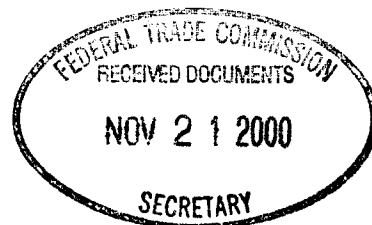


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



\_\_\_\_\_  
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

**ORDER GRANTING ANDRX'S REQUEST FOR CERTIFICATION  
TO THE COMMISSION FOR ENFORCEMENT OF SUBPOENAS**

**I. INTRODUCTION**

On November 1, 2000, Respondent Andrx Corporation ("Andrx") filed its Notice of Noncompliance With Third-Party Subpoenae Served on Biovail Law Firms ("Notice of Noncompliance"). In this motion, Andrx states that outside counsel who have represented non-party Biovail Corporation International ("Biovail") have failed to comply with discovery subpoenas served on them by Andrx. Andrx requests certification of that noncompliance to the Commission for purposes of enforcement, pursuant to 16 C.F.R. § 3.38(c).

On November 3, 2000, Cleary, Gottlieb, Steen & Hamilton; Keller and Heckman LLP; George S. Cary; and Steven J. Kaiser (collectively, the "Biovail Law Firms") responded, filing their Response of Biovail Law Firms Who Are Subject to Deposition to Andrx's "Notice of Noncompliance" ("Response of Biovail Law Firms to Notice of Noncompliance"). The Biovail Law Firms confirm that they do not intend to comply with the subpoenas and state that they feel that it would be appropriate to certify a request for judicial enforcement to the Commission, pursuant to 16 C.F.R. § 3.38(c).

The discovery dispute for which certification is sought arises from the allegations made by Andrx that federal law was violated in connection with this case and during the investigation that gave rise to the Complaint in this proceeding. Because enforcement of the subpoenas, as narrowed by previous rulings, is appropriate, Andrx's request for certification to the Commission for judicial enforcement is GRANTED, as set forth below.

In its Notice of Noncompliance, Andrx also requested to proceed with the deposition of a current FTC staff member whom Andrx alleges was personally engaged in extensive communications regarding this matter with the Biovail Law Firms. Andrx previously filed a motion to compel this deposition. Any such deposition was deferred until after the attorneys from the Biovail Law Firms had been deposed. Order on Andrx's Motion to Compel Complaint Counsel to Provide Limited Deposition Discovery Relating to Affirmative Defenses, October 31, 2000. Andrx's renewed request to take the deposition of this current FTC staff member at this time is DENIED WITHOUT PREJUDICE.

## II. THE SUBPOENAS

Andrx served subpoenas on outside counsel who have represented non-party Biovail, pursuant to Commission Rule 3.34. According to Andrx, its subpoenas sought discovery from the Biovail Law Firms to support its affirmative defenses contending that this proceeding is not in the public interest. On June 20, 2000, the Biovail Law Firms moved to quash the subpoenas served on them by Andrx. Andrx filed its opposition to the motion to quash on June 30, 2000. As discussed below, the relevancy of the discovery Andrx sought through its subpoenas on the Biovail Law Firms could not be evaluated before a ruling on the validity of Andrx's affirmative defenses.

At the time the Biovail Law Firms' motion to quash was pending, Complaint Counsel's motion to strike certain defenses was also pending. The Biovail Law Firms argued that Andrx was not entitled to discovery from them because Andrx's defenses based on alleged improprieties in the FTC's investigation were invalid as a matter of law. The parties were instructed that a ruling on the Biovail Law Firms' motion to quash would be made after an order was issued on Complaint Counsel's pending motion to strike. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 127 (July 14, 2000).

