

**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 THE MOTIONS TO QUASH THE SUBPOENAS  
DIRECTED AT BIOVAIL'S OUTSIDE COUNSEL**

Pursuant to § 3.22 of the Federal Trade Commission's Rules of Practice, Respondent Andrx Corporation ("Andrx") respectfully submits this memorandum in opposition to the motions submitted by Biovail International Corporation ("Biovail") and its outside counsel (the "Outside Counsel") to quash the subpoenas served upon them in this proceeding.<sup>1</sup>

**Preliminary Statement**

Throughout this proceeding, Complaint Counsel has stonewalled in providing discovery. That conduct has had the effect of encouraging third parties cooperating with the FTC staff, such as Biovail and the Outside Counsel here, to do the same. Indeed, so closely are Complaint Counsel and Biovail aligned that they do each other's bidding; for example, Complaint Counsel was able to

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<sup>1</sup> Specifically, the Outside Counsel served with subpoenas are Cleary, Gottlieb, Steen & Hamilton; Keller and Heckman LLP, Verner, Liipfert, Bernhard, McPherson and Hand, Chartered; George S. Cary (of Cleary, Gottlieb); and Steven J. Kaiser (of Cleary, Gottlieb).

procure a declaration from Biovail's counsel suggesting, contrary to the facts, that Biovail has expressed an interest in providing discovery -- yet, Biovail has resisted discovery at every turn and brought motions to quash, no discovery whatsoever has been provided by Biovail (now months into this proceeding), and in all its submissions Biovail has never made any commitment to provide any discovery.

Andrx has served subpoenas seeking discrete categories of non-privileged documents from Biovail's Outside Counsel, consisting of certain law firms and attorneys who have had a direct role in the events at issue in this case. These lawyers acted not simply in the role of legal advisors for Biovail, an alleged competitor of Andrx, but were direct actors in a scheme by which they improperly collaborated with, influenced and tainted the FTC staff in its investigation of Andrx. Thus, these attorneys themselves are critical fact witnesses in the events leading up to the FTC's commencement of this proceeding -- including participation in improper communications with FTC staff in violation of various conflict of interest statutes. See 18 U.S.C. §207; 16 C.F.R. § 4.1. Beyond that, Biovail -- three of whose senior executives appear on Complaint Counsel's witness list -- has refused to provide any discovery to Andrx because of jurisdictional gamesmanship based on it being a Canadian corporation. Andrx therefore has had no choice but to seek documents from Biovail's attorneys (who are indisputably within the subpoena power of this tribunal).

As further discussed below, the subpoenas issued by Andrx are entirely proper. Contrary to Biovail's contentions, the subpoenas do not seek

broad categories of privileged documents. Moreover, there is no prohibition against serving subpoenas on an entity's attorneys -- indeed, Complaint Counsel has identified attorneys on its own witness list (including Biovail's in-house General Counsel) -- and Biovail itself served Andrx's outside counsel in order to obtain discovery in a lawsuit against HMR when it could not readily obtain the documents from Andrx itself. See Biovail Corporation International v. Hoechst Aktiengesellschaft, et al., Civ. No. 98-1434 (D.N.J.) (FSH) (the "Biovail/HMR Action"). Given its own conduct, Biovail certainly cannot be heard to complain about Andrx's attempt to obtain from Outside Counsel documents critical to the defense of this action.

Lest there be any misunderstanding, Andrx is not seeking to create make-work and certainly does not wish to receive the same documents twice -- from Biovail and Outside Counsel. However, given Biovail's jurisdictional gamesmanship, Andrx is forced to seek documents from Outside Counsel and, in any event, certain of the requested discovery necessarily must be obtained from the Outside Counsel given the role they themselves played -- including deposition testimony of at least certain of the attorneys (i.e., Messrs. Cary and Kaiser).

