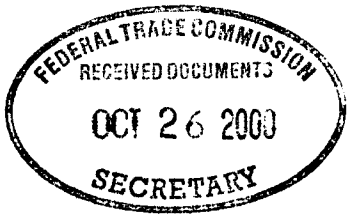
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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

MEMORANDUM IN OPPOSITION TO ANDRX CORPORATION'S MOTION TO COMPEL THE DEPOSITIONS OF NON-PARTIES EUGENE N. MELNYK AND BRUCE BRYDON AND THE PRODUCTION OF DOCUMENTS

PRELIMINARY STATEMENT

This is a strange and troubling motion by Andrx Corporation ("Andrx"), which is litigating discovery disputes that are entirely of its own making due to its failure unilaterally to participate in discovery that it sought.

Andrx served subpoenas for depositions on both the Chairman and the Chief Executive Officer of Biovail Corporation ("Biovail"). The Biovail executives appeared voluntarily for the depositions. Andrx failed to appear and take the depositions without good cause. Yet Andrx now seeks an order not only compelling the depositions but also precluding any evidence through these two executives. Andrx has this situation exactly backwards. If anyone should be penalized for Andrx's own foul-ups, it should be Andrx.

Andrx presents only the flimsiest of excuses for its failure to appear at and take the depositions. Biovail's Chairman, Eugene Melnyk, was produced for a deposition in this proceeding and related actions in Barbados, where he lives and works, on the day after the date for which Andrx had originally noticed the deposition. At least five attorneys from Andrx's law

firm have personally appeared in this matter, yet Andrx claimed to be unable to take Mr. Melnyk's deposition one day after the return date because of a previously scheduled commitment in London. Were all five of the attorneys committed to the London engagement and incapable of being freed to take the Melnyk deposition? Andrx offers no specifics to back its transparently thin excuse.

Andrx's counsel did appear at the deposition of Biovail's CEO Bruce Brydon in Washington, D.C. Although litigation practice requires that the party taking a deposition arrange for a court report (and there is certainly no obligation on a third party like Biovail to do so), counsel for Andrx neglected to take this simple and required step. As a result, Andrx did not proceed with the deposition, wasting Mr. Brydon's time and the time of Biovail counsel who traveled to Washington for nothing. In a spirit of cooperation, Biovail offered to produce Mr. Brydon on another date provided that Andrx would cover the costs and fees incurred with Andrx's plain error. Instead, Andrx brought this motion without even disclosing to the tribunal that Biovail had offered to produce Mr. Brydon again following Andrx's inept performance the first time around.

Nor has Andrx presented any sustainable basis for an order compelling Biovail to comply with a document subpoena delivered to Mr. Melnyk in the midst of a purely personal visit that he was making in New York State. Indeed, Administrative Law Judge D. Michael Chappell has already ruled that this method of seeking document disclosure from Biovail is improper and that a subpoena served in this manner cannot be enforced in this proceeding.

For these reasons, Andrx's motion should be denied.

POINT ONE

ANDRX HAS WAIVED ITS OPPORTUNITY TO DEPOSE BRUCE BRYDON AND SHOULD NOT BE PERMITTED TO DO SO NOW, ESPECIALLY WITHOUT BEARING THE COSTS

Bruce Brydon appeared for his deposition pursuant to Andrx's subpoena on September 28, 2000 in Washington D.C. Although counsel for Andrx appeared at the deposition, they were unprepared to take Mr. Brydon's deposition because they neglected to hire a court reporter. As a result of Andrx's ineptitude, Mr. Brydon and his counsel wasted an entire day and incurred substantial expenses.

Andrx misstates Biovail's position on the possibility of rescheduling Mr. Brydon's deposition. Counsel for Biovail informed Andrx that it would address Andrx's request that Mr. Brydon reappear provided that Andrx agree to the reasonable request that it reimburse Biovail for the expenses incurred in connection with Mr. Brydon's first appearance. (Exh. H to Shaftel Decl.) Andrx never responded to this proposal, but instead made this motion without disclosing in its motion papers that Mr. Brydon has offered to reappear provided that Andrx incur the costs.

By failing to take Mr. Brydon's deposition when he appeared at the noticed time and place, Andrx has waived the right to depose him. If the tribunal believes that is too harsh a result for Andrx's law office failure, however, then Andrx should be required to compensate Biovail for the lost time and expenses and the deposition should be held at a time and place designated by Mr. Brydon. These are the appropriate responses to Andrx's failure to attend to required details in connection with its subpoena. Thus, we respectfully request that the tribunal deny Andrx's motion or, in the alternative, order the Brydon deposition to proceed (i) at a time and place to be fixed by Mr. Brydon; and (ii) with Andrx bearing the costs incurred as a result of Mr. Brydon and counsel in appearing at the aborted first deposition session.

