UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
HOECHST MARION ROUSSEL, INC., a corporation,	)	
CARDERM CAPITAL L.P., a limited partnership,	)	Docket No. 9293
and	)	
ANDRX CORPORATION, a corporation.	)	

ORDER DENYING MOTION FOR INTERLOCUTORY APPEAL

I.

On October 3, 2000, an Order on Motions to Quash Subpoenas Served by Andrx on Outside Counsel for Biovail was issued. On October 13, 2000, a Joint Motion for Interlocutory Appeal was filed with the Office of the Secretary by Cleary, Gottlieb, Steen & Hamilton; Keller and Heckman LLP; Verner, Liipfert, Bernhard, McPherson and Hand, Chartered; George S. Cary; and Steven J. Kaiser (collectively, the "Biovail Law Firms"). Respondent Andrx Corporation ("Andrx") filed a Memorandum in Opposition to Joint Motion for Interlocutory Appeal on October 17, 2000.

For the reasons set forth below, the Motion for Interlocutory Appeal is DENIED.

II.

The order for which appeal is sought is a discovery ruling. The Commission "generally disfavor[s] interlocutory appeals, particularly those seeking Commission review of an ALJ's discovery rulings." *In re Gillette Co.*, 98 F.T.C. 875, 875, 1981 FTC LEXIS 2, *1 (Dec. 1, 1981). "Interlocutory appeals from discovery rulings merit a particularly skeptical reception, because [they are] particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay." *In re Bristol-Myers Co.*, 90 F.T.C. 273, 273, 1977 FTC LEXIS 83, *1 (Oct. 7, 1977). *Accord In re Gillette Co.*, 98 F.T.C. at 875 ("resolution of discovery issues, as a general matter, should be left to the discretion of the ALJ").

The Biovail Law Firms' request fails to meet the requirements of Commission Rule 3.23(b) for granting an interlocutory appeal. Applications for review of a ruling by the Administrative Law Judge may be made only if the applicant meets both prongs of a two part test. First, the ruling must involve "a controlling question of law or policy as to which there is substantial ground for difference of opinion." 16 C.F.R. § 3.23(b). Second, the Administrative Law Judge must determine "that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or [that] subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b).

The October 3, 2000 Order on Motions to Quash Subpoenas allowed narrowly limited discovery of non-privileged information relevant to Andrx's affirmative defenses. This discovery ruling does not involve a controlling question of law or policy, which has been defined as "not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478, *1 (Nov. 5, 1996). Accordingly, the first requirement of Rule 3.23(b) has not been met.

Because the first prong of the test has not been met, an inquiry into the second prong is not necessary and an analysis of whether subsequent review would be an inadequate remedy is not dispositive. A determination of whether an immediate appeal from the ruling would materially advance the ultimate termination of the litigation is also not necessary. If such a determination were made, it is clear that an appeal of the discovery ruling at issue would not materially advance the ultimate termination of the litigation. Such a construction would make every ruling in every case appealable as to the relevance and propriety of any areas of discovery allowed by an administrative law judge. "This would negate the general policy that rulings on discovery, absent an abuse of discretion, are not appealable to the Commission." *In re Exxon Corp.*, 1978 FTC LEXIS 89, *12 (Nov. 24, 1978).

Although the motion is denied on its merits on the substantive grounds set forth above, it would also be appropriate to deny the motion on procedural grounds. Applications for review may be filed within five days after notice of the Administrative Law Judge's determination. 16 C.F.R. § 3.23(b). Since a copy of the October 3, 2000 Order was delivered by fax to counsel of record for the Biovail Law Firms on October 3, 2000, the motion was apparently filed outside the five day timeframe.

The Motion for Interlocutory Appeal is DENIED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: October 25, 2000