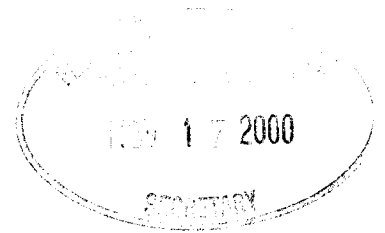


**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**



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 TO CONDITIONALLY PRECLUDE,  
CERTIFY AND/OR KEEP THE HEARING OPEN PENDING FURTHER  
DISCOVERY REGARDING AFFIRMATIVE DEFENSES**

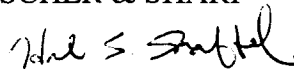
Pursuant to § 3.38 of the Federal Trade Commission's Procedures and Rules of Practice, 16 C.F.R. § 3.38, respondent Andrx Corporation makes this motion to conditionally preclude Complaint Counsel from introducing any evidence adduced from Biovail International Corporation ("Biovail") or any of its representatives absent full disclosure from Biovail; certify the issue of Biovail's failure to comply with this Court's order dated November 7, 2000; and/or keep the hearing of this matter open pending further discovery regarding Andrx's affirmative defenses.

The bases for this motion are set out in the attached Memorandum of Law in Support of Motion to Conditionally Preclude, Certify and/or Keep the Hearing Open Pending Further Discovery Regarding Andrx's Affirmative Defenses.

Dated: New York, New York  
November 16, 2000

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,  
FRISCHER & SHARP

By: 

\_\_\_\_\_  
Louis M. Solomon

Hal S. Shaftel

Colin A. Underwood

45 Rockefeller Plaza

New York, New York 10111

(212) 956-3700

Counsel for Respondent Andrx Corporation

**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

**PROPOSED ORDER ON RESPONDENT ANDRX CORPORATION'S MOTION TO  
CONDITIONALLY PRECLUDE, CERTIFY AND/OR KEEP THE HEARING OPEN  
PENDING FURTHER DISCOVERY REGARDING AFFIRMATIVE DEFENSES**

On November 16, 2000, pursuant to Section 3.38 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.38, respondent Andrx Corporation ("Andrx") filed a motion to conditionally preclude Complaint Counsel from introducing any evidence adduced from Biovail International Corporation ("Biovail") or any of its representatives absent their full compliance with their discovery obligations; certify the issue of the failure of the Biovail witnesses to comply with this Court's order dated November 7, 2000; and/or to keep the hearing of this matter open pending further discovery regarding Andrx's affirmative defenses.

Respondent Andrx's motion is hereby GRANTED.

ORDERED:

---

D. Michael Chappell  
Administrative Law Judge

Dated: November \_\_, 2000

**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 OF LAW IN SUPPORT OF MOTION TO  
CONDITIONALLY PRECLUDE, CERTIFY AND/OR KEEP THE HEARING OPEN  
PENDING FURTHER DISCOVERY REGARDING AFFIRMATIVE DEFENSES**

Pursuant to § 3.38 of the Federal Trade Commission's Procedures and Rules of Practice, 16 C.F.R. § 3.38, respondent Andrx Corporation ("Andrx") submits this memorandum of law in support of its motion to conditionally preclude Complaint Counsel from introducing any evidence adduced from Biovail International Corporation or any of its representatives ("Biovail") absent full disclosure by Biovail, to certify to the Commission the issue of Biovail's failure to comply with the Court's discovery order dated November 7, 2000, and/or keep the hearing open pending further discovery regarding Andrx's affirmative defenses.

**Preliminary Statement**

Complaint Counsel, during both the investigative and adjudicatory phases of this matter, has collaborated closely with Biovail, various senior Biovail executives, and outside law firms representing Biovail. Allegations concerning Biovail appear numerous times in the FTC's Complaint (see Complaint ¶¶ 16, 20 and 21) and in Complaint Counsel's responses to Andrx's Interrogatories (see Interrogatory Responses Nos. 3, 15 and 16). There are eight Biovail

employees (the most of any entity) who are listed in a June 12, 2000 letter from Complaint Counsel, identifying the individuals with whom the FTC staff communicated throughout the course of this investigation and adjudicative proceeding. Initially three and then two Biovail executives have appeared on Complaint Counsel's witness list.