Here, the time for completing discovery is extremely short. The discovery being sought is directly relevant and critical to Andrx's defense of this matter. Non-parties such as Biovail and its Outside Counsel should not be allowed to impede discovery based on relevance objections where, as here, the short discovery schedule means respondents will be seriously prejudiced if

important discovery is deferred in order to address questions of relevance --  
Complaint Counsel essentially already has the discovery it needs and therefore  
benefits by delaying respondents' discovery. It is therefore critical given the time  
pressures to allow respondents to develop a full evidentiary record without delay.

### **BACKGROUND**

#### **A. Despite the Central Role of Biovail and the Fact Top Biovail Executives Have Been Identified by Complaint Counsel As Witnesses In This Proceeding, Biovail Has Resisted Discovery By Andrx**

Issues relating to Biovail are highly relevant to key aspects of  
Complaint Counsel's case, including the absence of any competitive harm or  
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. In addition, Biovail is critical to certain of Andrx's affirmative  
defenses, including the defenses relating to the improprieties in the FTC  
investigation process occasioned by Biovail and its Outside Counsel's  
impermissible dealings with the FTC staff.

Recognizing the critical role of Biovail, Complaint Counsel has  
identified Messrs. Eugene Melnyk, Bruce Brydon, and Kenneth Cancellara,  
Biovail's Chairman of the Board, President and CEO, and General Counsel,  
respectively, as witnesses whom the FTC intends to call at trial. The centrality of  
Biovail to this case is further confirmed by, among other things, Complaint  
Counsel's repeated reference to Biovail in the Complaint (See Complaint ¶¶ 16,  
20 and 21) and in their responses to Andrx's Interrogatories (See Interrogatory

Responses Nos. 3, 15 and 16). Complaint Counsel also received voluminous documents from Biovail during the pre-complaint investigation and has identified no less than eight Biovail representatives with whom it communicated as part of the investigation. (See Letter, dated June 12, 2000, from Bradley Albert to Hal Shaftel and Peter Bernstein).

Given Biovail's obvious significance, Andrx served Biovail with subpoenas in this proceeding, but Biovail has hidden behind procedural technicalities to avoid providing Andrx with any discovery. On May 18, 2000, Andrx's Canadian counsel, Ogilvy Renault, directed a Canadian process server to personally serve subpoenas *duces tecum* and *ad testificandum* upon Biovail and Messrs. Cancellara and Melnyk. Mr. Cancellara, who was served personally at Biovail's corporate headquarters in Mississauga, Ontario, accepted service on his own behalf as well as 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 Respondent Andrx Corporation's Memorandum in Opposition to Biovail's Motion to Quash dated June 19, 2000 at p. 3. Despite these attempts at service, and despite the fact that Biovail has and continues to make itself available to Complaint Counsel, Biovail filled a motion to quash Andrx's subpoenas, claiming improper service.

At the time of finalizing this brief, Andrx just received Complaint Counsel's unauthorized Opposition to Andrx's Motion to Deny Biovail's Motion to Quash and the accompanying Declaration of Francis D. Landrey (executed June 29, 2000). Mr. Landrey is Biovail's counsel, and his collaboration with Complaint

Counsel in making a submission demonstrates their alliance. The self-serving assertions that Biovail is amenable to providing discovery are grossly misleading; indeed, they are belied by the record and Biovail's motions to quash Andrx's subpoenas. In fact, Biovail has never agreed to provide important items of discovery and has imposed outrageous conditions on the extremely limited discovery it informally has discussed -- albeit never committed to -- possibly providing to Andrx.

**B. The Direct Role of Biovail's Attorneys in the Events at Issue in this Proceeding**

As the record evidences, Biovail, along with its Outside Counsel, implemented a Machiavellian strategy to attack Andrx. The strategy pursued by Biovail and its Outside Counsel included improper contacts and collaboration with the FTC staff, together with vexatious litigation and a self-serving public relations campaign.

