

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

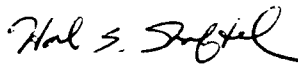
Pursuant to Section 3.38 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.38, respondent Andrx Corporation ("Andrx") hereby moves for an order compelling Complaint Counsel to provide limited discovery relating to Andrx's affirmative defenses, consisting of the depositions of Elizabeth Jex, David Ingelfield and David Balto.

The bases of this motion are set forth in the accompanying Memorandum in Support of Motion to Compel Complaint Counsel to Provide Limited Deposition Discovery Relating to Affirmative Defenses (dated October 10, 2000); and the accompanying Declaration of Hal S. Shaftel, executed on October 10, 2000.

Dated: New York, New York  
October 10, 2000

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,  
FRISCHER & SHARP

By: 

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Docket No. 9293

**RESPONDENT ANDRX CORPORATION'S MEMORANDUM  
IN SUPPORT OF MOTION TO COMPEL  
COMPLAINT COUNSEL TO PROVIDE LIMITED DEPOSITION  
DISCOVERY RELATING TO AFFIRMATIVE DEFENSES**

Respondent Andrx Corporation ("Andrx") submits this memorandum, pursuant to Section 3.38 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.38, in support of its motion for an order compelling Complaint Counsel to provide limited deposition discovery of three FTC staff members who alone have certain knowledge directly relevant to Andrx's affirmative defenses.<sup>1</sup>

**Preliminary Statement**

On April 28, 2000, Complaint Counsel filed its Motion to Strike Certain Affirmative Defenses Set Forth in Respondents' Answers. The Rules of Practice do not provide for an automatic stay of discovery relating to defenses subject to a pending motion to strike, nor did Complaint Counsel seek such a stay from this Court. Rather, Complaint Counsel simply

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<sup>1</sup> At the conference before the Court on October 5, 2000, Andrx raised the subject of this motion, consistent with its prior discussions with Complaint Counsel to do so, and Complaint Counsel agreed to expedite its response to the motion given the short time frame for discovery.

determined -- unilaterally -- that it would refuse to provide any discovery concerning the affirmative defenses.

By Order dated September 14, 2000 (the "September 14 Order"), this Court denied Complaint Counsel's motion in substantial part, sustained each of Andrx's affirmative defenses at issue, and permitted limited discovery. Promptly after the September 14 Order, Andrx attempted to narrow the discovery on these issues as much as possible -- just as it did with its discovery requests on Biovail's outside attorneys. Based on representations from Complaint Counsel, Andrx is not seeking from Complaint Counsel any further documents on these issues at this time. The discovery is limited to three depositions, which, assuming cooperation from Complaint Counsel and the witnesses, we believe can be completed in less than two days.

On the day following the September 14 Order, Andrx proposed that Complaint Counsel stipulate to facts relating to the affirmative defense of laches, waiver and estoppel (Aff. Def. No. 17), as a means to avoid the depositions of Elizabeth Jex and David Ingelfield. Andrx, despite its good faith efforts, was unsuccessful in obtaining agreement from Complaint Counsel on stipulated facts, therefore necessitating at least limited deposition discovery regarding laches, waiver and estoppel. The discussions concerning the proposed stipulation on facts was in the nature of settlement discussions (in an attempt to avoid depositions), and Andrx does not believe it is appropriate to disclose the details of the conversations. However, Andrx is not obliged to accept the self-serving characterization of facts that Complaint Counsel wanted to include in the proposed stipulation.<sup>2</sup> To develop the record surrounding the FTC's conduct in waiting to

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<sup>2</sup> The accompanying Declaration of Hal S. Shaftel, executed October 10, 2000, describes the general nature of the discussions with Complaint Counsel.

challenge the HMR/Andrx Stipulation, Andrx needs to depose Ms. Jex and Mr. Ingelfield, who were the principal FTC staff members involved in reviewing the Stipulation in 1997, and examine them regarding the scope and nature of their investigation and the relationship between their activities and this proceeding.

In addition, Andrx seeks limited discovery with respect to its affirmative defenses relating to improprieties in the FTC process and decision-making in this matter (Aff. Def. Nos. 7, 8, 18 and 19). To that end, Andrx seeks the deposition of David Balto, who, as Assistant Director of the Bureau of Investigation, had extensive communications outside the FTC concerning the non-public investigation. There can be no legitimate reason for objecting to the deposition of Mr. Balto, who, as documents previously provided to the Court demonstrate, was deeply involved in dealings outside the FTC in connection with this matter. The communications included impermissible dealings with George Cary, a former senior FTC staff person retained by Biovail Corporation, an alleged competitor of Andrx that, for many years, has been bent on harassing Andrx. Secretly, Mr. Balto assisted Biovail's attorneys in fashioning arguments that they then submitted to the FTC regarding the HMR/Andrx Stipulation and was the source, directly or indirectly, of leaks concerning the status of the non-public investigation.

