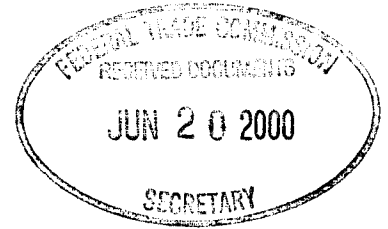


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the matter of

HOECHST MARION ROUSSEL, INC,
a corporation,

CARDERM CAPITAL L.P.
a limited partnership

and

ANDRX CORPORATION,
a corporation

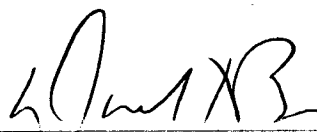
Docket No. 9293

To: The Honorable D. Michael Chappell
Administrative Law Judge

BIOVAIL'S MOTION TO QUASH SUBPOENAS

Pursuant to Rule 3.34(c) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.34(c), nonparty Biovail Corporation International ("Biovail") hereby moves to quash subpoenas served by Andrx Corporation on three law firms and two individual lawyers who have represented Biovail. The grounds for this motion are set forth in the attached Memorandum.

Dated: June 20, 2000



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(202) 383-5391

Attorneys for Biovail Corporation
International

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To: The Honorable D. Michael Chappell
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BIOVAIL'S MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENAS

Biovail Corporation International ("Biovail") hereby moves to quash the subpoenas served by Andrx Corporation ("Andrx") on May 30 and May 31, 2000 on Keller and Heckman LLP; Verner, Liipfert, Bernhard, McPherson and Hand, Chartered; Cleary, Gottlieb, Steen & Hamilton; George Cary and Steve Kaiser (collectively the "law firms"). The law firms are concurrently filing motions to quash the subpoenas issued on each of them. However, because the law firms are being targeted as a result of their representation of Biovail, Biovail believes it is necessary to file its own motion demonstrating the inappropriateness of Andrx's subpoenas.

BACKGROUND

According to the complaint in this action, respondents Hoechst Marion Roussel, Inc. ("Hoechst"), Carderm Capital L.P., and Andrx entered into a Stipulation and Settlement in September 1997 that violates Section 5 of the Federal Trade Commission Act. Pursuant to the

agreement, Andrx received \$10 million per quarter as payment for not introducing into the marketplace a generic version of Cardizem CD. The agreement not only deprived consumers of Andrx's product, but also, through operation of the Hatch-Waxman Act, 21 U.S.C. § 355, prevented any other pharmaceutical company from entering the relevant market with its own generic version of Cardizem CD. Accordingly, the Commission brought this action alleging that the purpose and effect of this agreement was to preclude competition for Cardizem CD.¹

Biovail is alleged to be relevant to two aspects of this action. First, Biovail participated in the relevant product market. Compl. ¶¶ 12, 16, 20. In June 1997 Biovail sought FDA approval for a generic version of Hoechst's Cardizem CD drug. *Id.* ¶¶ 16, 20. Second, in August 1997 Biovail rejected Hoechst's offer to compensate Biovail for delaying the introduction of its generic Cardizem CD drug, a proposed deal similar to the one accepted by Andrx. *Id.* ¶ 21. The Commission apparently intends to use this predicate act as evidence of Hoechst's "specific intent to preserve its monopoly in the relevant market." *Id.* ¶ 37.

On May 30 and 31, 2000, Andrx served its subpoenas on the law firms.² Some of the subpoenas sought only testimony, while others sought documents as well. As is clear from the subpoenas (which are attached to the law firms' Motion to Quash), Andrx is not seeking information relevant to the allegations in the complaint. Rather, Andrx seeks information that purportedly would support its legally impermissible affirmative defenses that the Commissioners were somehow coerced by FTC staff, Biovail and the media into unanimously voting to issue the Complaint.

According to the agreed upon schedule (as evidenced by correspondence copied to the ALJ), motions to quash the subpoena were due to be filed on June 20, 2000.

¹ In fact, in a lawsuit arising out of this agreement brought by purchasers of Cardizem CD, Judge Edmunds of the Eastern District of Michigan has granted partial summary judgment in favor of the consumers, ruling that the agreement was a per se violation of the antitrust laws. *See In re: Cardizem CD Antitrust Litigation*, MDL No. 1278, Order No. 13 (E.D. Mich. June 6, 2000).

² A subpoena was also served on the law firm of Proskauer Rose LLP, another firm that has represented Biovail. The issues involving that subpoena were resolved by an agreement between Andrx and Proskauer Rose.

ARGUMENT

Biovail now moves to quash Andrx's subpoenas under Rule 3.34(c). Biovail believes that the law firms, the nominal targets of Andrx's subpoenas, have more than adequately demonstrated why these subpoenas should be quashed. In particular, the law firms' motion demonstrates that the subpoenas seek information wholly irrelevant to this proceeding and that well-established caselaw requires that a party show a compelling need for a lawyer's deposition, a standard that Andrx has not even tried to meet here. However, Biovail, as the real target of the subpoenas, would like briefly to address Andrx's attempt to obtain discovery from its outside lawyers.