Despite the alliance between Complaint Counsel and Biovail, repeatedly Biovail and its agents have resisted discovery and, in fact, have defied directives of this Court to provide meaningful discovery. Not only that, but Complaint Counsel consistently has supported Biovail's tactics. For example, Complaint Counsel has filed multiple briefs in support of Biovail's obstructionist positions on discovery. See, e.g., Complaint Counsel's Opposition to Andrx's Motion to Deny Biovail's Motion to Quash (dated June 30, 2000); and Complaint Counsel's Opposition to Respondent Andrx's Motion to Compel Eugene W. Melnyk and Bruce Brydon to Appear for Deposition (dated October 24, 2000).

Andrx has a substantial need -- and legitimate right -- to take discovery from Biovail and its agents -- both with respect to Complaint Counsel's case-in-chief and various of respondents' affirmative defenses. There cannot be any doubt that Biovail has information material to Complaint Counsel's case, since it is prominently featured in Complaint Counsel's pleading, no less than three of its senior executives have appeared on Complaint Counsel's witness lists, and another five otherwise have communicated with the FTC staff regarding this matter.

Likewise, Biovail executives and their agents clearly have information directly relevant to Andrx's affirmative defenses, including, among other things, defenses relating to alleged improprieties in the FTC process. The improprieties included improper dealings between

the FTC staff and outside counsel who have represented Biovail: Cleary, Gottlieb, Steen & Hamilton (including George S. Cary and Steven J. Kaiser); Keller and Heckman LLP; and Verner, Liipfert, Bernhard, McPherson and Hand, Chartered (together, the "Biovail Law Firms"). By order dated September 14, 2000, this Court affirmed essentially all of Andrx's affirmative defenses.

Throughout this proceeding, Andrx has faced repeated roadblocks in seeking discovery from Biovail related to both Complaint Counsel's case and respondents' affirmative defenses. Indeed, Biovail and related parties have defied directives of this Court in refusing to provide discovery. That is particularly disturbing given how closely Complaint Counsel and Biovail have collaborated. Because these third parties still refuse to comply with their discovery obligations, even after this Court has ordered discovery, Andrx has not been able to develop a full record relating to the subject matter of this proceeding. In the event that Andrx is unable to obtain full discovery forthwith, the appropriate remedy is to preclude Complaint Counsel from adducing testimony at trial from any Biovail representatives. In addition, the Court should certify the issue of Biovail's non-compliance with its discovery obligations to the Commission and/or hold the hearing in this matter open to allow for the court-ordered discovery from the Biovail Law Firms to proceed.

**I. Complaint Counsel Should Be Precluded from Adducing Trial Testimony from Biovail Absent Full Discovery From Biovail**

As the Court is aware, Complaint Counsel has had extensive dealings with several senior Biovail executives, including, among others, Eugene N. Melnyk, Bruce Brydon and Kenneth Cancellera. Complaint Counsel identified each as a potential witness, before dropping

Mr. Melnyk for unknown and suspicious reasons -- we believe he may have information helpful to respondents' positions in this proceeding.

At the onset of the adjudicative phase of this proceeding, Andrx served, by hand, subpoenas on Biovail and Messrs. Melnyk and Cancellera in Canada, where they are located. With the support of Complaint Counsel, Biovail moved to quash those subpoenas. The Court granted the motion on the technical grounds that the recipients of the subpoenas were outside the jurisdictional reach of the subpoenas. Eventually, Complaint Counsel arranged for Biovail to make Mr. Cancellera available for deposition, after much resistance, at a place and date unilaterally selected by Biovail.