The discovery being sought by Andrx could not be narrower. No additional documents have been requested. The depositions of Ms. Jex and Messrs. Ingelfield and Balto together should take less than two full days. Therefore, Complaint Counsel cannot legitimately claim that the depositions will be burdensome -- let alone unduly burdensome -- to either it or the individual deponents.

**THE LIMITED DEPOSITIONS BEING  
SOUGHT ARE PROPER UNDER THE RULES**

The Commission's Rule of Practice 3.31(c)(1) states:

Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent

Here, consistent with the Rules, the depositions being sought are clearly relevant to the defenses of the respondents and the proposed relief. The FTC is a party here, and no basis exists for it to avoid providing relevant discovery. There is nothing in the Rules prohibiting the depositions being sought, which will not be burdensome or oppressive in any way.

**A. The Depositions of Elizabeth Jex and David Ingelfield  
Are Relevant to the Affirmative Defense of Waiver,  
Laches and Estoppel (Aff. Def. No. 17)**

Immediately after the September 14 Order, Andrx sought to avoid any depositions relating to Affirmative Defense No. 17 by seeking Complaint Counsel's agreement to a stipulation on the facts pertaining to waiver, laches and estoppel. That effort was unsuccessful. It therefore is necessary to depose Elizabeth Jex and David Ingelfeld, the principal FTC staff members who first investigated the HMR/Andrx Stipulation in 1997.<sup>3</sup> The FTC resolution authorizing process specifically stated that the investigation, among other things, sought to "determine whether any stipulation or agreement between [HMR] and Andrx is in violation of §5." Thus, the claim now being made by Complaint Counsel that the initial investigation by Ms.

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<sup>3</sup> The investigation was conducted in connection with the FTC's review of a planned acquisition by one of Andrx's shareholders, Watson Pharmaceuticals, Inc., of The Rugby Group, Inc., File No. 981-0006.

Jex and Mr. Ingelfield involved merger and market issues unrelated to this proceeding is flatly inconsistent with the FTC resolution. In any event, Andrx is not required to merely accept Complaint Counsel's characterization of the investigation without at least limited discovery into the relevant facts. In the course of the investigation by Jex and Ingelfield, Andrx cooperated fully and provided all documents requested -- amounting to a tens of thousands of pages -- relating to the Patent Action and the Stipulation. Andrx fully explained the Stipulation, including voluntarily appearing for interviews. Having fully investigated the matter, the FTC in 1998 advised Andrx that the matter was closed. The FTC never raised any issue concerning the Stipulation, never advised Andrx that it believed that there was anything wrong with the Stipulation, and never suggested that Andrx should seek the court's approval or consideration of the Stipulation in the Patent Action.

The FTC staff thereafter waited approximately two years before it then resumed its investigation relating to the HMR/Andrx Stipulation. It did so at the behest of Biovail and its outside counsel, which impermissibly collaborated with the FTC staff. In reliance on the completion of the initial investigation, Andrx was prejudiced because it had proceeded to operate under the HMR/Andrx Stipulation. Andrx therefore takes the position that the FTC, having waited until after the Patent Action settled before challenging the Stipulation, should now be prohibited from arguing -- as it seeks to do -- that the Stipulation is not protected from antitrust scrutiny since the judge did not approve it.

On the issues of laches, waiver and estoppel, it is important for Andrx to examine Ms. Jex and Mr. Ingelfield to ascertain the scope and extent of their review of the HMR/Andrx Stipulation and the relationship between their work and this matter. The September 14 Order specifically contemplates discovery on these equitable defenses, albeit the Court stated that the

"[d]iscovery on this defense will be limited." September 14 Order at 7. Faithful to that instruction, the discovery being required is extremely limited, consisting only of two short depositions -- and no additional document production.

In addition to the equitable defenses, the depositions of Ms. Jex and Mr. Ingelfield are also directly relevant to the issue of remedy. The facts surrounding the initial review of the HMR/Andrx Stipulation relate directly to the type of relief that Complaint Counsel seeks, since the government essentially seeks pre-clearance of every settlement in which Andrx is a party.

**B. The Deposition of David Balto Is Relevant to the Affirmative Defenses Pertaining to the Improprieties in the FTC Process (Aff. Def Nos. 7, 8, 18 and 19)**

The deposition of David Balto, Assistant Director of the Bureau of Competition, is appropriate with respect to the various affirmative defenses concerning improprieties in the FTC's process, including, among other things, the FTC staff's improper communications with Biovail and the leaking of confidential information during the non-public investigation. As the Court recognized in the September 14 Order, these defenses involve allegations that this proceeding "arose from an improper and illegal publicity campaign" and "improper disclosures" made or facilitated by the FTC staff. September 14 Order at 3.

