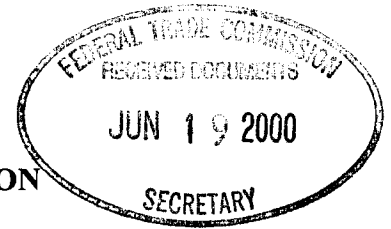


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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 BIOVAIL'S MOTION
TO QUASH SUBPOENAS ISSUED BY ANDRX, OR IN THE ALTERNATIVE,
IN SUPPORT OF ANDRX'S CROSS-MOTION TO PRECLUDE**

Pursuant to § 3.38 of the FTC's Procedures and Rules of Practice, respondent Andrx Corporation ("Andrx") submits this memorandum in opposition to the motions of Biovail Corporation, Eugene Melnyk, and Kenneth C. Cancellara to quash the subpoenas *duces tecum* and *ad testificandum* served upon them by Andrx, or in the alternative granting Andrx's cross-motion that, in the event these subpoenas are quashed or Complaint Counsel does not make these witnesses and the requested documents available for pre-trial discovery, the FTC be precluded from offering Biovail (through any of its representatives), Messrs. Melnyk and Cancellara, at the time of trial.

PRELIMINARY STATEMENT

From the very inception of the FTC's investigation of this case, Biovail, and specifically, Messrs. Melnyk and Cancellara, among others at Biovail, have been intimately involved in this case, and have had extensive communications with FTC staff. As the record makes clear, Biovail, its representatives, and Messrs. Melnyk and

Cancellara have made themselves readily available to the FTC staff during every aspect of the proceeding, from the non-public investigation through today. Specifically, allegations concerning Biovail appear numerous times in the FTC's Complaint (See Complaint ¶¶ 16, 20 and 21) in this proceeding, clearly playing a central role in the case Complaint Counsel intends to put on. Issues relating to Biovail are highly relevant to key aspects of Complaint Counsel's case, including the absence of competitive harm and the restraint of trade, the use of a Rule of Reason analysis to determine what constitutes a standard agreement in the industry, and what constitutes the relevant market.

It is for these reasons that Biovail appears on Complaint Counsel's Initial Disclosures as an entity with whom the FTC communicated during the investigation. Biovail appears numerous times in Complaint Counsel's Answers to Interrogatories. Eight Biovail employees (the most of any private entity), including Messrs. Melnyk and Cancellara, appear in a June 12, 2000 letter from Complaint Counsel to Respondents as individuals with whom FTC staff communicated throughout the course of this investigation and adjudicate proceeding. Most recently, and most importantly, on June 14, 2000, Messrs. Melnyk, Cancellara, and Bruce Brydon, Biovail's President and CEO, were identified as witnesses whom the FTC intends to call at trial. In addition, Biovail has filed two private lawsuits involving the same set of facts at issue here, in the United States, one against Andrx in the D.C. District Court (which was dismissed)¹, and one against Respondent HMR in New Jersey². Yet, despite the magnitude of Biovail's involvement in this case, they have consistently refused to allow Respondents access to any documents for use in this case, alleging that the operative Protective Order is

¹ Andrx Pharmaceuticals, Inc. v. Friedman, C. A. No. 98-0099 (JGP) (D.D.C.).

² Biovail Corp. International v. Hoechst Aktiengesellschaft et al., Civil Action No. 98-1434 (MTB) (SRC)

insufficient to protect the confidentiality of their documents.³ Biovail continues to engage in game playing, hiding behind the veil of "international sovereignty" whenever it suits their purpose, in order to avoid, or what amounts to the same thing, in these highly abbreviated proceedings, having to provide discovery to Respondents.