Complaint Counsel and Biovail, however, refused to produce Mr. Melnyk, who is Biovail's Chairman and was identified by Complaint Counsel on its initial witness list.<sup>1</sup> Not receiving any cooperation from Complaint Counsel or Biovail, Andrx personally served Mr. Melnyk in New York with a deposition subpoena. The subpoena called for his appearance on a specific date (September 18, 2000) in New York -- where Mr. Melnyk frequently visits for both business and personal reasons. Andrx noticed his deposition because Mr. Melnyk's position at Biovail makes him uniquely privy to communications and information relevant to this case that, as was ascertained from Mr. Cancellera at his deposition, are not discoverable from other sources. Mr. Melnyk's knowledge relating to this case includes, among other things, information concerning Andrx's affirmative defenses and Biovail's communications with the FTC staff.

In disregard of the subpoena personally served on him, Mr. Melnyk failed to appear in New York for his deposition on the scheduled date. He also failed to seek any relief

from the subpoena. Andrx thereafter promptly moved this Court for an order compelling Mr. Melnyk's deposition. By Order dated November 7, 2000, this Court granted the requested order, holding, in significant part, as follows:

Andrx's request to take the deposition of the Chairman of Biovail on a date and time Andrx selected is not unreasonable. . . . Since the witness was served with Andrx's subpoena in New York, designating New York as the location of the deposition in this proceeding. Andrx is hereby permitted to take the deposition of Melnyk at a location and time designated by Andrx or as agreed to by the parties.

On the very day of the November 7 Order, Andrx circulated it to Mr. Melnyk's attorneys (the Proskauer firm, which is Biovail's counsel) and requested that they "contact [Andrx] promptly to discuss scheduling". See 11/7/00 fax annexed hereto as part of Exhibit A. Not hearing anything whatsoever in response, Andrx again wrote Mr. Melnyk's attorneys on November 13, 2000. See 11/13/00 letter included in Exhibit A. By letter dated November 15, 2000. Mr. Melnyk's counsel advised Andrx that Mr. Melnyk would not appear in New York on the rescheduled date of his deposition. See 11/15/00, 11/16/00 and 11/17/00 correspondence included in Exhibit A.

Similar to its conduct with respect to Mr. Melnyk, Biovail has not cooperated in making Mr. Brydon available for deposition on appropriate terms. Mr. Brydon, Biovail's president and CEO, has been identified on Complaint Counsel's revised witness list as a witness Complaint Counsel intends to call at trial. See 9/13/00 Complaint Counsel's Revised Witness List. There was a deposition of Mr. Brydon scheduled for September 28, 2000, which failed to go forward due to a misunderstanding over logistics. Promptly thereafter, Andrx made several

---

<sup>1</sup> Although Complaint Counsel has since dropped Mr. Melnyk, it should not be permitted to "cherry pick", as further discussed below, as to which witnesses from Biovail to use and which to hide from respondents.



attempts to reschedule Mr. Brydon's deposition. Complaint Counsel and Biovail refused to do so, requiring Andrx then to make a motion. By the same November 7 Order compelling Mr. Melnyk to appear for deposition, Mr. Brydon also was required to appear. However, Biovail has put inappropriate conditions on that deposition, including, among other things, requiring Andrx to make payment of some unknown amount in advance of the deposition and unilaterally selecting the date.<sup>2</sup> Andrx has objected to those conditions, and still is waiting to reach an accommodation with Biovail for Mr. Brydon's deposition.

As discussed below (see Point III, at pp. 9-10, infra), Biovail's outside lawyers also have refused to provide discovery as required by this Court's orders.

The potential of a preclusion order addressed to Biovail witnesses has been repeatedly stressed in this proceeding. In its July 14 Order, this Court held that "[i]n the event that the parties are not able to develop an appropriate discovery schedule, including the voluntary depositions of Biovail's employees, Andrx may refile its motion to preclude." At the status conference on August 3, 2000, this Court made it clear that Complaint Counsel would risk an order of preclusion if Biovail did not furnish appropriate deposition and document discovery. See 8/3 Tr. at 127. Indeed, Complaint Counsel itself acknowledged that "we recognize the problem if Biovail doesn't show up and make itself available, that we may very well face preclusion at the end of the day." Id. Likewise, the November 7 Order requiring Messrs.

