

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

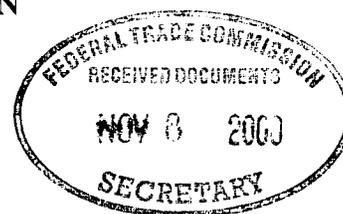
HOECHST MARION ROUSSEL, INC.,  
a corporation,

CARDERM CAPITAL L.P.,  
a limited partnership,

and

ANDRX CORPORATION,  
a corporation.

Docket No. 9293



**COMPLAINT COUNSEL'S MOTION TO COMPEL ADMISSIONS BY ANDRX  
CORPORATION 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 Andrx 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 Andrx Corporation.

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 8, 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

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S  
MOTION TO COMPEL ADMISSIONS BY ANDRX CORPORATION**

Complaint counsel served requests for admissions on respondent Andrx Corporation on September 25, 2000, within the discovery period for issuing such requests. Andrx objected to or refused to answer almost three-quarters of the requests, usually asserting multiple objections and refusals for a single request. Specifically, Andrx improperly objected that the requests call for legal conclusions, require characterization of documents, require incomplete responses, concern settlement discussions, and/or contain vague terms. Andrx also improperly refuses to admit or deny a number of requested admissions without giving a proper basis for its refusal. For the reasons given below, complaint counsel seeks an order under Commission Rule 3.38(a)(1), 16 C.F.R. § 3.38(a)(1), deeming the requests discussed below admitted, or compelling Andrx to properly answer them.

Requests for admissions under Commission Rule 3.32, 16 C.F.R. § 3.32, serve to narrow the issues for trial. Admissions do no more than identify which issues the responding party plans to contest. *See Trans Union Corp.*, Dkt. 9255, 1993 FTC Lexis 116, at \*2 (May 24, 1993)

(order ruling on motion to determine the sufficiency of responses to requests for admissions); *Beatrice Foods Co.*, Dkt. 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. Andrx’s improper responses fail to serve these purposes and should be rejected.

### **Improper Objections That Certain Requests Call for a Legal Conclusion**

Andrx improperly objects to Requests 3, 11, 23-30, 52-53, 57, 64-75, 77, 82-83, 104, 106, 110-11, 134, and 146 on the basis that the requests call for legal conclusions. However, the requests 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-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 Andrx objects on this basis relate directly to the facts of this case. For example, Request 3 states:

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

Request 3 merely asks Andrx whether it will contest 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). In addition, these Requests go to several issues raised by Andrx itself. For example, Andrx has argued that its compliance with the Hatch-Waxman Act provides an affirmative defense. *See* Answer of Andrx Corporation, ¶ 41. Complaint counsel therefore is particularly entitled to know whether Andrx will contest its application of the Act to the facts of this case. *See, e.g.*, Request 52. Other requests in this category address whether Andrx’s interpretation of the terms of the Stipulation and Agreement differs from the plain meaning of the words in the agreement. *See, e.g.*, Request 64. Andrx’s objections on the ground that these requests call for a legal conclusion should be overruled.

### **Improper Objections That Certain Requests Require Characterization**

Andrx objects to Requests 16-22, 32-38, 43, 46, 48, 55, 59, 61-75, 77, 82-84, 104, 113-121, 134-135, 137-140, and 144-145 on the ground that it is not required to characterize written documents that have already been submitted in discovery. This is not a valid objection. Whether Andrx believes the request requires it to “characterize” a document is irrelevant. *See Audiotext*

*Communications*, 1995 WL 625744, at \* 7 (“the objections that the complaint speaks for itself . . . are simply inappropriate”). The requests simply ask whether Andrx disputes straightforward statements. If necessary, Andrx can deny the requests, as long as the denials “fairly meet the substance of the requested admission.” Rule 3.32(b), 16 C.F.R. § 3.32(b). Otherwise, it should either admit – in whole, in part or with qualification, if good faith requires – or “set forth in detail” the reasons why it can neither affirm nor deny the request. *Id.*

In any event, the bulk of the requests in this category identify specific documents and merely ask whether the documents, which were submitted to a government agency or a court of law, contain certain statements. For example, Request 46 states:

Admit that the language “other bioequivalent or generic versions of Cardizem CD” is crossed out in paragraph 2 of the August 26, 1997 draft of the HMR/Andrx Stipulation and Agreement, Bates stamped 1512-23.