Therefore, in light of Biovail's refusal to cooperate with Andrx, and since the discovery period in this proceeding is extremely tight, Andrx retained Canadian Counsel (specifically, Ogilvy Renault in Ontario), to aid in its discovery of Biovail and Messrs. Melnyk and Cancellara. On May 18, 2000, Ogilvy Renault hired a Canadian process server to personally serve subpoenas *duces tecum* and *ad testificandum* upon Biovail and the named individuals. Mr. Cancellara was served personally at Biovail's corporate headquarters in Mississauga, Ontario. Mr. Cancellara also accepted service on behalf of Biovail. Mr. Melnyk's personal assistant, who stated that she was authorized to accept service on his behalf, accepted the subpoena directed to him. See Affidavits of Service annexed hereto. The manner of service employed here fully satisfies the FTC's Rules of Practice and Fed.R.Civ.P. 45. Biovail's disingenuous assertion that the Commission lacks jurisdiction over them because the subpoenas were allegedly improperly served is a delay tactic belied by the record, and should be rejected outright.

I.

SERVICE WAS EFFECTED UPON BIOVAIL AND MESSRS. MELNYK AND CANCELLARA

Biovail's sole argument is that the subpoenas should be quashed because the manner of personal service upon the corporation and the named individuals was "ineffective to confer jurisdiction of [the] Commission" over them. That is simply

³ Andrx, of course, fully disputes this proposition, and believes the Protective Order to be fully adequate to

incorrect. It is critical to observe that Biovail and its officers do not dispute having received actual notice of the subpoenas. That is all that is required by Rule 4.4(a) of the FTC's Rules of Practice, which provides that:

All other orders and notices, including subpoenas, orders requiring access, orders to file annual and special reports, and notices of default, may be served by any method reasonably certain to inform the affected person, partnership, corporation or unincorporated association, including any method specified in paragraph (a)(1)...(emphasis added).

Rule 4.4(a)(1) speaks to service "By the Commission" of, among other things, subpoenas. It is Andrx's position that this provision applies here since it is the Commission that issued the subpoenas that were served. However, even if subsection (a) does not apply, service was still properly effected under subsection (b), which reads:

By other parties. Service of documents by parties other than the Commission shall be by delivering copies thereof as follows...Upon a party other than the Commission or Commission counsel, service shall be by personal delivery or delivery by first-class mail. If the party is an individual or partnership, delivery shall be to such individual or a member of the partnership; if a corporation or unincorporated association, to an officer or agent authorized to accept service of process therefor. Personal service includes handling the document to be served to the individual, partner, officer, or agent; leaving it at his or her office with a person in charge thereof...(emphasis added)."

Biovail's reliance on FTC v. Compagnie De Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300 (D.C.Cir. 1980), is misplaced. That case addressed the issue of the ineffectiveness of service when the FTC sent an investigatory subpoena via certified mail. The Court of Appeals held that there was no statutory authority providing for service of compulsory process in that manner. Here, however, service was effected

insure the confidentiality of Biovail's documents.

pursuant to, and in accord with, Rule 4.4. (Even assuming Fed.R.Civ.P 45 was to trump, service was also proper under Rule 45.⁴)

Biovail seeks to rely on certain mechanisms of Canadian law as the sole means by which Andrx could have served the corporation and Messrs. Melnyk and Cancellara. This argument was rejected by Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa, 482 U.S. 522, 107 S.Ct. 2542 (1987), where the U.S. Supreme Court decision held that an international convention on the taking of evidence abroad (namely, the Hague Convention), was not the exclusive and mandatory means for obtaining documents and information located within a foreign territory. Specifically, the Court held that "[i]nternational comity does not require in all instances that American litigants first resort to [Hague] Convention procedures before initiating discovery under the Federal Rules." Societe Nationale at 523. While Canada is not a signatory to that portion of the Hague Convention dealing with the taking of evidence abroad, the principles remain the same. Here, Andrx has adhered to the provisions set forth by Fed.R.Civ.P. 45 and Rule 4.4 of the FTC's Rules of Practice.

II.