In particular, the record developed to date reveals that David Balto engaged in secret exchanges with Mr. Cary and other Biovail attorneys about the non-public investigation. He improperly provided information to Mr. Cary, the former Senior Deputy Director of the Bureau of Competition who Biovail hired to influence the FTC staff. Indeed, Biovail did so at a time when Mr. Cary was prohibited from dealing with the FTC on this matter. See 18 U.S.C. § 207, and 16 C.F.R. 4.1. Nonetheless, the FTC staff communicated with Mr. Cary in violation of these conflict of interest restrictions. Mr. Balto and other FTC officials then aided Mr. Cary in preparing, on Biovail's behalf, submissions to the FTC criticizing the HMR/Andrx Stipulation.

Neither Mr. Balto nor any other FTC staff person appears to have disclosed to the Commission that Mr. Balto reviewed and revised drafts of submissions made by Biovail to the Commission. In addition, Mr. Balto apparently was the source, directly, through Mr. Cary or otherwise, of leaks about the non-public investigation to the media.

In light of this record, it is pure "stonewalling" for Complaint Counsel to refuse to produce Mr. Balto for deposition.

The extent of communications between Mr. Balto and other FTC staff members, on the one hand, and Biovail's outside counsel and the media, on the other, should be explored. To do so, it is necessary to depose Mr. Balto about his activities and contacts with individuals outside the FTC. Over the objections of Biovail's outside counsel, Andrx was granted deposition and limited document discovery from them with respect to their communications with the FTC. See Order dated October 3, 2000. Nothing exempts Mr. Balto from providing the same type of discovery, and he therefore should be required to appear for deposition. Indeed, Mr. Balto's deposition is entirely consistent with the September 14 Order, which envisions "limited" discovery into this area as well. September 14 Order at 5. The single deposition fits the criteria of being limited -- as limited as can be, particularly since no additional documents are sought.

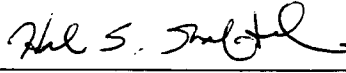


**Conclusion**

For the foregoing reasons, Andrx respectfully requests that this Court issue an order compelling Complaint Counsel to produce forthwith Elizabeth Jex, David Ingelfield and David Balto for depositions.

Dated: New York, New York  
October 10, 2000

SOLOMON, ZAUDERER, ELLENHORN,  
FRISCHER & SHARP

By: 

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Attorneys for Respondent Andrx Corporation

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**DECLARATION OF HAL S. SHAFTEL**

HAL S. SHAFTEL, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a member of Solomon, Zauderer, Ellenhorn, Frischer & Sharp, counsel for respondent Andrx Corporation ("Andrx"). I submit this declaration in support of Andrx Corporation's motion, pursuant to the FTC's Rule of Practice Section 3.38 C.F.R., to compel Complaint Counsel to provide limited deposition discovery relating to Andrx's affirmative defenses, consisting of the depositions of Elizabeth Jex, David Ingelfield and David Balto.

2. By its Order dated September 14, 2000, the Court sustained Andrx's affirmative defenses and permitted limited discovery concerning the issues pertinent to them. On the very next day, Andrx attempted to resolve any disputes over discovery relating to the affirmative defenses. To that end, we prepared a proposed stipulation on facts relating to the defense of laches, waiver and estoppel (and remedy as well), in an effort to avoid any deposition testimony regarding these issues from

Elizabeth Jex or David Ingelfield. Even though Complaint Counsel took the position, from the onset, that it would object to any deposition testimony, we nonetheless attempted in good faith to work out a stipulation on the facts regarding laches, waiver and estoppel. In doing so, we exchanged at least four drafts of a proposed stipulation. However, it is clear that the parties have reached an impasse and the discussions on the stipulation were taking more time than would the depositions.

3. Andrx also seeks to depose David Balto concerning the affirmative defenses involving alleged improprieties in the FTC process in this matter. In our discussions, Complaint Counsel refused to produce Mr. Balto for deposition.

4. Andrx and Complaint Counsel both agreed to raise these issues regarding depositions before the Court at the conference on October 5, 2000. At the conference, Andrx undertook to submit a motion to compel the requested depositions and Complaint Counsel agreed that it would submit an expedited response in light of the short time remaining for discovery.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in New York, New York, on October 10, 2000.



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HAL S. SHAFTEL

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**PROPOSED ORDER ON RESPONDENT ANDRX CORPORATION'S  
MOTION TO COMPEL COMPLAINT COUNSEL TO PROVIDE  
LIMITED DEPOSITION DISCOVERY RELATING TO AFFIRMATIVE DEFENSES**

On October 10, 2000, pursuant to Section 3.38 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.38, respondent Andrx Corporation ("Andrx") filed a motion for an order compelling Complaint Counsel to provide limited discovery relating to Andrx's affirmative defenses, consisting of the depositions of Elizabeth Jex, David Inglefield and David Balto.

Respondent Andrx's motion is hereby GRANTED.

ORDERED:

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D. Michael Chappell  
Administrative Law Judge

Dated: October 10, 2000