Reflecting the central role of the Outside Counsel, Complaint Counsel identified two in particular -- Messrs. Cary and Kaiser of the Cleary, Gottlieb firm -- as individuals with whom the FTC staff had dealings during the course of the investigation. To influence the FTC staff, Biovail hired the former Senior Deputy Director of the Bureau of Competition, George Cary of the Cleary, Gottlieb firm, as its outside counsel at a time when he was prohibited from dealing with the FTC on this matter. Nonetheless, Mr. Cary (assisted by his colleague, Mr. Kaiser) communicated with the FTC staff in violation of these

conflict of interest restrictions.<sup>2</sup> In particular, David Balto, Assistant Director of the Bureau of Competition, engaged in secret exchanges with Mr. Cary about the non-public investigation and provided confidential information to Mr. Cary. In turn, Mr. Cary used the information gained from Mr. Balto and other FTC officials in preparing, on Biovail's behalf, submissions to the FTC criticizing the Stipulation. In this way, government officials secretly collaborated with Biovail, a private party, in developing the very arguments then relied upon by the government officials to claim unlawful conduct on the part of respondents.

## ARGUMENT

### I.

#### **THERE IS NOTHING INAPPROPRIATE ABOUT ANDRX'S SERVICE OF SUBPOENA'S ON BIOVAIL'S OUTSIDE COUNSEL**

The motion to quash submitted by Biovail's Outside Counsel devotes nearly half of its pages to arguing that Andrx's subpoenas "are likely to chill communications between attorneys and clients." (Law Firm Mem. at 7). As a threshold matter, Outside Counsel has not pointed to a single authority that prohibits the service of subpoenas on a party's law firm. To the contrary, movants concede that no such authority exists. See Law Firm Mem. at 6 ("[N]either the Federal Rules of Civil Procedure nor the Federal Rules of Evidence prohibit deposing attorneys"). For the following reasons, Andrx's

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<sup>2</sup> Such conduct on the part of Mr. Cary was in clear violation of 18 U.S.C. § 207, and 16 C.F.R. 4.1. Mr. Cary worked at the FTC until March 1998; however, he was actively involved on Biovail's behalf by January 1999.

subpoenas on Biovail's Outside Counsel are entirely appropriate and should be upheld as so by the Court.

**A. Andrx Has Been Unable To Obtain Discovery From Biovail Itself and Therefore Has a Substantial Need for Discovery from Outside Counsel**

Notwithstanding its extensive involvement in many details of this case (including the FTC's decision to commence this action in the first place), Biovail has assiduously resisted discovery from Andrx at every turn while simultaneously making itself and its representatives available to Complaint Counsel upon request. Indeed, Biovail has challenged Andrx's subpoenas in this proceeding not because the company failed to receive adequate notice concerning the nature and scope of the discovery sought, but because of purportedly improper service. See Motion of Biovail Corporation Eugene N. Melnyk and Kenneth C. Cancellara to Quash Subpoenas dated June 7, 2000 at p. 1. Surely if Biovail were genuine in contending, as it does in the submission it made on this motion, that Andrx can obtain information "in this proceeding from Biovail," as opposed to Outside Counsel, the company would not have raised procedural hurdles such as defective service when actual and fair notice indisputably was provided.<sup>3</sup>

None of the authorities cited by Outside Counsel condemns as improper the service of document subpoenas on a party's attorney, particularly where, as here, the party has itself refused to provide discovery. See e.g.,

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<sup>3</sup> Thus, it turns the world on its head for movants to argue that the information responsive to the subpoenas can be obtained from "other sources" (Law Firm Mem. at 8) and the procedures to obtain foreign discovery are "relatively simple" (Biovail Mem. at 4.)



Shelton v. American Motors Corp., 805 F.2d 1323, 1328 (8<sup>th</sup> Cir. 1986)("This case does not involve AMC's refusal to produce the documents inquired about by plaintiff's counsel"); Sporck v. Peil, 759 F.2d 312, 313 (3d Cir. 1985)("There is no allegation in this case that defendants have improperly concealed or refused to produce requested documents").