POINT TWO

ANDRX HAS ALSO WAIVED THE OPPORTUNITY TO DEPOSE MR. MELNYK

Biovail's Chairman, Eugene Melnyk appeared for deposition on September 19, the date after the date noticed by Andrx in its subpoena. Nevertheless, Andrx declined to participate in Mr. Melnyk's deposition.

Andrx's purported reasons for not participating in Mr. Melnyk's deposition are unfounded.

Mr. Melnyk's deposition had been long-scheduled in the New Jersey action between Hoechst and Biovail to commence on September 19th in Barbados. Hoechst is a co-respondent with Andrx in this action. Due to the substantial overlap in the issues presented in both proceedings, Biovail made Mr. Melnyk available in Barbados, the only place where he could lawfully be deposed, for a simultaneous deposition in both proceedings. This is the same procedure that the parties followed in connection with the depositions of Michael Sitrick, where counsel for Andrx appeared and raised no objections to the simultaneous deposition of Mr. Sitrick in connection with three actions, the FTC, the Michigan Multi-District Litigation and the New Jersey action, and the deposition of Thomas Nee of Forest Laboratories who was deposed simultaneously in the New Jersey Action and this proceeding. Andrx participated in both the Sitrick and Nee depositions without objection.

Andrx's assertion that New York would be an appropriate place to depose Mr. Melnyk is misplaced. Mr. Melnyk is legally entitled to be deposed only in Barbados. The Federal Rules of Civil Procedure apply to "proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States.... except as otherwise provided by statute." *See* FED. R. CIV. P. 81(a)(3). Thus, the Federal Rules of Civil Procedure are applicable in this action. Pursuant to Rule 45(3)(A)(ii), FED. R. CIV. P., a non-party cannot be deposed more than 100 miles "[f]rom the place where that person resides, is employed or regularly transacts business..." FED. R. CIV. P. 45(3)(A)(ii). Mr.

Melnyk, a non-party to this action, both resides and regularly transacts business for Biovail Corporation in Barbados and, is, accordingly entitled to be deposed in Barbados. Counsel for Biovail informed Andrx of Mr. Melnyk's legal entitlement to be deposed in Barbados by correspondence dated September 14, 2000 (Exh. F to Shaftel Decl.) and it is therefore puzzling that Andrx falsely claims that counsel for Biovail did not provide it which such authority.

Equally puzzling is Andrx's claim that its counsel were unavailable to attend Mr. Melnyk's deposition scheduled to commence merely one day after the date noticed by Andrx in its subpoena. There are at least five attorneys from the firm of Solomon, Zauderer, Ellenhorn, Frischer & Sharp who have appeared at different times on behalf of Andrx in this action as well as the New Jersey Action: Louis Solomon, Hal Shaftel, Colin Underwood, Michael Lazaroff and Jonathan Lupkin. Certainly, Andrx is not suggesting that all of its attorneys had a long-scheduled business trip to the United Kingdom on that date. Indeed, Andrx never states in its motion papers that none of its attorneys were available to attend the deposition.

Moreover, Andrx cannot support its unfounded assertion that Mr. Melnyk possesses any unique knowledge relevant in this action. Notably absent from Andrx's brief is any documentary evidence that would support this contention. Rather, Andrx simply relies on the illogical conclusion that Mr. Melnyk's testimony must be relevant because Complaint Counsel placed him on their original witness list. However, and as Andrx correctly notes, Mr. Melnyk no longer appears on Complaint Counsel's witness list. (Andrx Brief at 6.) Clearly, the fact that Mr. Melnyk was dropped from this list can indicate only that, upon further reflection, Complaint Counsel determined that Mr. Melnyk has no unique knowledge relevant to the resolution of this action.

Counsel for Hoechst, Andrx's co-respondent in this action, conducted a thorough and complete examination of Mr. Melnyk in Barbados in connection with the New Jersey and FTC actions. Accordingly, there is no prejudice to Andrx by virtue of its non-appearance at this deposition. If Andrx has not received a copy of the transcript either through this action or the Multi-District Litigation, Biovail is willing to provide such a copy to Andrx pursuant to the

Protective Order in this action. Before burdening and harassing Mr. Melnyk with questions that can only be duplicative of those propounded by Hoechst, Andrx should be required to specifically detail and support with relevant documentation, those areas in which it can demonstrate that Mr. Melnyk possesses unique knowledge and which have not been previously covered by Hoechst.

