

THE CENTER FOR THE
MORAL DEFENSE
OF CAPITALISM

June 28, 2002

Donald S. Clark, Esq.
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W., Room 159-H
Washington, D.C. 20580

Re: Comments of the Center for the Moral Defense of Capitalism to the proposed Consent Agreement and Order in *In Re Biovail Corp. and Elan Corp., plc*, File No. 011-0132

Dear Mr. Clark:

On June 27, 2002, the Federal Trade Commission (FTC) issued a proposed consent order (Order) in the matter of *In re Biovail Corp. and Elan Corp., plc*, File No. 011-0132. The Center for the Moral Defense of Capitalism (CMDC) files the following public comments in response to the terms of the proposed consent order.

CMDC is a District of Columbia non-profit corporation which seeks to promote the welfare of the nation by advocating a moral foundation for individualism and economic freedom. In pursuance of our goals, CMDC has consistently opposed the enforcement of U.S. antitrust laws, because we believe such laws are unconstitutional and violate the right of all individuals to engage in voluntary action free of government coercion.

The proposed consent order in this case is a violation of the fundamental rights of the respondent corporations, and for this reason alone we believe entry of proposed order is inconsistent with the public interest. According to the facts alleged by the FTC in its complaint against Biovail and Elan, the two companies entered into a voluntary agreement regarding their mutual distribution of the generic hypertension drug Adalat CC. The FTC states that the respondents are the only companies which have FDA approval to market certain generic Adalat products, and that "there is little prospect of new entry in the near

future, because no other companies have applied for FDA approval of a 30 mg or 60 mg generic Adalat product” (Competitive Impact Statement, p. 1).

In other words, there is a lack of competition in the generic Adalat market because no other company has *voluntarily* chosen to enter the market, not, as the FTC claims, because Biovail and Elan have “illegally created market power” (id.) through their bilateral agreements on the distribution of Adalat products. The FTC has presented no evidence that the Biovail-Elan agreement has created any barrier which would *forcibly* prevent the entry of new competitors into the marketplace. Instead, they have taken appropriate and ethical advantage of their decision to produce generic Adalat in a manner which they believe benefits their separate, individual economic interests.

For a monopoly to exist in a given marketplace, there must be legal barriers to entry which prevent the *possibility* of competition; the temporary *absence* of competition due to voluntarily choices made by producers does not make those firms which choose to produce a monopolistic actor. The FTC cannot punish one or more companies for producing a product simply because other firms have not chosen to compete. To do so violates the right of the producing firms to engage in voluntary economic activity, and to enjoy the profits of said activities. Biovail and Elan earned the right to distribute generic Adalat by agreeing to produce it in accordance with the law, and consequently, they must be afforded the protection to voluntarily sell and distribute their supply as they see fit. If the companies wish to jointly agree on how to best accomplish their goals, than the FTC has no authority or right to challenge their decision.

Hypertension is a serious medical condition, and CMDC understands the importance of Adalat to those who require treatment for hypertension. We believe that consumers of Adalat have an interest in a dynamic, thriving market for the drug, one that can respond to market demand and meet consumer needs. In order for these interests to be met, however, CMDC believes that the FTC must cease all efforts to try and dictate the outcome of the marketplace through regulatory intervention. The question before the Commission should not be whether Biovail and Elan should be permitted to make voluntary agreements regarding Adalat. The appropriate issue is whether the FTC has a legal right to *initiate* force against the companies in order to create the illusion of competition where the marketplace has found it unnecessary at

this point in time. We believe the Commission has no such right, and that the terms of the proposed consent order would not only serve to violate the rights of the respondent companies, but would also constitute a manifest injury to the people of the United States, by undermining their ability to access a voluntary marketplace for commercial pharmaceuticals.

For the foregoing reasons, CMDC opposes the proposed consent order in its entirety, and we would urge the FTC to withdraw the agreement, and dismiss the case against the respondents immediately.

Sincerely,

/s/

S.M. Oliva
Assoc. Policy Analyst
The Center for the Moral Defense of Capitalism