---

<sup>2</sup> The November 7 Order required, with respect to Mr. Brydon, that Andrx "reimburse Brydon for his reasonable expenses incurred to attend" the prior September 28 session. However, Biovail now seeks to hold the rescheduled deposition hostage to some sort of "per diem Biovail paid to Mr. Brydon" and "all of Mr. Brydon's travel and hotel expenses for the two days he spent in Washington." See 11/15/00 letter, Exhibit A. As Andrx stated to Biovail in response, that unspecified amount does not appear "reasonable" as required by the November 7 Order nor otherwise consistent with the order. However, Andrx has provided Biovail/Brydon with an undertaking to pay reasonable expenses in accordance with the November 7 Order. See 11/16/00 letter, Exhibit A.

Melnyk and Brydon to appear for depositions denied "without prejudice" Andrx's motion to preclude trial testimony.

In circumstances analogous to here, parties routinely are precluded from offering testimony at trial from witnesses who did not appear for deposition. See, e.g., Reilly v. NatWest Mkt. Group, Inc., 181 F.3d 253, 269 (2<sup>nd</sup> Cir. 1999) (approving imposition of sanction precluding testimony of two witnesses not made available for depositions prior to trial); Equal Employment Opportunity Comm'n v. Kenosha Unified Sch. Dist., 620 F.2d 1220, 1226 (7<sup>th</sup> Cir. 1980) (holding that "precluding testimony is a permissible sanction in the face" of a failure to comply with discovery orders, and citing to Rule 37 in support); Magee v. Paul Revere Life Insurance Co., 178 F.R.D. 33, 38 (E.D.N.Y. 1998) (holding that Rule 37(d) was available to punish plaintiff for failure to produce at a deposition a witness who it had the capacity to produce at trial and, for that reason, precluding testimony of plaintiff's witness at trial); Bradgate Assoc. Inc. v. Fellows, Read & Assoc., Inc., 1992 U.S. Dist. 4668, at \*4 (D.N.J. 1992) (affirming magistrate's ruling precluding the testimony of a witness at trial when plaintiff failed to proffer witness for pre-trial deposition, and stating that the magistrate's preclusion ruling "cannot be found to be unjust or an abuse of discretion" under Fed. R. Civ. P. 37(b)(2)(B)).

In the event that both Messrs. Melnyk and Brydon are not made available to Andrx immediately for deposition on appropriate terms fully consistent with the November 7 Order, the Court should preclude Complaint Counsel from introducing evidence at trial adduced from any Biovail witnesses. It is not sufficient merely to preclude Mr. Melnyk, since Complaint Counsel suddenly dropped him from their witness list -- reflecting, if anything, that he may have knowledge supportive of respondents' positions. It would be highly prejudicial to Andrx if Complaint Counsel is allowed to cherry-pick which Biovail witness it wants to have testify at

trial and which to hide from even providing deposition testimony. Thus, an order merely precluding Mr. Melnyk alone from testifying is meaningless -- since Complaint Counsel is no longer intending to call him to testify. The only fair and sensible order is a broader order of preclusion against Biovail generally, which has been repeatedly discussed during this proceeding as the remedy if, as is the case, Biovail does not provide meaningful discovery.

**II. The Failure of Biovail Witnesses to Comply With The November 7 Order Should Be Certified**

Section 3.38(c) of the Federal Trade Commission's Procedures and Rules of Practice provides that "in instances where a nonparty fails to comply with a subpoena or order, [the Administrative Law Judge] shall certify to the Commission a request that court enforcement of the subpoena or order be sought" (emphasis added). As the record here makes clear, certification, regrettably, is necessary at this juncture in order for Andrx to obtain discovery to which it is entitled at least from Mr. Melnyk. Andrx reserves the right also to seek certification with regard to compelling the deposition of Mr. Brydon if he does not comply with the November 7 Order.

