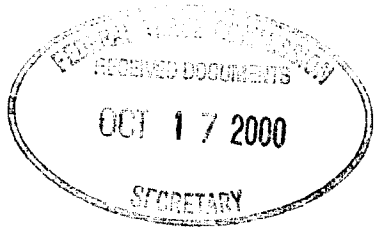

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

HOECHST MARION ROUSSEL, INC., a corporation,
CARDERM CAPITAL L.P., a limited partnership,

and

ANDRX CORPORATION, a corporation.

Docket No. 9293

RESPONDENT ANDRX CORPORATION'S MEMORANDUM IN OPPOSITION TO JOINT MOTION FOR INTERLOCUTORY APPEAL

Respondent Andrx Corporation ("Andrx") submits this memorandum in opposition to the Joint Motion for Interlocutory Appeal of Cleary Gottlieb, Steen & Hamilton, Keller and Heckman LLP, Verner Liipfert, Bernhard, McPherson and Hand, Chartered, George S. Cary and Steven J. Kaiser (collectively, the "Biovail Law Firms" or "Movants"), dated October 11, 2000, purportedly brought pursuant to the Commission's Rule of Practice 3.23(b).

Preliminary Statement

The Biovail Law Firms seek permission for an interlocutory appeal of this Court's discovery ruling set forth in the Order dated October 3, 2000 (the "October 3 Order"), on grounds that do not even come close to satisfying the criteria established in the Commission's Rule of Practice 3.23(b). Indeed, the Commission has applied even more stringent requirements where, as here, the challenge is being made to an order directed at discovery matters.

After full briefing of the Biovail Law Firms' motion to quash the discovery requests served on them, this Court, by the October 3 Order, required the Biovail Law Firms to produce three witnesses for depositions and documents relating to a very limited number of topics. See October 3 Order, attached as Ex. A to Movants' Mem. The Biovail Law Firms do not argue -- nor can they -- that the discovery at issue is burdensome. The Biovail Law Firms, in fact, acknowledge that the October 3 Order does not present any burden to them, stating that "the Court carefully reviewed the categories of documents in Andrx's subpoenas and appropriately limited that discovery to a narrow universe". Movants' Mem. at 1. As for the depositions, each certainly can be completed in less than a full day -- assuming cooperation on the part of the witnesses.

After initially foot-dragging on extremely limited discovery, what the Biovail Law Firms now seek to do, rather than provide the limited discovery that this Court ordered them to provide, is to engage in further foot-dragging. Turning the world on its head, the Biovail Law Firms argue that an appeal would "avoid time-consuming detours on topics already found by the Court to be irrelevant." Movants' Mem. at 2. In its rulings, this Court has specifically sustained various affirmative defenses relating to the discovery sought from the Biovail Law Firms and determined that these issues are indeed relevant. If anything, the Biovail Law Firms have spent more time litigating over the modest discovery at issue than the time it would take simply to provide the discovery. Given that the close of discovery is fast-approaching, it is imperative that this discovery be provided without further delay, and that the October 3 Order be enforced.

THE REQUEST FOR INTERLOCTORY APPEAL SHOULD BE DENIED

Section 3.23(b) of the Commission's Rules of Practice provides that an interlocutory appeal is permitted only when the Administrative Law Judge determines, "in writing, with justification in support thereof", that the ruling at issue:

> [1] involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and [2] that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy.

16 C.F.R. § 3.32(b); see also In re Harper & Row, Publishers, Inc., et al., No. 9217-22, 1990 WL 606340 (stating that 3.23(b) provides "narrow exceptions to the general rule disfavoring interlocutory review"); In the Matter of General Nutrition, Inc., No. 9175 (April 19, 1985) (Howder, J.) ("[u]nder Rule 3.23(b), interlocutory review is not automatically permitted" but, rather, the judge must first certify in writing that the two requirements of §3.23(b) have been met). Here, Movants have not come close to satisfying either of the requirements of §3.23(b).

Furthermore, a request for an interlocutory appeal must be accompanied by a "strong statement of facts" justifying an appeal; "conclusory recitations" are not sufficient. Operating Manual of the Federal Trade Commission, §10.14.2.2 (1995). The FTC's Operating Manual further explains:

> [C]ounsel are urged to point to the facts in the record as it exists at that time, and to the law, pleadings, depositions, admissions, etc., which demonstrate that interlocutory review is a necessary step. Typical failures of petitions for review have included statements that litigation will be expensive either for the Commission or the respondent and for that reason interlocutory appeal should be granted. Courts almost uniformly reject that plea, as does the Commission.

Id. (emphasis added).

As further discussed below, the Biovail Law Firms do not and cannot justify their application for an interlocutory appeal.

A. No Basis Exists to Disturb The Discovery Ruling at Issue

The Commission disfavors interlocutory appeals, particularly where, as here, the order at issue involves discovery rulings. See In re Harper & Row, Publishers, Inc., et al., No. 9217-22, 1990 WL 606340 (F.T.C. June 27, 1990) ("Interlocutory appeals, especially those seeking review of the presiding Administrative Law Judge, are disfavored"); In re The Gillette Co., 98 F.T.C. 875 (1981) ("As the Commission has frequently stated, we generally disfavor interlocutory appeals, particularly those seeking Commission review of an ALJ's discovery rulings"). As the Commission explained in In re Bristol-Myers Co., 90 F.T.C. 273 (1977), such requests can lead to, among other things, "repetitive delay" and "endless dispute":

> Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of our adjudicative process. Interlocutory appeals from discovery rulings merit a particularly skeptical reception, because particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay. In the absence of close and decisive supervision by the administrative law judge, the discovery process in any but the simplest case can be productive of endless dispute, sincere or contrived, to the point that any eventual remedial order relates only to history. Further, any perception on the part of our administrative law judges that the Commission will exercise broadly its undisputed authority to review interlocutory rulings will tend toward the atrophy of their sense of responsibility for the impact of their rulings on the proceedings before them.