Mr. Melnyk fully complied with the deposition subpoena served on him by Andrx. However, should the commission order that his deposition proceed, the subject matters should be limited to those not previously covered by Hoechst.

POINT THREE

FOR THE SECOND TIME IN THIS PROCEEDING, ANDRX FAILED TO FOLLOW INTERNATIONAL PROCEDURES FOR SECURING THE PRODUCTION OF DOCUMENTS FROM A FOREIGN CORPORATION

Andrx's attempt to circumvent established international procedures for securing the production of documents from a foreign corporation must be denied. Andrx failed to acquire jurisdiction over Biovail Corporation, a Canadian Corporation, by serving Biovail's Chairman, Mr. Melnyk, in the United States. Indeed, this very issue has already been briefed and ruled upon by the Commission in Biovail's favor. Andrx chose to ignore the Commission's ruling, however, and is again attempting to obtain document discovery without resorting to Canadian procedures for doing so.

On July 14, 2000, the ALJ ruled in response to Biovail Corporation's motion to quash subpoenas *duces tecum and ad testificandum* served by Andrx that "a subpoena issued by an administrative agency of the United States must not violate international law."[1] (Attached hereto as Exhibit A.) Accordingly, the ALJ ruled, *inter-alia*, that because Andrx failed to comply with Canadian law by obtaining the production of documents from a Canadian

[1] The ruling was based on *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980).

corporation by a letter rogatory/letter of request to the appropriate Canadian court, the subpoenas violated international law and were quashed.

Notwithstanding this prior ruling, Andrx is once again seeking to obtain the production of documents from Biovail without going through the letters rogatory process. Thus, Andrx has failed to cure the jurisdictional deficiencies noted by this Commission on July 14th and the subpoenas *duces tecum* are therefore void.

The very fact that Andrx makes no argument in support of its request that Biovail be ordered to produce documents in response to its subpoena *duces tecum* is a tacit admission that there is no legal basis upon which it can seek to enforce that subpoena. However, despite the obvious jurisdictional deficiencies of the subpoena *duces tecum* and in accordance with Biovail's desire to support the timely resolution of this action, Biovail agreed to provide Andrx with "all documents it is to produce in the New Jersey Action in supplementation in its prior document production in that action...includ[ing] all Biovail documents [it] may reasonably require concerning the relevant market and the sales and marketing of Cardizem CD, Cardizem CD generic, Tiazac or Tiazac generic....[and] a full supplementation of any communications Biovail has had with the FTC or the media concerning topics relevant" in this proceeding. (Exh. F to Shaftel Decl.) Andrx failed to respond to Biovail's generous offer in light of the fact that Andrx has failed to acquire jurisdiction over Biovail for a second time.

POINT FOUR

AN ORDER OF PRECLUSION IS INAPPROPRIATE

The authorities cited by Andrx to support its request for an order of preclusion are obviously inapplicable here. Both cases on which Andrx relies deal with the application of the sanctions provision of the Federal Rules of Civil Procedure, Rule 37.2. What Andrx fails to note

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[2] *Bradgate Associates Inc. v. Fellows, Read & Associates Inc.*, 1992 U.S. Dist. Lexis 4668 (D.N.J. 1992) deals with the application of Rule 37(b)(2)(B) ("Failure To Comply With Order") and *Magee v. Paul Revere Life Insurance Co.*, 178 F.R.D. 33 (E.D.N.Y. 1998) deals with the application of Rule 37(d) ("Failure of *Party* to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection." (Emphasis Added)).

is that Federal Rule 37 is only applicable to a "[p]arty or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party...." Fed. R. Civ. P. 37(d); 37(b)(2). Both Mr. Melnyk and Mr. Brydon are non-parties to this proceeding and, thus, Federal Rule 37(d) and 37(b)(2) is not applicable.

Similarly, the Commission's Rules of Practice, 16 C.F.R. §3.38(b), apply only to a "[p]arty or an officer or agent of a party. . . ." Surely, Andrx's argument that Biovail executives are, as a practical matter, agents for the FTC staff is a desperate attempt to place Biovail within the coverage of this rule, when the rule's plain language precludes that possibility. Indeed, Andrx cites no authority that would support its proposition that an agreement to appear at trial and to meet with FTC staff prior to any trial testimony renders one an agent for the FTC.

