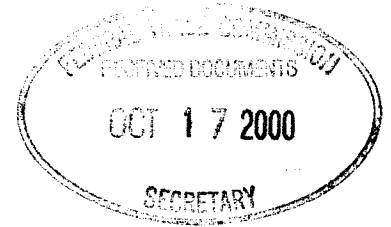


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



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

To: The Honorable D. Michael Chappell
Administrative Law Judge

**COMPLAINT COUNSEL'S MEMORANDUM
IN OPPOSITION TO ANDRX'S MOTION TO COMPEL
DEPOSITIONS OF JEX, INGELFIELD, AND BALTO**

Counsel for Andrx Corporation seek to compel the depositions of Federal Trade Commission attorneys Elizabeth Jex, David Inglefield, and David Balto.¹ Although styled as a motion seeking only "limited" deposition discovery relating to a number of different affirmative defenses, the motion seeks much more than is necessary or warranted in light of Your Honor's ruling on complaint counsel's motion to strike.² Accordingly, with respect to Andrx's affirmative defense number 17, we request that Your Honor permit only the deposition of either Elizabeth Jex or David Inglefield, with the choice left to Andrx's counsel. With respect to

¹ Respondent Andrx Corporation's Motion to Compel Complaint Counsel to Provide Limited Deposition Discovery Relating to Affirmative Defenses (October 10, 2000).

² Order on Complaint Counsel's Motion to Strike (September 14, 2000).

Andrx's affirmative defense numbers 7, 8, 18, and 19, since Andrx already is permitted to depose three other lawyers regarding the events giving rise to these defenses, we respectfully request that Your Honor deny Andrx's motion to compel the deposition of David Balto until such time that Andrx's counsel demonstrate that Mr. Balto's deposition really is necessary for Andrx to make its defenses.

1. The Jex and Inglefield Depositions

Andrx purports to need the depositions of Ms. Jex and Mr. Inglefield in order to support its affirmative defense number 17, which claims the equitable defenses of waiver, laches, and estoppel.³ The primary fact Andrx alleges in support of the purported need for the depositions of both Ms. Jex and Mr. Inglefield is that they were the "principal FTC staff members who first investigated the HMR/Andrx Stipulation in 1997."⁴

In its motion, Andrx does not even attempt to make a showing as to why the depositions of both Ms. Jex and Mr. Inglefield are necessary. This is not surprising: they worked on the investigation together and there essentially is nothing of significance that one knows about the investigation that the other does not. What Andrx requests is not limited; instead it is unnecessarily cumulative and duplicative. There is no reason that both Ms. Jex and Mr.

³ In light of this Court's determination that some limited discovery regarding affirmative defense number 17 may -- with a proper showing -- be permissible, we have offered Andrx rather detailed stipulations of fact concerning the FTC's prior investigation of Watson Pharmaceuticals, Inc. and The Rugby Group, which was conducted by Ms. Jex and Mr. Inglefield, in order to obviate any need for their depositions. Agreement, unfortunately, could not be reached on the language of the stipulations.

⁴ Respondent Andrx Corporation's Motion to Compel Complaint Counsel to Provide Limited Deposition Discovery Relating to Affirmative Defenses at p. 4 (October 10, 2000).

Inglefield should be made to appear for deposition. We therefore respectfully request that this Court limit Andrx to the deposition of either Ms. Jex or Mr. Inglefield – Andrx’s choice.

2. The Balto Deposition

Andrx’s request to depose FTC attorney David Balto concerns Andrx’s affirmative defenses numbers 7, 8, 18, and 19, and arises from a much different set of facts and circumstances than those giving rise to the request to depose Ms. Jex and Mr. Inglefield. With respect to Mr. Balto, Andrx alleges improper communications between Mr. Balto and three attorneys working on behalf of third-party Biovail Corporation (hereinafter the “Biovail attorneys”), which took place during the non-public investigation of the matter that gave rise to the present case.

Here, Your Honor has denied the Biovail attorneys’ motion to quash a subpoena from Andrx, and they will be required to appear for deposition to testify about the facts and circumstances allegedly giving rise to Andrx’s affirmative defenses number 7, 8, 18, and 19.⁵ Since this ruling, the Biovail attorneys have filed a motion for interlocutory appeal to the Commission seeking to overturn Your Honor’s decision requiring them to appear for deposition.⁶

In light of the motion for interlocutory appeal, we request that any decision on whether Mr. Balto be made to appear for deposition be deferred until after Your Honor decides on the Biovail attorneys’ motion. Further, should Your Honor deny the Biovail attorneys’ motion for interlocutory appeal, we request that Your Honor defer ruling on Andrx’s request to depose Mr.

⁵ Order on Motions to Quash Subpoenas Served by Andrx on Outside Counsel for Biovail (October 3, 2000).

⁶ Joint Motion for Interlocutory Appeal (October 11, 2000).

Balto until such time as the three Biovail attorneys have been deposed. After they have been deposed, it should become apparent whether Mr. Balto's deposition really is necessary.

We make this request because Mr. Balto is a supervisory attorney who worked directly and substantially on the FTC investigation of the matter giving rise to this lawsuit. Requiring an FTC attorney to be deposed under such circumstances would be extraordinary. In fact, research has failed to find -- and Andrx has failed to cite -- even one case in FTC administrative adjudication where an FTC attorney who worked on an investigation was ordered to appear for a deposition regarding the conduct of that investigation.

Although some concern could be raised that deferring a decision on Mr. Balto's deposition until after those of the three Biovail attorneys are completed may cause undue delay, we would note, as Your Honor has in ruling on complaint counsel's motion to strike, that Andrx's defenses are not properly before this tribunal and are only appropriate for consideration on appeal to a court of appeal.⁷ Accordingly, there is no urgency in ruling on Andrx's motion to compel with respect to Mr. Balto, and Andrx will have ample opportunity to make its record at a later time, should the evidence show that such a deposition is necessary.

* * * * *

For all these reasons, Andrx's October 10 motion to compel complaint counsel to provide limited deposition discovery relating to affirmative defenses should be denied except as set forth above. Permitting only the deposition of Ms. Jex or Mr. Inglefield and deferring a decision on the deposition of Mr. Balto until after those of three other attorneys allegedly involved in the same improper communications would appear to be more consistent with the limited discovery

⁷ Order on Complaint Counsel's Motion to Strike at pp. 4 & 5.

contemplated by Your Honor's ruling on complaint counsel's motion to strike than the unnecessarily broad discovery being requested by Andrx's counsel.

Respectfully Submitted,



Markus H. Meier

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: October 17, 2000

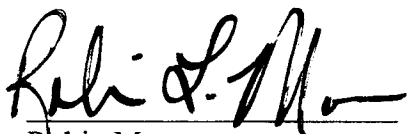
CERTIFICATE OF SERVICE

I, Robin Moore, hereby certify that on October 17, 2000, I caused a copy of the Complaint Counsel's Memorandum in Opposition to Andrx's Motion to Compel Depositions of Jex, Inglefield, and Balto to be served upon the following persons via overnight delivery.

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