Id. (emphasis added); see also In re The Gillette Co., 98 F.T.C. 875 (1981) ("The Commission believes that routine review of such [discovery] rulings would substantially

delay adjudicative proceedings .... [and] resolution of discovery issues...should be left to the discretion of the ALJ").

The October Order disposed of a conventional discovery dispute, which is an area where this Court has wide discretion and the Commission disfavors appeals. This case is no exception. The Biovail Law Firms have already engendered great delay in Andrx's pursuit of discovery "reasonably expected to yield information relevant to the defense of Andrx." October Order at 3. Here, as in In re Kroger Co., "holding the proceedings in abeyance . . . could accomplish only delay". 91 F.T.C. 1146 (1978). Accordingly, the October 3 Order should be enforced, and the Biovail Law Firms' application denied.

B. The Biovail Law Firms Cannot Satisfy the Criteria of Section 3.23(b)

Contrary to what the Biovail Law Firms argue, the October 3 Order -- when objectively viewed -- involves no "controlling question of law or policy as to which there is substantial ground for difference of opinion" (emphasis added). The Biovail Law Firms argue that Andrx has no need for discovery from them because the Court already has determined that "the issue whether the proceeding was brought in the 'public interest' cannot be litigated in this forum." Mem. Br. at 4. In actuality, this Court, after review of the applicable law, previously held that:

> Because Andrx's affirmative defenses challenging the Commission's public interest determination raise issues that may be reviewed by courts, these defenses [related to whether the proceeding was brought in the public interest] are not so legally insubstantial or unmistakably unrelated or so immaterial as to have no bearing on the issues.

Order on Complaint Counsel's Motion to Strike, dated September 14, 2000 (the "September 14 Order") (attached as Ex. B to Movant's Mem.), at 5. Therefore, the Court further stated that "due process requires that this issue be preserved" and specifically approved limited discovery. Id.

Thus, prior to the October 3 Order, this Court already had found that the information sought bears on relevant issues. As non-parties, the Biovail Law Firms have no standing to challenge the September 14 Order ruling sustaining Andrx's affirmative defenses (nor would it be even timely to attempt to do so).

Even more importantly, rather than "materially advanc[ing] the ultimate termination of the litigation", granting the Biovail Law Firms' request will only further delay this proceeding and reward the Biovail Law Firms for their foot-dragging in complying with the October 3 Order. Andrx is entitled to the narrow discovery permitted by the October 3 Order, and such discovery should be provided without further delay.

C. The Biovail Law Firms Misdescribe the Basis of the October 3 Order and Otherwise Rely on Inaccurate Statements

In a distortion of the basis of the October 3 Order, the Biovail Law Firms argue that discovery is being sought from them "simply because they provided information to the Commission." Movants' Mem. at 2. However, that is not "simply" the reason for the discovery. To the contrary, the Biovail Law Firms fundamentally misdescribe the reason for the discovery being sought. Here, Andrx has concrete evidence reflecting extensive dealings between the Biovail Law Firms and the FTC staff involving, among other things, the FTC staff surreptitiously reviewing drafts of Biovail submissions to the Commission without disclosing that fact to the Commission; the FTC staff's communication of non-public information about Andrx to Biovail's outside counsel; the FTC staff's

communication of information directly or indirectly leaked to the media; and contacts between Biovail's principal outside attorney (George Cary) and FTC staff when Mr. Cary, a former FTC staff member himself, may have been precluded from having such contacts. Moreover, the information sought is not, as the Biovail Law Firms contend (Movants' Mem. at 5), directed only toward Andrx's affirmative defense relating to whether this proceeding was brought in the public interest.

To bolster their motion, the Biovail Law Firms rely on the argument that the October 3 order may have a so-called "chilling effect" on communications. Movants' Mem. at 2, 5. However, the Biovail Law Firms do not provide any concrete evidence of chilling effect. They rely on exaggerated rhetoric, which is not enough to support an interlocutory appeal. If the Biovail Law Firms are genuinely concerned about a chilling effect, they can raise the issue with the Commission during the ordinary course after the limited discovery at issue is provided without engendering further delay in these proceedings.[1]

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[1] Using irresponsible rhetoric, the Biovail Law Firms refer to a decision of the U.S. District Court for the Eastern District of Michigan concerning the HMR/Andrx Stipulation. Not only does that decision have nothing to do with the discovery at issue but the citation to it is misleading. That decision is not controlling here and the District Court, recognizing the complexity of the matter, has certified the questions addressed in the decision for interlocutory review by the Sixth Circuit pursuant to 28 U.S.C. 1292(b).

Conclusion

For the foregoing reasons, Andrx respectfully requests that this Court deny the Biovail Law Firms' request for an interlocutory appeal.

Dated: New York, New York
October 16, 2000

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CERTIFICATE OF SERVICE

I, Allen H. Bowden , hereby certify that on October 16, 2000, I caused to be served upon the following persons, by Federal Express overnight, Respondent Andrx Corporation's Memorandum in Opposition to Joint Motion for Interlocutory Appeal:

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