Given that the scheduled hearing in this proceeding is imminent, the issue of certification may very well be moot since enforcement of the discovery obligations at issue presumably will proceed after Complaint Counsel presents its case. Therefore, the proper remedy for the failure on Biovail's part to provide discovery is, as explained above, preclusion regardless of whether these matters are certified to the Commission for enforcement. However, certification nonetheless is appropriate to preserve Andrx's rights and in the event this Court continues the hearing to allow for enforcement of Biovail's discovery obligations before any evidence is adduced from Biovail at trial.

### **III. The Hearing Should Be Kept Open If The Biovail Law Firms Are Not Made Available**

Andrx has served subpoenas seeking limited depositions and discrete categories of non-privileged documents from the Biovail Law Firms. These lawyers acted not simply in the role of legal advisors for Biovail -- but were direct actors, as the record makes clear, in a scheme by which they collaborated with, influenced and tainted the FTC staff in its investigation of Andrx. Thus, as this Court already has recognized, the particular attorneys whom Andrx seeks to depose are critical fact witnesses.

No less than three separate orders have been issued directing the Biovail Law Firms to provide limited deposition and document discovery -- none have been complied with by them.

First, by order dated September 14, 2000, this Court specifically held that at least limited discovery on this issue would be appropriate.

Second, by order dated October 3, 2000, this Court ordered the Biovail Law Firms to provide specific discovery consisting of:

- (1) non-privileged communications, to/from Biovail or Biovail agents, regarding the Biovail Law Firms' communications with the FTC staff concerning the HMR/Andrx matter; and
- (2) the depositions of the three individual attorneys requested by Andrx (Carey, Kaiser and Dubeck) relating to non-privileged communications, including to/from Biovail or Biovail agents, regarding the Biovail Law Firms' communications with the FTC staff concerning the HMR/Andrx matter.

Third, by Order dated October 25, 2000, this Court denied the Biovail Law Firms' Motion for Interlocutory Appeal relating to their discovery obligations.

Despite these three orders directing discovery, nothing whatsoever has been provided from the Biovail Law Firms by way of either deposition or document discovery. As a result, on October 31, 2000, Andrx filed a Notice of Noncompliance seeking certification to the Commission of the Biovail Law Firms' noncompliance with discovery obligations.

To date, the Biovail Law Firms -- just like Eugene Melnyk -- have not provided court-ordered discovery. That has seriously impeded Andrx's ability to prepare for the hearing in this matter. In the event that such discovery is not provided immediately, the record should be kept open at the hearing to avoid prejudicing Andrx due to the obstructionist discovery tactics of Biovail and the Biovail's Law Firms.

### **Conclusion**

For the foregoing reasons, Andrx respectfully requests that, in the event that Messrs. Melnyk and Brydon are not made available for deposition on appropriate terms in accordance with the November 7 Order, Complaint Counsel should be precluded from relying on testimony from any Biovail witnesses at trial. In addition, the issue of Biovail's non-compliance with the November 7 Order should be certified to the Commission and the record at the hearing should be kept open in the event that Mr. Melnyk and the Biovail Law Firms do not provide timely discovery.

Dated: New York, New York  
November 16, 2000

Respectfully Submitted,  
SOLOMON, ZAUDERER, ELLENHORN,  
FRISCHER & SHARP

By: Hal S. Shaftel

Louis M. Solomon  
Hal S. Shaftel  
Colin A. Underwood

45 Rockefeller Plaza  
New York, New York 10111  
(212) 956-3700  
Counsel for Respondent Andrx Corporation

EXHIBIT A

**SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP**  
45 Rockefeller Plaza  
New York, NY 10111

Phone No. (212) 956-3700  
Telecopier No. (212) 956-4068

**TELECOPY TRANSMISSION COVER SHEET**

**DATE:** November 7, 2000

<b><u>TO</u></b>	<b><u>FAX NO.:</u></b>	<b><u>TEL NO.:</u></b>
Francis D. Landrey, Esq.	212-969-2900	212-969-3000
<b><u>FROM:</u></b>		
Hal S. Shaftel, Esq.	(212) 956-4068	(212) 424-0755

**COMMENTS:**

Please contact me promptly to discuss scheduling.