Furthermore, the courts in both cases cited by Andrx were reviewing the Magistrate Judge's decision to issue an order of preclusion only as against a party to the action and only where that party refused to comply with a court order demanding discovery. See *Magee v. Paul Revere Life Insurance Co.*, 1789 F.R.D. 33, 38 (E.D.N.Y 1998); *Bradgate Associates, Inc. v. Fellows, Read & Associates, Inc.* These cases are clearly irrelevant here because, as indicated, Mr. Melnyk and Mr. Brydon are non-parties to this action and there exists no court order compelling their deposition testimony. Moreover, neither Magee nor Bradgate can be read to suggest that an order of preclusion would be appropriate, where as here, the non-parties went to great lengths to make themselves available for depositions and where the moving party is at fault for not having taken the depositions.

Therefore, because Mr. Melnyk and Mr. Brydon fully complied with the Andrx subpoenas (notwithstanding the lack of validity of those subpoenas), an order of preclusion would be inappropriate in this case.

CONCLUSION

For the reasons set for above, Eugene N. Melnyk and Bruce Brydon respectfully request that the Commission deny Andrx's motion to compel their depositions and the production of documents in its entirety.

Dated: October 26, 2000

PROSKAUER ROSE LLP

By: _____
Ronald S. Rauchberg
Francis D. Landrey
John Siegal
Stefanie S. Kraus

1585 Broadway
New York, NY 10036-8299
(212) 969-3342

O'MELVENY & MEYERS LLP

By: _____
David T. Beddow
Neil K. Gilman

555 13th Street, N.W.
Washington, D.C. 20004-1109

Attorneys for Biovail Corporation International, Eugene N. Melnyk and Bruce Brydon

CERTIFICATE OF SERVICE

I, Neil K. Gilman, hereby certify that on October 26, 2000 I caused a copy of the Memorandum in Opposition to Andrx Corporation's Motion to Compel The Depositions of Non-Parties Eugene N. Melnyk and Bruce Brydon and the Production of Documents to be served upon the following persons by hand:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Donald S. Clark, Secretary (original plus one copy)
Federal Trade Commission
Room 172
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Markus M. Meier, Esq.
Federal Trade Commission
Room 3114
601 Pennsylvania Ave., N.W.
Washington, DC 20580

And upon the following persons by overnight mail:

James M. Spears, Esq.
Shook, Hardy & Bacon, L.L.P.
801 Pennsylvania Avenue, N.W.
Suite 800
Washington, DC 20004

Peter O. Safir, Esq.
Kleinfeld, Kaplan & Becker
1140 19th St., N.W.
Washington, DC 20036

Louis M. Solomon, Esq.
Colin A. Underwood, Esq.
Solomon, Zauderer, Ellenhorn, Frischer & Sharp
45 Rockefeller Plaza
New York, NY 10111

Neil K. Gilman

UNITED STATES OF AMERICA
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

ORDER GRANTING MOTION OF BIOVAIL, MELNYK, AND CANCELLARA TO QUASH SUBPOENAS AND DENYING MOTION OF ANDRX TO PRECLUDE

I.

On May 12, 2000, Respondent Andrx Corporation ("Andrx") served upon third party Biovail Corporation ("Biovail"), Eugene N. Melnyk, and Kenneth C. Cancellara, subpoenas *ad testificandum* and *duces tecum*, issued by the Secretary of the Commission pursuant to Commission Rules 3.34(a) and (b).

On June 12, 2000, pursuant to Commission Rule 3.34(c), Biovail, Melnyk, and Cancellara, filed a motion to quash the subpoenas *duces tecum* and *ad testificandum* asserting that Biovail is a Canadian corporation, that Melnyk, its Chairman, is a citizen of Barbados, with his principal place of business in Barbados, and that Cancellara, its General Counsel, is a citizen of Canada. Among other grounds for their motion to quash, they assert that Andrx failed to follow Canadian procedures governing service of process in a United States proceeding within the sovereign territory of Canada and failed to personally serve Melnyk.

On June 19, 2000, Andrx filed its opposition to the motion to quash and a cross-motion, asking in the alternative that, in the event that these subpoenas are quashed or that Complaint Counsel does not make these witnesses and the requested documents available for pre-trial discovery, Complaint Counsel be precluded from offering Biovail (through any of its representatives), Melnyk and Cancellara, at the time of trial.

On June 30, 2000, Complaint Counsel filed its opposition to Andrx's motion to deny Biovail's motion to quash.

For the reasons set forth below, the motion to quash is GRANTED. The cross-motion of Andrx is DENIED WITHOUT PREJUDICE.

II.

