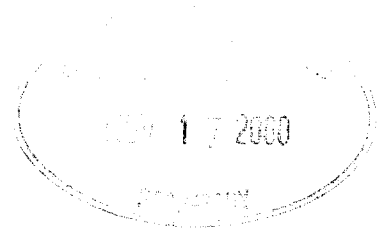


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



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 MOTION TO COMPEL  
DEPOSITION TESTIMONY OF DAVID A. BALTO**

Pursuant to Section 3.38 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.38, respondent Andrx Corporation hereby moves for an order compelling David A. Balto to appear for a deposition

The bases of this motion are set forth in the accompanying Memorandum in Support of Motion to Compel Deposition Testimony of David A. Balto.

Dated: New York, New York  
November 16, 2000

SOLOMON, ZAUDERER, ELLENHORN,  
FRISCHER & SHARP

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Docket No. 9293

**RESPONDENT ANDRX CORPORATION'S  
MEMORANDUM IN SUPPORT OF MOTION TO COMPEL  
DEPOSITION TESTIMONY OF DAVID A. BALTO**

Respondent Andrx Corporation ("Andrx") submits this memorandum, pursuant to Section 3.38 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.38, in support of its motion for an order compelling David A. Balto, to appear for a deposition.

**Preliminary Statement**

As previous submissions to this Court have demonstrated, David Balto, Assistant Director of the Bureau of Competition, is a material fact witness with respect to the affirmative defenses concerning improprieties in the FTC's process in this matter. In particular, the record developed to date reveals that Mr. Balto engaged in secret exchanges with outside counsel who have represented Biovail -- Cleary, Gottlieb, Steen & Hamilton; Keller and Heckman LLP; Verner, Liipfert, Bernhard, McPherson and Hand, Chartered; George S. Cary; and Steven J. Kaiser (together, the "Biovail Law Firms"). By its Order dated September 14, 2000 ("September 14 Order"), this Court sustained the various affirmative defenses directed at the FTC's process. As the September 14 Order observed,

the defenses involve allegations that this proceeding "arose from an improper and illegal publicity campaign" and "improper disclosures" made or facilitated by the FTC staff.

September 14 Order at 3.<sup>1</sup>

### ARGUMENT

Andrx diligently has sought discovery from the Biovail Law Firms, which have refused to provide any discovery -- not a single scrape of paper, let alone any depositions. By Order dated October 3, 2000, the Court specifically compelled deposition and document discovery from the Biovail Law Firms. However, the Biovail Law Firms have consistently refused to comply. On October 11, counsel for the Biovail Law Firms served a Joint Motion for Interlocutory Appeal of the October 3 Order, which this Court denied in an Order dated October 25. Still, the Biovail Law Firms have refused to provide any discovery. On October 31, 2000, Andrx filed a Notice of Noncompliance with Third-Party Subpoenae Served on Biovail Law Firms, requesting that this Court's order be certified to the Commission for enforcement.

In addition to discovery from the Biovail Law Firms, Andrx has sought to depose Mr. Balto about his dealings with those attorneys and other related topics. When Complaint Counsel refused to produce him for deposition, the parties engaged in motion practice over Mr. Balto's deposition. On October 31, 2000, this Court issued an Order (the "October 31 Order") denying -- without prejudice -- Andrx's motion to compel deposition

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<sup>1</sup> Among other things, it appears that Mr. Balto improperly provided information to one of Biovail's attorneys (Mr. Cary), the former Senior Deputy Director of the Bureau of Competition, who Biovail hired to influence the FTC staff, at a time when Mr. Cary was prohibited by conflict of interest restrictions from dealing with the FTC on this matter. Mr. Balto and other FTC officials then aided Mr. Cary in preparing, on Biovail's behalf, submissions to the FTC criticizing the HMR/Andrx Stipulation. Neither Mr. Balto nor any other FTC staff person appears to have disclosed to the Commission that Mr. Balto reviewed and revised drafts of submissions made by Biovail to the Commission. In addition, Mr. Balto apparently was the source, directly, through Mr. Cary or otherwise, of leaks about the non-public investigation to the media.

discovery from Mr. Balto. The Court's decision was premised on the assumption that Andrx, in the first instance, might be able to obtain the information it needed from Biovail and/or the Biovail Law Firms. The October 31 Order accepted Complaint Counsel's view that Andrx's application "to depose Balto be deferred until such time as [the Biovail Law Firms] have been deposed." Accordingly, this Court specifically held that "[a]ny deposition of Balto is deferred until such time as the above-referenced attorneys for Biovail have been deposed."

However, the view that discovery from the Biovail Law Firms might satisfy Andrx's legitimate needs has proven incorrect since the Biovail Law Firms have resisted discovery. Therefore, as the October 31 Order itself recognizes, it is now appropriate for this Court to revisit its ruling and to compel the deposition of Mr. Balto.<sup>2</sup>

Mr. Balto's deposition is entirely consistent with the September 14 Order, which envisions "limited" discovery into this area as well. September 14 Order at 5. The single deposition fits the criteria of being limited -- as limited as can be, particularly since no additional documents are sought. Nothing in the FTC rules precludes testimony from FTC staff members. To the contrary, the rules explicitly contemplate discovery -- including depositions -- from Commission employees. See FTC Rule of Practice § 3.33(g)(ii)(permitting the use of a deposition, at trial, of "an official or employee . . . of the

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<sup>2</sup> It is clear that the Biovail Law Firms intend to protract court enforcement of the subpoenas. In their response to Andrx's Notice of Noncompliance they represent:

The Law Firms respectfully reserve their rights to argue to the Commission that it should not seek judicial enforcement of this discovery order. In the event that the Commission seeks judicial enforcement, the Law Firms respectfully reserve their rights to argue to the United States District Court that the discovery order should not be enforced.

Biovail Law Firms' Response to Notice of Noncompliance, dated November 3, 2000, at 2.

Commission by "an adverse party for any purpose"). Indeed, it is rudimentary that discovery ought to be a "two-way street." Wardius v. Oregon, 412 U.S. 470, 475 U.S. (1973).

In sum, Andrx has a legitimate and substantial need for deposing Mr. Balto now, since it is being blocked from obtaining discovery, in the first instance, from the Biovail Law Firms. Given the short time remaining before the scheduled commencement of the hearing in this matter, Andrx has been seriously prejudiced by the delay -- indeed, stonewalling -- on the part of the Biovail Law Firms with regard to any discovery. Accordingly, Andrx should be allowed to proceed with the deposition of Mr. Balto as an alternative source of the information it is entitled to obtain.

#### **Conclusion**

The nature and extent of communications between Biovail's agents and Mr. Balto and other FTC staff members needs to be explored. To do so, it is necessary to depose Mr. Balto about his activities and contacts with individuals outside the FTC, particularly since, in contravention of this Court's directives, the Biovail Law Firms have not provided discovery as ordered. For the foregoing reasons, Andrx respectfully requests that this Court grant its motion for an order compelling Mr. Balto to appear for a deposition.

Dated: New York, New York  
November 16, 2000

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DOCKET NO. 9293

**PROPOSED ORDER ON RESPONDENT ANDRX CORPORATION'S  
MOTION TO COMPEL DEPOSITION TESTIMONY OF DAVID A. BALTO**

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 for an order compelling the deposition testimony of David A. Balto.

Respondent Andrx's motion is hereby GRANTED. Mr. Balto is hereby ordered to appear for a deposition by no later than five business days after the date of this Order.

ORDERED:

\_\_\_\_\_  
D. MICHAEL CHAPPELL  
ADMINISTRATIVE LAW JUDGE

Dated: November \_\_, 2000