---

**Number of Pages:**  
(incl. cover sheet)

**CLIENT/MATTER NO.** 0228/002

**Fax Operator:** Joyce Ashman

**Secretary:** SE

THE FOLLOWING MATERIAL IS INTENDED FOR THE USE OF THE ADDRESSEE ONLY AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED AND CONFIDENTIAL OR OTHERWISE EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF YOU ARE NOT THE INTENDED RECIPIENT, DO NOT READ THE FOLLOWING MATERIAL, AND DO NOT DISSEMINATE THIS MATERIAL TO ANYONE OTHER THAN THE INTENDED RECIPIENT. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND MAIL THIS COMMUNICATION TO US AT THE ABOVE ADDRESS. THANK YOU.



# Federal Trade Commission

## Facsimile Transmittal Sheet

<b>To:</b>	Louis M. Solomon, Esquire  Fax number: 212/956-4068	Total number of pages sent (including this cover sheet):  7
<b>From:</b>	Judge D. Michael Chappell  Federal Trade Commission Washington, D.C. 20580  Telephone: (202) 326- 3634	Sending Organization Code:  1366
		Date:  11/7/00
		Time:  4:41
<b>Subject:</b>	Andrx-Hoechst Generic Cardizem -- Docket No. 9293	
<b>Note:</b>		

Disposition of FAX:  Burn Bag



[ATTACHED NOVEMBER 7, 2000 ORDER IS OMITTED]

SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP

45 ROCKEFELLER PLAZA  
NEW YORK, NEW YORK 10111  
(212) 956-3700  
FACSIMILE: (212) 956-4068

RICHARD T. SHARP  
HARRY FRISCHER  
DAVID N. ELLENHORN  
MARK C. ZAUDERER  
LOUIS M. SOLOMON  
BERTRAND C. SELLIER  
DAVID E. NACHMAN  
EDWIN M. BAUM  
HAL S. SHAFTEL  
ROBERT L. MAZZEO  
JONATHAN P. HUGHES  
LEONARD S. BAUM  
MARGARET A. DALE  
COLIN A. UNDERWOOD

JOHN J. O'CONNELL  
OF COUNSEL

WRITER'S DIRECT DIAL  
(212) 424-0755

WAYNE M. AARON  
LISA M. BABISKIN  
JESSICA L. BIER  
DEAN T. CHO  
ANDRE K. CIZMARIK  
ROBERT S. FRENCHMAN  
TERESA A. GONSALVES  
STEVEN H. HOLINSTAT  
MICHAEL S. LAZAROFF  
SERGIO A. LLORIAN  
JONATHAN D. LUPKIN  
CAROLINE S. PRESS  
JENNIFER R. SCULLION  
CHARLES D. STAR  
EMILY STERN  
CAROLINE L. WERNER

November 13, 2000

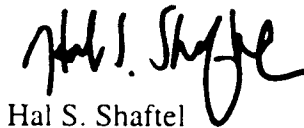
Francis D. Landrey, Esq.  
Proskauer Rose, LLP  
1585 Broadway  
New York, NY 10036-8299

Re: In the Matter of Hoechst Marion Roussel, Inc.,  
FTC Docket No. 9293

Dear Francis:

You have not responded to my request to discuss scheduling the depositions of Messrs. Melnyk and Brydon. Given Judge Chappell's order, I certainly hope we are not going to see more of the same old gamesmanship from Biovail. I do ask that you try to act responsibly. To that end, I intend to depose Mr. Melnick at our office on November 22, 2000. Please confirm his availability or otherwise give me alternate dates for the very near term. As for the Brydon deposition, we should confer about logistics if the deposition proceeds in Canada. Thank you.

