

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

2000

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 ANDRX'S MOTION TO COMPEL
COMPLAINT COUNSEL TO PROVIDE LIMITED DEPOSITION
DISCOVERY RELATING TO AFFIRMATIVE DEFENSES**

I.

On October 11, 2000, Respondent Andrx Corp. ("Andrx") filed a Motion to Compel Complaint Counsel to Provide Limited Deposition Discovery Relating to Affirmative Defenses ("Motion to Compel"). On October 17, 2000, Complaint Counsel filed an Opposition to the Motion to Compel. Andrx seeks to compel the depositions of Federal Trade Commission attorneys Elizabeth Jex, David Ingelfield and David Balto. As set forth herein, Andrx's Motion to Compel is GRANTED in part and DENIED in part.

II.

Andrx asserts that it needs to depose Jex and Ingelfield, who were the principal FTC staff members involved in reviewing, in 1997, the Stipulation and Agreement that is at issue in this case. Andrx maintains that, in order to develop the record surrounding the FTC's conduct in waiting to challenge the Stipulation and Agreement, it needs to examine Jex and Ingelfield regarding the scope and nature of their investigation and the relationship between their activities and this proceeding.

Complaint Counsel raises no objection other than to assert that depositions of both Jex and Ingelfield would be duplicative and unnecessary. Complaint Counsel requests that Andrx be permitted to depose either Jex or Ingelfield, but not both, with the choice left to Andrx's counsel.

Andrx is hereby allowed to take the deposition of either Jex or Ingelfield. Andrx may choose which witness to depose. With this limitation, Andrx's motion with respect to compelling deposition testimony on its equitable defenses is GRANTED in part and DENIED in part.

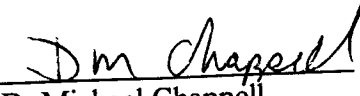
III.

Andrx also asserts that it needs to take the deposition of David Balto, Assistant Director of the Bureau of Competition, regarding Andrx's affirmative defenses concerning improprieties in the FTC's process, including the FTC staff's communications with Biovail and the leaking of confidential information during the non-public investigation. Andrx alleges that Balto improperly provided non-public information to a former Senior Deputy Director of the Bureau of Competition who, subsequent to his position at the FTC, became counsel for Biovail Corporation, at a time when the former employee was prohibited from dealing with the FTC on this matter.

Complaint Counsel requests that a ruling on Andrx's request to depose Balto be deferred until such time as the attorneys for Biovail have been deposed. *See* Order on Motions to Quash Subpoenas Served by Andrx on Outside Counsel for Biovail, Docket No. 9293, October 3, 2000. Complaint Counsel maintains that after these depositions it should become apparent whether Balto's deposition is necessary. Complaint Counsel further asserts that because Andrx's defenses are not properly before this tribunal and are only appropriate for consideration on appeal to a court of appeal, there is no urgency in ruling on Andrx's motion to compel with respect to 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.

Andrx's motion to compel the deposition of Balto is DENIED WITHOUT PREJUDICE. Any deposition of Balto is deferred until such time as the above referenced attorneys for Biovail have been deposed and, if required, may be scheduled outside the close of discovery.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: October 31, 2000