Absent the discovery from Outside Counsel, respondents are at risk of not obtaining crucial discovery relating to Biovail because Biovail is claiming it is outside this tribunal's jurisdiction. At the very least, Biovail (while fully cooperating with Complaint Counsel) will require respondents to comply with tedious international mechanisms for discovery which, despite respondents' diligence, at best may not be completed within the short time frame allotted for discovery in this proceeding.

**C. Biovail Itself Served Subpoenas on Andrx's Outside Counsel in Related Litigation**

Ignoring Biovail's very own conduct in a related proceeding, movants have the audacity to argue that, "to the extent the subpoenas call for business documents of Biovail, Andrx can obtain them from Biovail itself". (Law Firm Mem. at 8). Apart from the fact that Biovail has refused to provide such discovery to Andrx, Biovail itself has sought discovery of Andrx's business records from Andrx's outside counsel in the Biovail/HMR Action pending in federal court in New Jersey. Biovail therefore has no legitimate basis to object to Andrx seeking discovery from its outside counsel. Indeed, it is hypocritical for Biovail to do so. After serving a subpoena directly on Andrx in the Biovail/HMR

Action, Biovail then served a subpoena on Andrx's outside attorneys, the Solomon, Zauderer firm, seeking essentially the same business records. The reason Biovail did so was it did not want the federal court in Florida with jurisdiction over Andrx to address the subpoena before a different court with jurisdiction over Solomon, Zauderer did so.

Here, Andrx has as much stronger basis for seeking documents from outside attorneys than Biovail did. Unlike Biovail, it is not seeking to "forum shop." Rather, Andrx requires discovery from Outside Counsel because Biovail itself is resisting any discovery -- Andrx, in contrast, was concededly available for Biovail to serve with discovery.

**C. Biovail's Outside Counsel Are Direct Participants In Events Relating to Andrx's Affirmative Defenses**

Outside Counsel argue that depositions of a party's attorney should be "disfavored" (Law Firm Mem. at 6). However, none of the cases cited by movants preclude a party from deposing an attorney where that attorney has knowledge of material facts in the case. To the contrary, the cases have expressly authorized such depositions. See American Cas., 160 F.R.D. at 584 (deposition of opposing counsel permissible given attorneys peculiar knowledge of relevant facts); N.F.A., 117 F.R.D. at 85-86 n. 2 &4("Examples where deposition of an attorney is both necessary and appropriate are [when t]he attorney may be a fact witness, such as an actor or a viewer"; Court approved of agreement between parties to permit deposition of patent counsel on advice given to plaintiff as plaintiff placed advice of counsel at issue).

Indeed, Outside Counsel concede (Law Firm Mem. at 7fn.5) that their cases all arise in the inapposite context of parties seeking to depose their adversary's counsel of-record and are, therefore, irrelevant here. See Shelton, 805 F.2d at 1325 (attempt to depose in-house counsel supervising the litigation); American Cas. Co. of Reading, PA . v. Krieger, 160 F.R.D. 582, 584 (S.D.Cal. 1995)(attempt to depose defendant's counsel of record); Harrison v. Chicago Tribune Co., 134 F.R.D. 232, 233 (N.D. Ill. 1990)(attempt to depose defendant's counsel of record); West Peninsular Title Co. v. Palm Beach County, 132 F.R.D. 301 (S.D.Fla 1990)(attempt to depose defendant's counsel of record); Advance Sys., Inc. of Green Bay v. APV Baker PMC, 124 F.R.D. 200, 200 ( E.D. Wis. 1989)(attempt to depose defendant's trial counsel); N.F.A. Corp. v Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 84 (M.D.N.C. 1987)( attempt to depose plaintiff's patent attorney, who was of-record in the litigation).