Very truly yours,

  
Hal S. Shaftel

HSS/se

# PROSKAUER ROSE LLP

1585 Broadway  
New York, NY 10036-8299  
Telephone 212.969.3000  
Fax 212.969.2900

LOS ANGELES  
WASHINGTON  
BOCA RATON  
NEWARK  
PARIS

Francis D. Landrey  
Senior Counsel

Direct Dial 212.969.3505  
flandrey@proskauer.com

November 15, 2000

## **BY TELECOPIER**

Hal S. Shaftel, Esq.  
Solomon, Zauderer, Ellenhorn, Frischer & Sharp  
45 Rockefeller Plaza  
New York, New York 10111

Re: In the Matter of Hoechst Marion Roussel, Inc.  
FTC Docket No. 9293

Dear Hal:

I have your letter of November 13 concerning the scheduling of Mr. Melnyk's deposition. Mr. Melnyk is not available on the date you suggest, November 22. As soon as I have a date, we will make Mr. Melnyk available in Barbados, which is both his residence and the place where he regularly conducts business. We believe that Mr. Melnyk may not be compelled to travel to New York for this deposition.

With respect to the deposition of Mr. Brydon, he will be made available in Tucson, Arizona on November 28, 2000. You will need to make all arrangements for a place to conduct the deposition and a court reporter. The deposition will be taken in Tucson because Mr. Brydon recently relocated to the Tucson area. I will shortly forward Biovail's statement of the reasonable expenses incurred in connection with Mr. Brydon's wasted trip to Washington. Those costs include: 1) all of Mr. Brydon's travel and hotel expenses for the two days he spent in Washington; and 2) the per diem Biovail paid to Mr. Brydon for his time spent on Biovail's

Hal S. Shaftel, Esq.  
November 15, 2000  
Page 2

behalf on the day scheduled for the deposition. These expenses will need to be paid before Mr. Brydon will appear for his deposition.

Sincerely,

A handwritten signature in black ink, appearing to read "F. D. Landrey". The signature is stylized with a large "F" and "D", and a long horizontal stroke extending to the right.

Francis D. Landrey

cc: Michael L. Koon, Esq.  
Markus M. Meier, Esq.  
James M. Spears, Esq.

PROFESSIONAL ROSE LLP

SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP

45 ROCKEFELLER PLAZA  
NEW YORK, NEW YORK 10111  
(212) 956-3700  
FACSIMILE: (212) 956-4068

RICHARD T. SHARP  
HARRY FRISCHER  
DAVID N. ELLENHORN  
MARK C. ZAUDERER  
LOUIS M. SOLOMON  
BERTRAND C. SELLIER  
DAVID E. NACHMAN  
EDWIN M. BAUM  
HAL S. SHAFTEL  
ROBERT L. MAZZEO  
JONATHAN P. HUGHES  
LEONARD S. BAUM  
MARGARET A. DALE  
COLIN A. UNDERWOOD

JOHN J. O'CONNELL  
OF COUNSEL

WRITER'S DIRECT DIAL  
(212) 424-0755

WAYNE M. AARON  
LISA M. BABISKIN  
JESSICA L. BIER  
DEAN T. CHO  
ANDRE K. CIZMARIK  
ROBERT S. FRENCHMAN  
TERESA A. GONSALVES  
STEVEN H. HOLINSTAT  
MICHAEL S. LAZAROFF  
SERGIO A. LLORIAN  
JONATHAN D. LUPKIN  
CAROLINE S. PRESS  
JENNIFER R. SCULLION  
CHARLES D. STAR  
EMILY STERN  
CAROLINE L. WERNER

November 16, 2000

Francis D. Landrey, Esq.  
Proskauer Rose, LLP  
1585 Broadway  
New York, NY 10036-8299

Re: FTC Proceeding

Dear Francis:

Given Judge Chappell's order dated November 7, 2000, regarding the depositions of Messrs. Melnyk and Brydon, I had asked you to stop the gamesmanship and please schedule the depositions in a manner faithful to that order. Your letter yesterday reflects that Biovail is not doing that, opting instead to snub Judge Chappell's directive. It is particularly disturbing that Biovail would do so in the context of an FTC proceeding in which Complaint Counsel is collaborating so closely with it.

