal S. Shaftel , hereby certify that on May 30, 2000, I caused a copy of RESPONDENT ANDRX'S MOTION FOR AN ORDER (1) GRANTING RESPONDENTS ACCESS TO DOCUMENTS AVAILABLE TO COMPLAINT COUNSEL; (2) DECLARING THAT COMPLAINT COUNSEL'S DISCLOSURE OF INFORMATION TO THIRD PARTIES VIOLATED STATUTORY AND REGULATORY CONFIDENTIALITY RESTRICTIONS AND THE PROTECTIVE ORDER ENTERED IN THIS MATTER; AND (3) PROHIBITING COMPLAINT COUNSEL FROM FURTHER DISCLOSING CONFIDENTIAL INFORMATION TO THIRD PARTIES, PROPOSED ORDER, AND MEMORANDUM IN SUPPORT to be served upon the following persons by Federal Express:

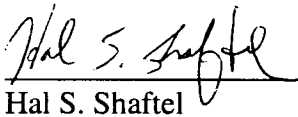
Hon. D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
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\_\_\_\_\_  
Hal S. Shaftel