THE FTC SHOULD BE PRECLUDED FROM OFFERING MESSRS. MELNYK AND CANCELLARA AS WITNESSES AT TRIAL IF THEY DO NOT APPEAR FOR PRE-TRIAL DEPOSITIONS

To not allow Respondents to depose prior to trial witnesses that will almost certainly be called by Complaint Counsel, or to examine the documents requested in the subpoenas, flies in the face of notions of fairness, due process, and both the Federal Rules of Civil Procedure and the FTC's own Rules of Practice. Simply put, these

⁴ There is even dispute in the federal courts as to whether Fed.R.Civ.P. 45 actually requires personal service. See, e.g., Shur v. First Nationwide Bank, 184 B.R. 640 (E.D.N.Y. 1995), and Doe v. Hersemann, 155 F.R.D. 630 (N.D.Ind. 1994), both holding that Rule 45 does not require personal service.

witnesses should not be entitled to make themselves voluntarily available to the FTC on what has been an ongoing basis, and then claim that this Court or the Commission has no jurisdiction over them for purposes of pre-trial discovery. If these subpoenas are quashed, then the FTC should be precluded from offering the testimony of these witnesses at trial.

This issue was presented in Magee v. Paul Revere Life Insurance Co., 178 F.R.D. 33 (E.D.N.Y. 1998), where the court held that sanctioning the plaintiff by precluding the testimony of his expert witness at trial was permissible where the witness had failed to appear for deposition; this failure was imputed to the plaintiff as his failure to produce a witness for deposition when that witness could be produced at trial. Magee at *38. In so doing the court rejected the plaintiff's argument that Fed.R.Civ.P. 45 was the exclusive remedy available to the defendant (i.e. sanctioning the witness), and held that Rule 37(d) was available to punish the plaintiff for failure to produce for deposition a witness who it had the capacity to produce at trial. Id. Similarly, in Bradgate Associates, Inc. v. Fellows, Read & Associates, Inc., 1992 U.S. Dist 4668 (D.N.J. 1992), the district court affirmed the magistrate's ruling precluding the testimony of a witness at trial when the plaintiff had failed to proffer that witness for a pre-trial deposition, 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). Id. at *4.

It is clear that Complaint Counsel has the ability to, and in fact intends to, produce at least three Biovail representatives as witnesses at trial. Those individuals include Messrs. Melnyk and Cancellara. Therefore, Andrx (and the other Respondents) should be able to conduct pre-trial depositions of these witnesses. If these witnesses are

available for the FTC they should be similarly available for Respondents. If the Commission does not have jurisdiction over them as Biovail asserts, then the FTC should be precluded from producing them as witnesses at the time of trial.

CONCLUSION

For the foregoing reasons, Biovail's motion to quash Andrx's subpoenas should be denied in its entirety, or in the alternative, if the Court quashes the subpoenas and Complaint Counsel does not produce these witnesses, Andrx's cross-motion to preclude the FTC from calling Biovail and Messrs. Melnyk and Cancellara at trial should be granted in its entirety.

Dated: New York, New York
June 19, 2000

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,
FRISCHER & SHARP

By:



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Counsel for Respondent Andrx Corporation

AFFIDAVIT OF SERVICE

BETWEEN:

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

-and-

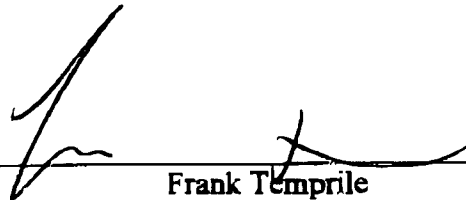
BIOVAIL CORPORATION INTERNATIONAL

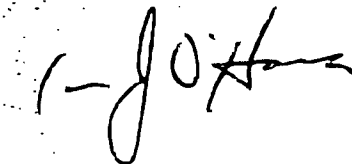
AFFIDAVIT OF SERVICE

I, Frank Temprile, Process Server, of the City of Toronto, in the Province of Ontario, **Make Oath and Say:**

1. On 18 May 2000, at 3:38 p.m., I served Biovail Corporation International with a copy of the Subpoena Ad Testificandum and a copy of the Subpoena Duces Tecum as attached by leaving a copy of each with Kenneth C. Cancellara, a person who appeared to be in care and control of the place of business located at 2488 Dunwin Drive, Mississauga, Ontario.
2. Kenneth C. Cancellara identified himself to me and stated to me that he was authorized to accept the said documents on behalf of Biovail Corporation International.