Here, the particular Biovail's attorneys whom Andrx seeks to depose -- in particular, Messrs. Cary and Kaiser -- are critical fact witnesses and, moreover, are not of-record to any of the parties to this proceeding. There is no risk of "duplicative depositions" (Biovail Mem. at 4) here, since only the deposition of attorneys having specific personal involvement in the events will be pursued. The factual significance of George Carey's testimony is illustrative. Specifically, and as noted above, Carey was an integral part (if not the architect) of Biovail's all-out effort to destroy Andrx by fomenting excessive negative publicity about the Stipulation and inappropriately using his influence as a former top-ranking FTC official to encourage FTC action. Andrx intends to prove that

the public tumult caused by Carey's efforts forced the FTC's hand and compelled the Commission to institute these proceedings. Carey's testimony is therefore directly relevant to Andrx's affirmative defense that the commencement of this proceeding was not brought in the "interest of the public," as required by statute, but instead was commenced in response to the excess publicity generated by Carey on behalf of Biovail.

## II.

### **ANDRX'S SUBPOENAS SEEK NON-PRIVILEGED INFORMATION RELEVANT TO BOTH COMPLAINT COUNSEL'S CASE-IN-CHIEF AND ANDRX'S AFFIRMATIVE DEFENSES**

At page 3 of their brief, Outside Counsel complains that the Andrx subpoenas seek "virtually all of their files" and constitute "unwarranted intrusion into the attorney-client relationship." (Law Firm Mem. at 3). Quite simply, that is a gross misstatement for the following reasons:

#### **A. The Subpoenas Do Not Seek Privileged Information**

First and foremost, nothing in Andrx's subpoenas purports to seek information protected by the attorney-client privilege. Indeed, the subpoenas themselves expressly contemplate Outside Counsel's invocation of privilege and their concomitant preparation of a privilege log. See e.g. Subpoena Duces Tecum issued to George Cary, dated May 12, 2000, Definition and Instruction No. 20. Thus, it is a complete red-herring for movants to argue that the subpoenas seek "Biovail's legal strategies and theories" (Biovail mem. at 4) -- as movants know, the subpoenas have nothing to do with that (and Biovail can assert any appropriate objections on privilege grounds in any event).

**B. The Subpoenas Seek Information Directly Relevant To The Government's Case**

Complaint Counsel's June 14 witness list makes abundantly clear that Complaint Counsel intends to rely heavily on Biovail in their case-in-chief because the descriptions of the testimony to be given by Biovail witnesses is extremely broad. Take, for example, the proposed testimony of Bruce Brydon:

We expect Mr. Brydon to testify generally about the pricing of generic pharmaceutical products, and in particular, generic Cardizem CD. We also expect Mr. Brydon to testify generally about Biovail's efforts to develop once-a-day diltiazem products. In addition, we expect Mr. Brydon to testify about his participation in a series of meetings which took place between Hoechst Marion Roussel and Biovail Corporation in or around August 1997. See Complaint Counsel's Preliminary Witness List at 2.

And the proposed testimony of Messrs. Cancellara and Melnyk is at least as broad. (Id.)

It is disingenuous for movants to characterize the subpoenas as "go[ing] straight to the challenged affirmative defenses" (Biovail Mem. at 3 n.3) -- in fact, they directly relate to Complaint Counsel's affirmative case as well. Particularly given Biovail's anticipated role at the hearing in connection with Complaint Counsel's case, Andrx needs access to certain Biovail documents, and Andrx's requests calls for information germane to Biovail's proposed testimony, market issues, industry practices and the absence of any anticompetitive effects from the Stipulation. For example, and tracking the proposed testimony of Mr. Brydon, Andrx seeks documents relating to "the pricing and marketing of generic pharmaceuticals, and in particular, generic Cardizem CD" (Requests 3, 4, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24);

"Biovail's efforts to develop once-a-day diltiazem products" (Request 2); and Biovail's "participation in a series of meetings which took place between Hoechst Marion Roussel and Biovail Corporation in or around August 1997" (Request 8).