## III. THE VALIDITY OF ANDRX'S AFFIRMATIVE DEFENSES

Andrx's Answer to the Complaint in this proceeding asserted several affirmative defenses. Among Andrx's affirmative defenses were defenses asserting that this administrative proceeding is not "to the interest of the public." In summary, Andrx's affirmative defense numbers 18 and 19 contend that this proceeding is not in the public interest because it arose from an improper and illegal publicity campaign surrounding the Commission's non-public investigation; and that improper disclosures have been made by or with assistance from Biovail which was represented by a former Deputy Director of the Bureau of Competition of the Federal Trade Commission. (Answer of Andrx Corporation, April 13, 2000, ¶¶ 18, 19.)

These defenses were challenged and supported in several rounds of briefing. Complaint Counsel filed a Motion to Strike Certain Affirmative Defenses Set Forth in Respondents' Answers ("motion to strike") on April 28, 2000. Andrx filed an opposition on May 19, 2000. Complaint Counsel next filed a reply brief in support of its motion to strike on May 26, 2000.

Andrx then filed a supplemental submission in opposition on June 5, 2000. Finally, Complaint Counsel filed a supplemental reply brief in support of its motion to strike on June 12, 2000. Oral arguments of counsel were heard on August 3, 2000.

In support of its motion to strike Andrx's defense numbers 18 and 19, Complaint Counsel asserted that these defenses raise issues and arguments that go beyond the scope of this proceeding and that the focus of this proceeding is limited to whether the violation alleged in the Complaint has in fact occurred. (Complaint Counsel's Memorandum in Support of Their Motion to Strike Certain Affirmative Defenses Set Forth in Respondents' Answers, April 28, 2000, p. 3.) Andrx contended that its defenses, if proven, would demonstrate that the Commission acted improperly and in excess of its statutory authority by bringing this action. (Respondent Andrx Corporation's Memorandum in Opposition to Complaint Counsel's Motion to Strike Certain Affirmative Defenses, May 19, 2000, p. 28.) Andrx further alleged that improper, illegitimate and unlawful communications occurred between the FTC staff and counsel for Biovail, a former Senior Deputy Director of the Bureau of Competition, at a time when such communications were prohibited by federal law. (Andrx's Supplemental Submission in Further Opposition to Complaint Counsel's Motion to Strike Affirmative Defenses, June 5, 2000, p. 3.)

By Order dated September 14, 2000, Complaint Counsel's request to strike Andrx's affirmative defense numbers 18 and 19 was denied. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 137, \*9-10 (Sept. 14, 2000). In general terms, a conflict over the extent to which the Commission's reason to believe a proceeding is in the public interest may be challenged, litigated, or reviewed by the courts has led to the current discovery dispute. More specifically, the extent to which a respondent is allowed discovery to support its allegations of violations of federal law relating to the Commission's investigation and the issuance of a complaint has led to the current discovery dispute.

On the one hand, the Supreme Court and other courts have held that the Commission's determination that a proceeding is in the public interest is judicially reviewable in limited circumstances. *Federal Trade Commission v. Klesner*, 280 U.S. 19, 30 (1929) (Courts may review whether a proceeding is in the public interest.); *Hill Bros. v. Federal Trade Commission*, 9 F.2d 481, 484 (9<sup>th</sup> Cir. 1926) (The Commission's reason to believe determination is not "a subject of controversy either before the commission or before the court, except in so far as the question of public interest is necessarily involved in the merits of the case. . ."); *Standard Oil Co. v. Federal Trade Commission*, 596 F.2d 1381, 1385-86 (9<sup>th</sup> Cir. 1979), *rev'd on other grounds* 449 U.S. 232 (1980) (citations omitted) (A determination by the Commission that there is "reason to believe" a violation of the FTC Act has occurred is within the agency's discretion and is ordinarily not reviewable, but "courts will review an agency action when the alleged abuse of discretion is the violation of 'constitutional, statutory, regulatory or other legal mandates or restrictions.'"); *Boise Cascade Corp. v. Federal Trade Commission*, 498 F. Supp. 772, 779 & 779 n.3 (D. Del. 1980) (The Commission's "reason to believe" determination is "committed to agency discretion" and thus is reviewable only where there are strong facial indications of bad faith.).

