

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 OPPOSITION TO ANDRX'S  
MOTION TO DENY BIOVAIL'S MOTION TO QUASH**

We oppose Andrx's June 19<sup>th</sup> motion regarding Biovail's motion to quash Andrx's subpoenas because it presents this Court with a false choice between either denying Biovail's motion or precluding us from calling any Biovail witnesses at trial. There is a third option for resolving Andrx's concerns: require Andrx to work out a mutually convenient schedule with Biovail for the depositions of Biovail's employees. Nothing in Biovail's motion to quash suggests that it will not make its documents and employees available for deposition in this proceeding. More importantly, as set forth in the attached declaration of Biovail's attorney, Francis D. Landrey, Biovail is prepared to make its employees available for deposition on a voluntary basis provided that the parties reach agreement on a mutually convenient schedule and appropriate discovery.

In light of the declaration from Biovail's attorney, Andrx's request that this Court deny Biovail's motion to quash effectively is moot.<sup>1</sup> Additionally, Andrx's request that this Court preclude complaint counsel from calling any Biovail witnesses at trial is premature.

As demonstrated by the two cases Andrx cites in support of its motion, the sanction of precluding witnesses from testifying at trial is extreme and rare. For example, in *Magee v. Paul Revere Life Ins. Co.*, 178 F.R.D. 33 (E.D.N.Y. 1998), the district court upheld a magistrate judge's order invoking the sanction only after making the following findings of fact: (1) the witness in question was the plaintiff's designated expert (at 34); (2) the expert witness had been lawfully subpoenaed on three separate occasions over the course of several months (at 38); (3) the magistrate judge had issued an order to compel the expert witness to testify at deposition (*id.*); (4) defense counsel had made reasonable accommodations to meet the expert witness's schedule (*id.*); and (5) the magistrate judge had repeatedly extended the discovery cutoff deadline to permit the deposition (*id.*). Similarly, in *Bradgate Associates, Inc. v. Fellows, Read & Associates, Inc.*, 1992 U.S. Dist. 4668 (D.N.J. 1992), the other case Andrx cites in support of its request for preclusion, the district court ordered that a witness be precluded from testifying at trial only after making findings that: (1) the magistrate judge had given the plaintiff notice that any witness not produced for deposition during the discovery period would be precluded from testifying at trial (at \*2); (2) the witness in question was a former employee of the plaintiff (at

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<sup>1</sup> Should this Court decide that Andrx's motion is not moot, and that a ruling on Biovail's motion to quash is necessary, we refer this Court to the decision in *Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487 (D.D.C. 1984), which held that the federal district court lacks the authority to enforce a subpoena issued by an administrative agency (whose statutory authority is similar to that of the FTC) directed to a foreign citizen in a foreign county.

\*4); (3) the magistrate judge had previously extended the time for discovery (at \*2); and (4) sufficient time had been given for discovery (*id.*).

In contrast to *Magee* and *Bradgate*, we are far from reaching the point where consideration of the sanction of precluding witnesses from testifying at trial should even be raised. Discovery in this case is not set to close until October 20, 2000. Additionally, Biovail has offered to cooperate with Andrx's request that its employees appear for depositions in this proceeding. Surely, before asking this Court to take the extreme measure of precluding complaint counsel from calling any Biovail witnesses at trial, Andrx should be required to work with Biovail -- in a reasonable and diligent manner -- toward resolving their discovery issues and developing an appropriate schedule for the voluntary depositions of Biovail's employees.

Accordingly, we respectfully request this Court to: (1) find Andrx's request to deny Biovail's motion to quash moot; (2) deny Andrx's request to preclude the Biovail employees from testifying at trial; and (3) order Andrx to work out a mutually convenient schedule with Biovail for voluntary compliance with its subpoenas.

Respectfully Submitted,



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Markus H. Meier

Counsel Supporting the Complaint

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

Dated: June 30, 2000

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

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In the matter of

HOECHST MARION ROUSSEL, INC.,  
a corporation,

Docket No. 9293

CARDERM CAPITAL L.P.,  
a limited partnership,

**DECLARATION OF  
FRANCIS D. LANDREY**

and

ANDRX CORPORATION,  
a corporation.