SWORN Before me at the city of)
Toronto, in the Province of Ontario)
This 23th day of May 2000)


Frank Temprile



A Notary for and in
The Province of Ontario.

AFFIDAVIT OF SERVICE

BETWEEN:

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

-and-

BIOVAIL CORPORATION INTERNATIONAL

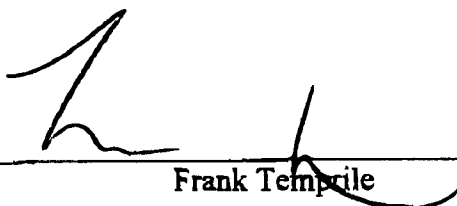
AFFIDAVIT OF SERVICE

I, Frank Tempile, Process Server, of the City of Toronto, in the Province of Ontario, **Make Oath and Say:**

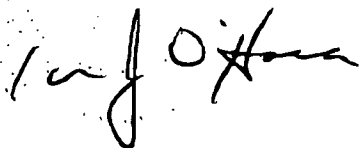
1. On 18 May 2000, at 3:38 p.m., I served Eugene N. Melnyk with a copy of the Subpoena Ad Testificandum and a copy of the Subpoena Duces Tecum as attached by leaving a copy of each with Mel Uzen at 2488 Dunwin Drive, Mississauga, Ontario.

2. Mel Uzen identified herself to me and stated to me that she was authorized to accept the said documents on behalf of Eugene N. Melnyk.

SWORN Before me at the city of)
Toronto, in the Province of Ontario)
This 23rd day of May 2000)



Frank Tempile



A Notary for and in
The Province of Ontario.

AFFIDAVIT OF SERVICE

BETWEEN:

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

-and-

BIOVAIL CORPORATION INTERNATIONAL

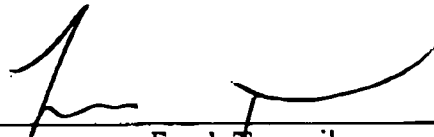
AFFIDAVIT OF SERVICE

I, Frank Temprile, Process Server, of the City of Toronto, in the Province of Ontario, **Make Oath and Say:**

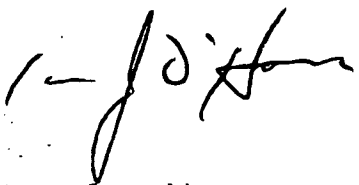
1. On 18 May 2000, at 3:38 p.m., I personally served Kenneth C. Cancellara with a copy of the Subpoena Ad Testificandum and a copy of the Subpoena Duces Tecum as attached by leaving a copy of each with Kenneth C. Cancellara at 2488 Dunwin Drive, Mississauga, Ontario.

2. Kenneth C. Cancellara identified himself to me.

SWORN Before me at the city of)
Toronto, in the Province of Ontario)
This 23th day of May 2000)



Frank Temprile



A Notary for and in
The Province of Ontario.

CERTIFICATE OF SERVICE

I, Sharon M. Sash, hereby certify that on June 19, 2000, I caused a copy of RESPONDENT ANDRX CORPORATION'S MEMORANDUM IN OPPOSITION TO BIOVAIL'S MOTION TO QUASH SUBPOENAS ISSUED BY ANDRX, OR IN THE ALTERNATIVE, IN SUPPORT OF ANDRX'S CROSS-MOTION TO PRECLUDE to be served upon the following persons by hand:

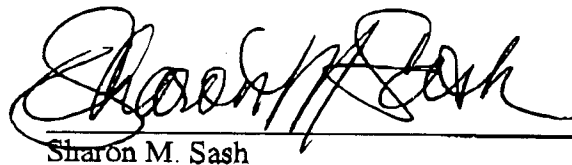
Hon. D. Michael Chappell
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Sharon M. Sash