On the other hand, the Commission has held that the only inquiry before this tribunal is whether the conduct alleged in the complaint violates the FTC Act.

[I]t has long been settled that the adequacy of the Commission's "reason to believe" a violation of law has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.

*In re Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974). Nevertheless, the Commission recognizes that the Commission will review its reason to believe and public interest determinations in extraordinary circumstances. *In re Boise Cascade Corp.*, 97 F.T.C. 246, 247 n.3 (1981).

In the instant case, Andrx has presented an allegation of violation of federal law. Andrx asserts that the former Deputy Director of the Bureau of Competition, after leaving the Federal Trade Commission, became outside counsel for Biovail. Andrx maintains that the former Deputy Director improperly communicated with the FTC staff on behalf of Biovail at a time when he was prohibited from so doing by 18 U.S.C. § 207 (restrictions on former employees of the executive branch) and 16 C.F.R. § 4.1 (restrictions on former employees of the FTC). (Andrx's Memorandum in Opposition to Motions to Quash the Subpoenas Directed at Biovail's Outside Counsel, June 30, 2000, p. 2.) Andrx has presented its allegations not only in its pleadings, but also in open court. Transcript of Pretrial Hearing, Docket 9293, pp. 34-45 (August 3, 2000). No finding has been made as to whether federal law has been violated, as alleged by Andrx. If, as alleged, a federal statute has been violated in connection with this case, that should qualify as an "extraordinary circumstance."

The Order on Complaint Counsel's Motion to Strike instructed the parties that although "the Commission's determination that this proceeding is in the public interest cannot be litigated in this proceeding . . . due process requires that this issue be preserved." *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 137 at \*10 (citations omitted). It further instructed the parties that "any discovery into this area will be limited." *Id.* Andrx was specifically ordered not to "probe into the mental processes of the Commissioners." *Id.* This limited discovery was allowed because logic dictates that if the issue is reviewable, then a party must be allowed to make a record.

#### IV. THE DISCOVERY FOR WHICH COURT ENFORCEMENT OF THE SUBPOENAS IS SOUGHT

Following the issuance of the September 14, 2000 Order on Complaint Counsel's Motion to Strike, Andrx and the Biovail Law Firms were unable to resolve their discovery dispute. Andrx offered to narrow the scope of its subpoenas served on the Biovail Law Firms. The Biovail Law Firms continued to insist that they would not comply with Andrx's subpoenas. By Order dated October 3, 2000, the Biovail Law Firms' motion to quash was granted in part and denied in part. Order on Motions to Quash Subpoenas Served by Andrx on Outside Counsel for Biovail, Docket 9293 (Oct. 3, 2000) ("October 3, 2000 Order").

The Andrx subpoenas seek discovery from the Biovail Law Firms to support Andrx's defense that this proceeding arose from an improper and illegal publicity campaign surrounding the Commission's non-public investigation and that improper and unlawful disclosures had been made by or with assistance from Biovail which was represented by a former Deputy Director of the Bureau of Competition of the Federal Trade Commission. Andrx maintains that the attorneys it seeks to depose participated in unlawful communications with FTC staff investigating and litigating this matter. To properly determine whether unlawful communications occurred, it would be necessary to depose all three witnesses, not just the former Deputy Director.

The Biovail Law Firms argue that because the FTC's determination that it had reason to believe that a proceeding would be in the public interest cannot be litigated in this proceeding, Andrx is not entitled to the discovery Andrx seeks from them. The Biovail Law Firms further argue that Andrx's defense that this proceeding is not in the interest of the public is frivolous in light of the determination by the U.S. District Court for the Eastern District of Michigan that the agreement between Andrx and Respondent Hoechst Marion Roussel that is at issue in this proceeding is a per se violation of the Sherman Act.

