



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

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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 ON MOTIONS TO QUASH SUBPOENAS SERVED  
BY ANDRX ON OUTSIDE COUNSEL FOR BIOVAIL**

**I.**

Andrx Corporation ("Andrx") served subpoenas on outside counsel who have represented non-party Biovail Corporation International ("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"). On June 20, 2000, the Biovail Law Firms moved to quash the subpoenas served on them by Andrx. Also on June 20, 2000, Biovail filed a motion to quash the subpoenas served by Andrx on the Biovail Law Firms. Andrx filed its opposition to the two motions on June 30, 2000. Based on the Court's request, on September 26, 2000, both sides indicated that they had not resolved all disputed issues.

Although the subpoenas were originally broader, Andrx has represented in its September 26, 2000 status report that it now seeks only the following categories of discovery from the Biovail Law Firms:

- (1) Confirmation that, through document productions already made by others, Andrx has all the Biovail Law Firms' written communications to or from the FTC;
- (2) The Biovail Law Firms' written communications with Sitrick & Co., which was

Biovail's public relations firm, or any members of the press concerning the HMR/Andrx matter;

- (3) Non-privileged communications to/from Biovail or Biovail agents, regarding the Biovail Law Firms' communications with the FTC staff concerning the HMR/Andrx matter;
- (4) Time records or other diaries/memorializations (with related descriptions) of the Biovail Law Firms reflecting their communications with the FTC staff concerning the HMR/Andrx matter;
- (5) Retainer agreements and new matter memos reflecting the matters/projects in connection with which the Biovail Law Firms' communications with the FTC staff regarding the HMR/Andrx matter were conducted; and
- (6) The depositions of the three individual attorneys directly and substantially involved in the communications on Biovail's behalf with the FTC staff (i.e., Messrs. Carey, Kaiser and Dubeck).

For the reasons set forth below, the motions to quash are GRANTED in part and DENIED in part.

## II.

The subpoenas have been substantially narrowed to limit their burden and scope. Andrx asserts that it seeks only non-privileged information. A remaining question is whether the information Andrx seeks is "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." 16 C.F.R. § 3.31(c)(1).


Depositions of attorneys may be permissible where the attorneys are fact witnesses. *American Casualty Co. v. Krieger*, 160 F.R.D. 582, 586 (S.D. Cal. 1995). *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8<sup>th</sup> Cir. 1986) and its progeny hold that courts should order the taking of opposing counsel's deposition only "where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." Unlike *Shelton* and the other cases relied upon by the Biovail Law Firms, the attorneys here are not opposing counsel. Since Carey, Kaiser and Dubeck are not counsel to a party in this proceeding, the dispositive inquiry is not whether other means exist and whether the information is crucial, but whether their depositions are reasonably expected to yield relevant, non-privileged information.

The discovery sought in categories 3 and 6 listed above is reasonably expected to yield information relevant to the defense of Andrx. The motions to quash are DENIED only as to 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.

In all other respects, the motions to quash are GRANTED.

ORDERED:

  
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D. Michael Chappell  
Administrative Law Judge

Date: October 3, 2000