That Andrx has no defense to the Commission's charges is confirmed by Judge Edmunds' recent decision declaring the agreement a *per se* violation of the antitrust laws. Andrx is thus desperate to move the focus of this proceeding away from its illegal conduct. Accordingly, Andrx has launched an all out assault on Biovail, the FTC Staff, the Commissioners and the media. The first step in this cynical strategy is the serving of the subpoenas here. Andrx seeks to harass Biovail by forcing its lawyers to respond to expensive and time-consuming discovery simply because Biovail had the temerity to complain about Andrx's blatantly illegal deal. The logical next step in its strategy will be to seek depositions of FTC Staff, or even the Commissioners. By focussing on completely irrelevant issues, Andrx hopes to seek retribution on Biovail and make the FTC "pay" for challenging Andrx. This should not be tolerated by the ALJ.

Even if the ALJ rejects Complaint Counsel's motion to strike and allows Andrx to seek discovery on its affirmative defenses, Andrx's discovery tactics should be rejected.³ All of these topics can be addressed through the testimony of Biovail witnesses. For example, Ken Cancellara, Biovail's General Counsel, directs the work of the outside law firms and lawyers,

³ Because the Andrx subpoena goes straight to the challenged affirmative defenses, the question whether the depositions should go forward is moot if the ALJ grants Complaint Counsel's motion to strike. *See* Rule 3.31(c)(1) of the Rules of Practice (discovery only permitted for "information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent"). Accordingly, at the very least, the ALJ should require that the depositions be deferred pending a decision on the motion to strike.

and is thus familiar with the issues raised by Andrx. Mr. Cancellara was the individual who was approached by Hoechst in the hopes of obtaining an agreement whereby Biovail would delay introduction of its Cardizem CD generic in return for cash payments. Thus, Mr. Cancellara can address the issues relevant to the complaint and the affirmative defenses (if the ALJ deems them relevant).⁴ This is certainly a better procedure than allowing Andrx to force four of Biovail's outside counsel to provide duplicative depositions. There is no basis for placing such an extreme burden on Biovail, who is not a party to this action.

As to the documents sought by Andrx, although they may be in the law firms' possession, they are Biovail documents. As Andrx is aware, documents from the law firms have been gathered and produced in other litigation. In fact, copies of these documents have been produced to Andrx, but Andrx is barred from using them because of the existence of certain protective orders. This issue is in the process of being resolved, and, in any event, Andrx can obtain them in this proceeding from Biovail. Once again, there is no need for the time and expense required for compliance with these subpoenas by the law firms.

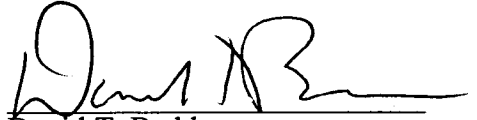
In short, Andrx can obtain everything it wants – to the extent permitted by the ALJ – through much less harassing and extreme methods. Accordingly, the ALJ should not allow discovery where Biovail's lawyers could be forced to reveal Biovail's legal strategies and theories in this or other litigation. *See, e.g., Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (oral depositions of opposing counsel should be permitted only in limited circumstances and only after the party seeking the deposition has demonstrated the propriety and need for the deposition). The subpoenas should therefore be quashed.

⁴ Andrx has already attempted to serve subpoenas on several Biovail witnesses, including Mr. Cancellara. The subpoena was procedurally improper, and Biovail moved to quash. However, because it is relatively simple to obtain discovery from foreign citizens, Andrx can obtain from Biovail all the discovery it needs. However, Andrx's unwillingness or inability to follow proper procedures should not entitle it to depose Biovail's United States lawyers.

CONCLUSION

For the foregoing reasons, Biovail's motion to quash should be granted.

Dated: June 20, 2000



David T. Beddow
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555 13th Street, N.W.
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(202) 383-5391

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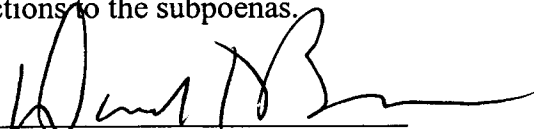
Docket No. 9293

To: The Honorable D. Michael Chappell
Administrative Law Judge

**STATEMENT OF DAVID T. BEDDOW PURSUANT TO RULE 3.22(F) OF THE
FEDERAL TRADE COMMISSION'S RULES OF PRACTICE**

I am a partner with O'Melveny & Myers LLP, counsel for Biovail Corporation International and submit this statement pursuant to Rule 3.22(f) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.22(f), in connection with the motion of Biovail to quash the subpoenas dated May 12, 2000, directed to Biovail's outside law firms and lawyers. I have discussed with Louis M. Solomon of Solomon, Zauderer, Ellenhorn, Frischer & Sharp, counsel for Andrx Corporation ("Andrx") in a good faith effort to resolve by agreement the issues raised by Biovail's Motion to Quash. During those conversations we were unable to reach agreement with counsel for Andrx resolving the objections to the subpoenas.

Dated: June 20, 2000



David T. Beddow
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555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5391

Attorney for Biovail Corporation
International

CERTIFICATE OF SERVICE

I, David T. Beddow, hereby certify that on June 20, 2000, I caused a copy of the Motion of Biovail To Quash Subpoenas issued by Andrx Corporation to be served upon the following persons by hand:

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

And upon the following persons by overnight mail:

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45 Rockefeller Plaza
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David T. Beddow

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