Because Andrx's affirmative defenses challenging the Commission's determination that this proceeding was in the public interest were judged to be defenses which may be reviewable in other courts, the limited discovery that Andrx seeks from the Biovail Law Firms relating to Andrx's public interest defenses was determined to be relevant. October 3, 2000 Order at 2 (*citing* 16 C.F.R. § 3.31(c)(1)). An alleged violation of federal law in connection with any phase of this case should be relevant to the public interest. Full disclosure should shed light on this matter, or should put an end to it.

The Biovail Law Firms continue to insist that, as attorneys, no discovery may be had from them absent a showing of requisite need. (Response of Biovail Law Firms to Notice of Noncompliance, p. 3-4, *citing* *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8<sup>th</sup> Cir. 1986) and its progeny which require a demonstration of need when depositions of *opposing* counsel are sought). However, the Biovail Law Firms are not counsel to a party in this

proceeding. Accordingly, the Biovail Law Firms have previously been instructed that *Shelton* and its progeny do not shield them from producing relevant discovery. October 3, 2000 Order at 2.

The October 3, 2000 Order granted the Biovail Law Firms' motion to quash in part and denied it in part. The Order was carefully tailored so that no work product and no privileged information would be divulged. The scope of discovery Andrx was permitted from the Biovail Law Firms was narrowly limited to only the following:

- (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.

October 3, 2000 Order at 3.

#### **V. REJECTED REQUEST FOR INTERLOCUTORY APPEAL**

The Biovail Law Firms sought interlocutory review of the October 3, 2000 Order, asserting that the legal and policy implications of requiring attorneys to testify and provide documents should be resolved by the Commission. (Memorandum in Support of Joint Motion for Interlocutory Appeal, October 13, 2000, p. 2.) Andrx filed an opposition to the motion for interlocutory review on October 17, 2000.

Commission Rule 3.23(b) requires that the Administrative Law Judge determine that the ruling from which interlocutory appeal is sought involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation or that subsequent review will be an inadequate remedy. Because the Biovail Law Firms sought review of a discovery ruling, it was determined that this dispute did not involve a controlling question of law or policy and that an immediate appeal would not materially advance the ultimate termination of the litigation. Accordingly, the Biovail Law Firms' motion for interlocutory appeal was denied. Order Denying Motion for Interlocutory Appeal, October 25, 2000, p. 2.

#### **VI. CERTIFICATION FOR ENFORCEMENT**

Andrx, in the instant motion, now seeks certification to the Commission for court enforcement of its subpoenas served on the Biovail Law Firms. The Biovail Law Firms acknowledge that they are "resisting the Court's discovery Order through the enforcement stage."

(Response of Biovail Law Firms to Notice of Noncompliance, p. 4.) The Biovail Law Firms agree that this tribunal should certify a request for judicial enforcement to the Commission, so that the Biovail Law Firms can make their arguments to the Commission and/or the United States District Court at the enforcement stage. *Id.*

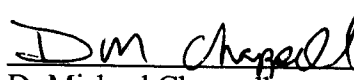
The Commission's Rules of Practice state that "in instances where a nonparty fails to comply with a subpoena or order, [the Administrative Law Judge] shall certify to the Commission a request that court enforcement of the subpoena or order be sought." 16 C.F.R. § 3.38(c). This rule is derived from the Commission's organic statute which sets forth "in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence." 15 U.S.C. § 49. *See also In re Market Dev. Corp.*, 95 F.T.C. 100, 225 (Jan. 15, 1980).

Although Andrx seeks enforcement of its subpoenas on the Biovail Law Firms, these subpoenas, as originally drafted, have already been determined to be overly broad. October 3, 2000 Order, p. 3. To the extent that Andrx seeks certification to the Commission for enforcement of the October 3, 2000 Order which allowed only limited discovery from the Biovail Law Firms, this request is GRANTED.

Pursuant to Rule 3.38(c), Andrx's motion is certified to the Commission with the recommendation that the Commission seek court enforcement of the subpoenas, as narrowed by the October 3, 2000 Order.

The hearing on the merits in this proceeding is set to begin on December 12, 2000.

ORDERED:

  
D. Michael Chappell  
Administrative Law Judge

Date: November 21, 2000