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FRANCIS D. LANDREY, under penalty of perjury, declares as follows:

1. I am Senior Counsel at Proskauer Rose LLP, counsel for Biovail Corporation ("Biovail") in an antitrust lawsuit pending in the United States District Court for the District of New Jersey entitled *Biovail Corporation v. Hoechst A.G., et al.*, Civil Action No. 98-1434 (FSH) (SRC) (the "New Jersey Action"). The Proskauer firm has also appeared, together with O'Melveny & Myers LLP, as counsel for non-party Biovail in the above-captioned proceeding (the "FTC Proceeding") in connection with the motion of Biovail and two of its officers to quash certain subpoenas served by Respondent Andrx Corporation. I make this declaration in connection with Andrx's cross-motion to preclude testimony from Biovail witnesses at trial in the FTC Proceeding (the "Cross-Motion").

2. Contrary to Andrx's position on the Cross-Motion, Andrx has not been prevented from obtaining appropriate discovery from Biovail. Andrx already has in its possession, and, subject to the resolution of Biovail's confidentiality concerns, will be able to use in the FTC Proceeding, the entirety of Biovail's over 320,000-page document production in the New Jersey Action. In the New Jersey Action, among other things, Biovail challenges the same anti-competitive activities of respondents at issue in the FTC Proceeding.

3. Moreover, as part of the proceedings in the FTC Proceeding, as a result of certain document requests made by the FTC to Hoechst, subject once again to resolution of Biovail's confidentiality concerns, Andrx will have access to the deposition testimony taken in the New Jersey Action of a number of Biovail witnesses, including Bruce Brydon (whose deposition has been concluded), Kenneth Cancellara (whose deposition has been taken for five days with another day yet to be scheduled) and Eugene Melnyk (whose deposition is scheduled to take place in the New Jersey Action later this summer). Counsel for Andrx's co-respondent, Hoechst Marion Roussel, Inc. ("HMR"), has taken, or will take, each of these depositions and certainly has covered, or will cover, among other subjects, matters of common interest to both Andrx and HMR in the FTC Proceeding.

4. Andrx is not a party to the New Jersey Action. To obtain the discovery Biovail requires from Andrx in the New Jersey Action, Biovail has served subpoenas on Andrx and two of its officers. In these subpoenas, Biovail seeks appropriate discovery in pursuit of its claims. Rather than comply with the subpoenas and provide the discovery to which Biovail believes it is entitled under the Federal Rules, Andrx filed objections. Andrx's objections have

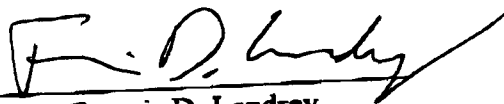
necessitated lengthy, and so far unsuccessful, negotiations concerning the timing and scope of the discovery to be provided by Andrx. To date, Biovail has received no discovery from Andrx.

5. Despite the extensive discovery to which Andrx already has access to assist it in defending the claims in the FTC Proceeding, Biovail has offered to cooperate with Andrx on its requests that Biovail witnesses voluntarily appear to have their depositions taken in the FTC Proceeding. On Biovail's behalf, I have engaged in extensive negotiations with counsel for Andrx in an effort to resolve our respective discovery issues arising out of Andrx's desire to obtain discovery from Biovail in the FTC Proceeding and the actions pending in the Multi-District Litigation in the Eastern District of Michigan and arising out of Biovail's desire to obtain discovery from Andrx in the New Jersey Action. During those discussions I have repeatedly made clear to Andrx that the Biovail witnesses they seek to depose will agree voluntarily to appear for their depositions in the FTC Proceeding *provided* the parties can reach agreement on an appropriate schedule for this discovery and a concomitant commitment from Andrx to produce its documents and make its witnesses available for depositions in the New Jersey Action.

6. Biovail, a Canadian Corporation, and the Biovail officers and directors Andrx seeks to depose, none of whom are citizens of the United States, seek only mutuality in discovery obligations if they are to voluntarily agree to come to the United States to provide discovery in the FTC Proceeding. Andrx can hardly claim, therefore, that it has been prevented from obtaining the depositions it seeks. Instead, it has so far been unwilling to provide equal

access to the Andrx witnesses and documents Biovail seeks as part of Biovail's necessary discovery to prepare for trial in the New Jersey Action.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 29, 2000.

  
Francis D. Landrey

## CERTIFICATE OF SERVICE

I, Robin Moore, hereby certify that on June 30, 2000, I caused a copy of the Complaint Counsel's Opposition to Andrx's Motion to Deny Biovail's Motion to Quash to be served upon the following persons via facsimile and overnight delivery.

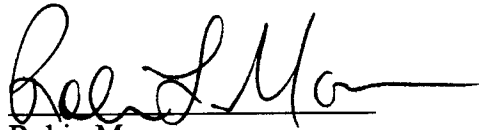
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