Judge Chappell's order specifically provides that Andrx can require Mr. Melnyk to appear in New York for his deposition, given that he was served personally with process in New York -- not to mention his frequency in New York. We therefore reiterate our intent for Mr. Melnyk's deposition to proceed in New York, particularly since we are extremely busy preparing for the imminent hearing in this matter. In the event the date of November 22, which Andrx had selected, is particularly problematic for the witness, I am willing to discuss an alternative date in November for him to appear in New York. I look forward to hearing from you this week with another November date. Thank you.

With respect to Mr. Brydon, nowhere does Judge Chappell's order require us to make any payment -- particularly in an amount you have not even quantified -- before proceeding with Mr. Brydon's deposition. You have our undertaking that Andrx will make payment in accordance with Judge Chappell's order. However, any such amount must be consistent with the order, reasonable, and not arbitrary; therefore, Andrx is not agreeing, nor need it, to any sort of blank check in order to take Mr. Brydon's

Francis D. Landrey, Esq.

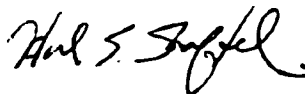
November 16, 2000

Page 2

deposition. I am inquiring into the availability of an attorney at this end to depose Mr. Brydon on the date you suggested and I will confer with you promptly on scheduling.

Andrx reserves all rights in this matter, including, without limitation, as to the preclusion of Biovail witnesses at the hearing.

Very truly yours,

A handwritten signature in black ink, appearing to read "Hal S. Shaftel". The signature is written in a cursive style with a large, sweeping flourish at the end.

Hal S. Shaftel

HSS/gcc

cc: Other Counsel

## CERTIFICATE OF SERVICE

I, Allen H. Bowden , hereby certify that on November 16, 2000, I caused to be served upon the following persons, by Federal Express overnight, and by facsimile transmission (without exhibits and with the exception of Donald S. Clark, Secretary), (1) Respondent Andrx's Motion to Conditionally Preclude, Certify and/or Keep the Hearing Open Pending Further Discovery Regarding Affirmative Defenses; Proposed Order on Respondent Andrx's Motion to Conditionally Preclude, Certify and/or Keep the Hearing Open Pending Further Discovery Regarding Affirmative Defenses; Respondent Andrx's Memorandum of Law in Support of Motion to Conditionally Preclude, Certify and/or Keep the Hearing Open Pending Further Discovery Regarding Affirmative Defenses; (2) Respondent Andrx's Motion to Preclude Complaint Counsel From Introducing Evidence of Certain Conversations Between Respondents and FTC Staff Members; Respondent Andrx's Memorandum of Law in Support of Motion to Preclude Complaint Counsel From Introducing Evidence of Certain Conversations Between Respondents and FTC Staff Members; Proposed Order on Respondent Andrx's Memorandum of Law in Support of Motion to Preclude Complaint Counsel From Introducing Evidence of Certain Conversations Between Respondents and FTC Staff Members; (3) Respondent Andrx's Motion to Compel Deposition Testimony of David A. Balto; Respondent Andrx's Memorandum in Support of Motion to Compel Deposition Testimony of David A. Balto; Proposed Order on Respondent Andrx's Motion to Compel Deposition Testimony of David A. Balto:

Hon. D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
Room 104  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

Donald S. Clark, Secretary  
Federal Trade Commission  
Room 172  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

Markus Meier, Esq.  
Federal Trade Commission  
Room 3114  
601 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

James M. Spears, Esq.  
Shook, Hardy & Bacon, L.L.P  
600 14th Street, N.W.  
Suite 800  
Washington, D.C. 20005

Peter O. Safir, Esq.  
Kleinfeld, Kaplan and Becker  
1140 19<sup>th</sup> St., N.W.  
Washington, D.C. 20036

Dated: November 16, 2000

  
Allen H. Bowden