The challenged subpoenas were issued by the Secretary of the Commission at the request of Respondent Andrx pursuant to Commission Rule 3.34 and served by Andrx pursuant to Commission Rule 4.4. 16 C.F.R. §§ 3.34, 4.4. Under *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980), a subpoena issued by an administrative agency of the United States must not violate international law. "When an American regulatory agency directly serves its compulsory process upon a citizen of a foreign country, the act of service itself constitutes an exercise of American sovereign power within the area of the foreign country's territorial sovereignty." *Id.* at 1304. "Such an exercise constitutes a violation of international law." *Id.* at 1313. *See also Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487, 496 (D.C. Cir. 1984)(interpreting the statutory provision similar to section 9 of the Federal Trade Commission Act [15 U.S.C. § 49] which authorizes the Commodity Futures Trading Commission to compel the attendance of witnesses and the production of documents

"from any place in the United States" and holding that a district court is without jurisdiction to enforce an investigative subpoena served on a foreign citizen in a foreign nation).

"The exercise of jurisdiction by any governmental body in the United States is subject to limitations reflecting principles of international and constitutional law, as well as the strictures of the particular statute governing that body's conduct." *Saint-Gobain-Pont-A-Mousson*, 636 F.2d at 1315. At the time the investigatory subpoena at issue in *Saint-Gobain-Pont-A-Mousson* was served, "the only statutory source of instruction as to the permitted geographic range of subpoena service was the FTC Act section 9, which empowered the Commission to require by subpoena the attendance of witnesses and the production of documentary evidence relating to a matter under investigation 'from any place in the United States.'" *Id.* at 1308 (*quoting* 15 U.S.C. § 49). Section 9 imposes the same geographic limitation when compulsory process is sought in a Part III proceeding. 15 U.S.C. § 49 ("Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided."). In 1980, the FTC Act was amended to allow service of Civil Investigative Demands in territories outside the United States. Section 13 of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 381, codified at 15 U.S.C. § 57b-1(c)(7)(B). The statute explicitly states that the provisions of 15 U.S.C. § 57b-1 do not apply to any proceeding brought under section 5(b) [15 U.S.C. § 45(b)]. 15 U.S.C.§ 57b-1(j)(1). Because the statutory language governing the geographic scope of subpoenas issued in a Part III adjudication is the same as that governing investigatory subpoenas at the time *Saint-Gobain-Pont-A-Mousson* was decided,

Saint-Gobain-Pont-A-Mousson requires that the subpoenas issued pursuant to Commission Rule 3.34 must not violate international law

Biovail has represented that Canadian law requires that American tribunals or litigants seeking to compel the testimony of a witness or the production of documents must obtain the evidence they seek by a letter rogatory/letter of request to the appropriate Canadian court. Andrx has not challenged Biovail's representation of what is required to comply with Canadian law. Accordingly, because the subpoenas served on Biovail and Cancellara by Andrx apparently do not comport with Canadian law, they are hereby quashed.

III.

Service upon Melnyk, through delivering subpoenas bearing his name at Biovail's offices in Ontario, Canada apparently fails to comply with Canadian and international law. Accordingly, for the reasons set forth above, the subpoenas served on Melnyk are hereby quashed.

IV.

Andrx asks, in the alternative, that Complaint Counsel be precluded from offering Biovail (through any of its representatives) and Melnyk and Cancellara as witnesses at trial if these witnesses are not available and the requested documents are not produced in pre-trial discovery. A motion to exclude evidence is premature at this time. Biovail has represented in its motion to quash subpoenas served on Biovail's outside lawyers, filed June 20, 2000, that certain "topics can be addressed through the testimony of Biovail witnesses" and that "Mr. Cancellara can address the issues relevant to the complaint and the affirmative defenses." Based upon these representations, the Court is confident that the parties and Biovail will be able to resolve this dispute. In the event that the parties are not able to develop an appropriate discovery schedule,

including the voluntary depositions of Biovail's employees, Andrx may refile its motion to preclude. Accordingly, Andrx's motion to preclude is DENIED WITHOUT PREJUDICE.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated: July 14, 2000

UNITED STATES OF AMERICA
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

ORDER SETTING HEARING ON MOTIONS

The parties are hereby notified that a prehearing conference on certain pending motions in the above referenced matter will be held on August 3, at 1:00 p.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.

The Court will hear arguments on the following motions and oppositions thereto: Complaint Counsel's Motion to Strike Certain Affirmative Defenses; Andrx's Motion to Compel Complaint Counsel to Respond to Interrogatories; Andrx's Motion to Compel Complaint Counsel to Produce Documents; Aventis' Motion to Compel Discovery; and Complaint Counsel's Motion to Compel Andrx to Produce Documents.

Biovail's Motion to Quash Subpoenas (served on outside counsel) and the Joint Motion to Quash Subpoenas Served on Various Law Firms and Attorneys will not be considered at this hearing. A ruling on those motions will be made after a determination is made on Complaint Counsel's motion to strike.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated: July 14, 2000

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