There is nothing objectionable in this request, *see Audiotext Communications*, 1995 WL 625744, at \* 7, and Andrx should be required to indicate whether it will contest this simple fact. Nor can Andrx escape its obligation under Rule 3.32(b) to engage in a reasonable search of “readily obtainable” information if such is necessary to respond to the requests. Complaint counsel is entitled to receive proper answers to these requests.

### **Improper Objections That Certain Requests Are Incomplete**

Andrx refuses to answer Requests 55, 59, 61-75, 77, and 82-83 on the grounds that these requests are “incomplete in . . . [their] expression of the agreement.” These requests merely ask whether Andrx intends to contest the meaning of certain terms in contracts to which Andrx is a

party. Accordingly, complaint counsel fails to see what Andrx 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. Andrx must answer unless it shows that answering these requests would inevitably lead to a false conclusion. *See id.* Andrx cannot make any such showing, and complaint counsel is entitled to proper responses to these requests.

### **Improper Objections That Certain Requests Cover Settlement Discussions**

Andrx refuses to answer Requests 107-109, arguing that they address discussions between FTC staff and Andrx concerning possible settlement of the FTC’s precomplaint investigation, and are thus protected from disclosure. This refusal is evasive and misleading. First, Andrx asserts no recognized privilege that bars response to these requests.<sup>1</sup> 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 Andrx may have taken in response to those discussions; they do not reveal any positions taken by Andrx during these discussions. Andrx should be directed to respond to these requests.

### **Improper Refusals to Admit or Deny**

Andrx asserts that it can neither admit nor deny Requests 22-30, 42, 51, 53-54, 56, 58, 65, 67, 96, 103, and 142 because the requests are vague or contain undefined terms. Complaint

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<sup>1</sup> Arguments regarding the admissibility of settlement discussions are properly addressed when, and if, such discussions are presented to Your Honor.

counsel cannot discern any vagaries in the definition of “Andrx,” as used in Request 22 or “negotiated,” as used in Request 42 that would prevent a good faith answer.<sup>2</sup> Nor does Andrx describe why the terms are vague or otherwise problematic, therefore failing to satisfy its obligation under Rule 3.32(b) to “set forth in detail” the reasons it can neither admit nor deny the requests. *See Audiotext Communications*, 1995 WL 625744, at \* 2. Moreover, litigants must respond to requests for admissions even if they have ambiguous or undefined phrases as long as any ambiguity can be explained in a qualified response. *See id.* at \* 6. Judges have rejected similar objections when the terms at issue should be understood by the objecting party. *See, e.g., id.* (rejecting vagueness objections because the party, given its business operations, “should understand the . . . alleged objectionable phrases”); *Beatrice Foods*, 1979 FTC Lexis 597, at \* 11 (rejecting objection to the language “the frozen food section of a grocery store” in a request for admissions issued to a company in the business of selling ready-to-serve orange juice). Complaint counsel is entitled to know whether Andrx plans on disputing the assertions in these requests.

Andrx neither admits nor denies Requests 45, 47, and 49, which ask whether Andrx will dispute that it was responsible for inserting or removing certain language in drafts of the Stipulation and Agreement, asserting the nonsensical justification that the agreement was a “negotiated document,” and the FTC has already explored the recollections of Andrx employees. However, Andrx is obligated to identify whether it will dispute the assertions in these requests, regardless of whether complaint counsel has engaged in other discovery relevant to the issue.

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<sup>2</sup> Andrx’s statement that Request 67 “confuses time periods” is a similarly improper basis for refusing to admit or deny the request. Either Andrx disputes complaint counsel’s interpretation of the Stipulation and Agreement term referred to, or it does not.

*See Trans Union*, 1993 FTC Lexis 116, at \* 2 (“It is . . . proper to request admissions as to facts which are in one’s possession”).