**C. Discovery Related to Andrx's Affirmative Defense Is Not Stayed**

At page 4 of their brief, Outside Counsel argue (erroneously) that those of Andrx's requests seeking information "to substantiate its contention that the FTC's staff investigation was somehow improper" should be quashed because Andrx's affirmative defense on this score is "invalid as a matter of law." (Law Firm Mem. at 4). Particularly a non-party, if acting in good faith, ought not to have any basis to object because of a pending motion to strike. In any event, the FTC's Rules of Practice do not grant a stay of discovery pending the resolution of Complaint Counsel's motion to strike. Andrx believes that this proceeding was not commenced "in the interest of the public" and was, therefore, brought in violation of statute. Andrx has interposed an affirmative defense premised upon this statutory deficiency, and that defense remains viable until such time as this Court strikes it from Andrx's answer -- a course of action that Andrx believes to be inappropriate based upon the controlling case law. See Memorandum in Opposition to Complaint Counsel's Motion to Strike Andrx's Affirmative Defenses, at 26-31.

**III.**

**Outside Counsel Makes No Demonstration of Undue Burden**

Nowhere does nor can Outside Counsel establish that the discovery being sought is in any way unduly burdensome. The discovery

requests are directed at discrete categories of information and the movants wholly fail to make any showing that it would be an onerous task to provide it. Moreover, Andrx seeks only one complete set of relevant documents and does not seek duplicative discovery if Biovail, rather than Outside Counsel, provides the information. There is simply no support provided for the assertion that the subpoenas somehow place "an extreme burden" (Biovail Mem.) on movants.

#### IV.

#### **There Is Nothing Abusive About the Subpoenas At Issue**

At page 2 of their brief, Outside Counsel disingenuously criticizes Andrx's subpoenas because "Biovail is adverse to Andrx in other litigation." (Law Firm Mem. at 2). The obvious suggestion here is that Andrx is using the FTC proceeding to obtain discovery from Biovail for use against the company in another litigation. That suggestion surely rings hollow given that Biovail's only direct claims against Andrx have been dismissed. Specifically, Biovail commenced a lawsuit of its own against Andrx, attacking the Stipulation at issue in this proceeding. Andrx Pharmaceuticals, Inc. v. Friedman, C.A. No. 98-0099 (JGP)(D.D.C). However, the United States District Court for the District of Columbia dismissed the lawsuit as being without merit. See Andrx v. Friedman, 83 F.Supp.2d 179 (D.D.C. 2000).

In addition, the discovery being sought will not result in any claimed "chilling effect" (Law Firm Mem. at 5) on communications between outsiders and the FTC staff. Even if such a claim had any legal basis in certain circumstances

(and it does not and should not trump a party's due process rights to develop its defenses), it clearly is not applicable here, where Biovail, far from being a secret source of information, has commenced multiple litigations and otherwise waged a highly publicized campaign challenging the Stipulation at issue in this proceeding.

### CONCLUSION

For the foregoing reasons, Andrx respectfully requests that the motions to quash the subpoenas directed at Biovail's Outside Counsel should be denied in all respects.

Dated: New York, New York  
June 30, 2000

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, Peter M. Todaro, hereby certify that on June 30, 2000, I caused to be served upon the following persons, by overnight mail, next business day delivery, the following document: Respondent Andrx Corporation's Memorandum In Opposition To The Motions To Quash The Subpoenas Directed At Biovail's Outside Counsel (dated June 30, 2000):

Hon. D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
Room 104  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

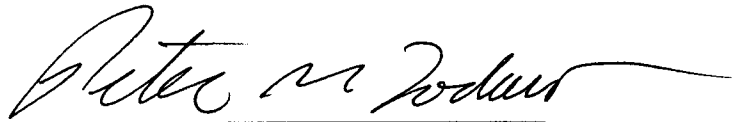
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