Andrx also states that it can neither admit nor deny Requests 85-86, which ask whether Andrx will dispute that the Stipulation and Agreement was neither presented to nor approved by the District Court for the Southern District of Florida, because the requests are “not specific as to time.” Andrx offers no explanation for the bald assertion that this supposed ambiguity prevents a good faith response to the requests. Moreover, Andrx still must provide a qualified answer if qualification is appropriate. *See* Rule 3.32(b), 16 C.F.R. § 3.32(b).

Finally, Andrx refuses to answer Requests 97-100, stating only that it “can neither admit nor deny th[e] request,” with no explanation. These responses do not satisfy Andrx’s burden in justifying its objections. *See Audiotext Communications*, 1995 WL 625744, at \* 2. Andrx 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 Breakthrough Sciences, Inc.*, Dkt. 9275, 9276, 2977, 1996 FTC Lexis 236, at \* 2 (May 15, 1996) (order directing respondents to answer request for admissions). Furthermore, Andrx must make a “reasonable inquiry” to answer these requests. *See* Rule 3.32(b), 16 C.F.R. § 3.32(b). These requests address what Andrx itself believed, and therefore should be readily answerable.<sup>3</sup>

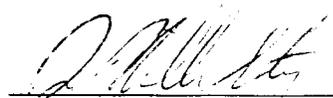
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<sup>3</sup> If Andrx can neither admit nor deny any requests, it can only be because it possesses no evidence on the requested point, in which case Andrx should be prohibited from offering any evidence on these points at trial.

### Conclusion

Andrx 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, Andrx does not carry this burden. Therefore, in accordance with Rule 3.38(a)(1), these requests should be deemed admitted or, in the alternative, Andrx should be compelled to provide proper responses 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 8, 2000

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Docket No. 9293

**Declaration of Markus H. Meier**

Pursuant to 16 C.F.R. § 3.22(f), I declare 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 Andrx in a good faith effort to resolve by agreement the issues raised in complaint counsel's motion to compel admissions by Andrx in response to complaint counsel's first request for admissions. Complaint counsel and Andrx have been unable to reach such an agreement.

2. On September 25, 2000, complaint counsel issued to Andrx our First Requests for Admissions. Andrx responded to this request on October 18, 2000, objecting to or refusing to admit or deny the vast majority of requests.

3. By letter of November 2, 2000 (attached), I informed Hal Shaftel, counsel for Andrx, that a number of Andrx's responses were insufficient. The letter identified a number of categories describing the shortcomings in Andrx's responses. The letter stated our interest in

trying to resolve the issues raised by Andrx's responses and asked Mr. Shaftel to contact me to discuss them further. The letter informed him that if the issues could not be resolved by November 7, 2000, we would need to file appropriate papers with Your Honor.

4. On November 7, 2000, I spoke by telephone with Hal Shaftel about Andrx's responses to complaint counsel's requests for admissions. He agreed to re-examine Andrx's responses and asked to discuss the matter on November 8. On November 8, I spoke by telephone with Mr. Shaftel. Despite our best efforts, we were not able to resolve the issues that are the subject of this motion.

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

  
\_\_\_\_\_  
Markus H. Meier

Dated: November 8, 2000

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**ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO COMPEL  
ADMISSIONS BY ANDRX CORPORATION**

IT IS HEREBY ORDERED that complaint counsel's motion to compel admissions by Andrx Corporation in response to complaint counsel's first request for admissions is GRANTED. The following requests are hereby deemed ADMITTED: 3, 11, 16-30, 32-38, 42-43, 45-47, 48-49, 51-59, 61-75, 77, 82-86, 96-100, 103-104, 106-11, 113-121, 134-135, 137-140, 142, and 144-146.

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

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

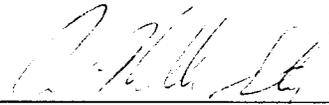
## CERTIFICATE OF SERVICE

I, Jon Miller Steiger, hereby certify that on November 8, 2000, I caused a copy of complaint counsel's Motion to Compel Admissions by Andrx Corporation in Response to Complaint Counsel's First Requests for Admissions, and the supporting memorandum and declaration, to be served upon the following persons via hand delivery or facsimile and overnight delivery.

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