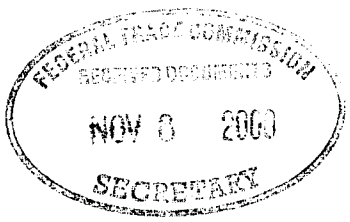
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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 ON ANDRX'S MOTION TO COMPEL MELNYK AND BRYDON TO APPEAR FOR DEPOSITIONS AND PRODUCE DOCUMENTS

I.

On October 16, 2000, Respondent Andrx Corporation ("Andrx") filed a Motion to Compel Eugene N. Melnyk and Bruce Brydon to Appear for Depositions and Produce Documents ("Motion to Compel"). By this motion, Andrx seeks to take the depositions of the Chairman and the Chief Executive Officer of Biovail Corporation ("Biovail") and for Biovail to produce documents responsive to its subpoena *duces tecum*. In the alternative, Andrx seeks an order precluding Complaint Counsel from calling any Biovail witnesses to testify at trial and from introducing any documents of Biovail at trial.

On October 26, 2000, Biovail filed an Opposition to the Motion to Compel, asserting that it has already offered to produce Melnyk and Brydon for depositions. Biovail further asserts that Andrx is not entitled to the production of documents because Andrx failed to cure jurisdictional deficiencies of the subpoenas *duces tecum*. Complaint Counsel also filed an Opposition to the Motion to Compel on October 24, 2000. Complaint Counsel takes no position on whether Melnyk and Brydon should be compelled to provide deposition testimony, but does maintain that to preclude Complaint Counsel from offering testimony from any Biovail witness would be unjust and contrary to the Commission's rules and precedent.

For the reasons set forth below, Andrx's Motion to Compel is GRANTED in part and DENIED in part.

II. DEPOSITIONS

A. BRYDON

Bruce Brydon is the Chief Executive Officer of Biovail. According to the Complaint, Biovail is a manufacturer of generic pharmaceuticals that had submitted an Abbreviated New Drug Application with the Food and Drug Administration for a generic version of Cardizem CD. Complaint ¶ 16. Brydon has been identified as a witness that Complaint Counsel intends to call at trial.

Andrx served a subpoena commanding Brydon to provide deposition testimony at a time and place designated by Andrx. In response to the subpoena, counsel for Brydon informed Andrx's counsel that Brydon would be available for a deposition at Biovail's counsels' offices, on a date selected by Brydon. Andrx apparently agreed to that time and location and assumed that Biovail's counsel would also make arrangements for a court reporter. Andrx assumed incorrectly. According to the pleadings, on the date of Brydon's deposition, Brydon and counsel representing Brydon and counsel for the parties in this proceeding were present for Brydon's deposition. However, a court reporter was not present as Andrx failed to arrange for one and was unable to find one on the day of the deposition.

By letter dated October 7, 2000, Andrx offered to make "reasonable accommodations" for the timing of Brydon's deposition and to depose Brydon in Canada, if that would be more convenient for Brydon. Biovail responded by letter dated October 10, 2000 that once Andrx states its willingness to compensate Biovail for the time of its executives and the expenses Biovail unnecessarily incurred in connection with Brydon's previous appearance, Biovail would address Andrx's request that Brydon appear again for a deposition.

Biovail asserts that Andrx's motion to compel should be denied because it has already made Brydon available for a deposition. In the alternative, Biovail requests that the Brydon deposition proceed only at a time and place fixed by Brydon and that Andrx bear the costs incurred as a result of Brydon and counsel appearing at the aborted first deposition session.

Because Complaint Counsel intends to call Brydon as a witness at trial, Andrx will have the opportunity to depose Brydon, which may be outside the close of discovery. Andrx is hereby permitted to take the deposition of Brydon at a location and time designated by Brydon. However, counsel for Andrx must agree to reimburse Brydon for his reasonable expenses incurred to attend the deposition scheduled for September 28, 2000. 16 C.F.R. § 3.31(d)(1). In the alternative, Andrx may choose to take the deposition of Brydon in Washington, D.C. when Brydon travels to Washington, D.C. to provide testimony at trial.

B. MELNYK

Eugene N. Melnyk is the Chairman of Biovail. Complaint Counsel initially listed Melnyk on its preliminary witness list, but has subsequently decided not to list Melnyk as a witness for trial. Biovail is a Canadian corporation.

Melnyk resides and regularly transacts business in Barbados, but at least occasionally makes personal visits to New York state. Andrx personally served Melnyk with subpoenas *duces tecum* and *ad testificandum* when Melnyk was in New York. The subpoenas commanded Melnyk to provide deposition testimony at the offices of Andrx's counsel in New York, New York, on September 18, 2000.

Biovail is involved in litigation with Hoechst Marion Roussel ("HMR"), filed in the U.S. District Court for the District of New Jersey ("the New Jersey action"). Andrx is not a party to the New Jersey action. Melnyk's deposition in the New Jersey action had been previously scheduled to commence on September 19, 2000, in Barbados, and was expected to take three days. Melnyk's counsel informed Andrx that Melnyk would be available for questioning in Barbados on September 19, 2000. Melnyk's counsel further insisted that Andrx attend the deposition in Barbados taken by HMR in the New Jersey action and the FTC proceeding before Andrx subjected Melnyk to questioning and that Melnyk's counsel would object to any duplication of examination by Andrx.

Andrx did not appear for the deposition of Melnyk in Barbados. Andrx asserts that it properly served Melnyk in New York and that the Commission's Rules of Practice do not authorize Biovail to insist that Andrx travel to Barbados to take Melnyk's deposition and sit through a deposition scheduled in another case to which Andrx is not a party. Andrx further asserts that it could not take the deposition of Melnyk on September 19, 2000, because Andrx's counsel had a previously scheduled business trip to the United Kingdom on that date.

Biovail asserts that the Federal Rules of Civil Procedure govern this dispute because Rule 81(a)(3) sets forth: "[t]hese rules 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 under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings." Fed. R. Civ. P. 81(a)(3). Biovail next argues that Rule 81(a)(3) makes applicable to this proceeding Rule 45 of the Federal Rules of Civil Procedure. Because Fed. R. Civ. P. 45(c)(3)(A)(ii) requires that a third party can not be required to travel more than 100 miles from his place of residence or business, Biovail asserts that Melnyk is legally entitled to be deposed only in Barbados.

Case law interpreting Fed. R. Civ. P. 81(a)(3) makes clear that the Federal Rules of Civil Procedure apply when an action is brought in federal court to enforce an agency subpoena, but do not necessarily govern the underlying administrative proceeding. E.g. *Federal Trade Commission v. MacArthur*, 532 F.2d 1135, 1141 (7th Cir. 1976). An interpretation that Fed. R.

Civ. P. 81(a)(3) makes the limitations found in Fed. R. Civ. P. 45 applicable to administrative subpoenas during the pendency of an administrative proceeding was expressly rejected in *Federal Communications Commission v. Schreiber*, 329 F.2d 517, 534 n.23 (9th Cir. 1964). To impose the limits of Fed. R. Civ. P. 45 on administrative subpoenas would fail "'to observe the important distinction between the administrative proceeding . . . and the court action to enforce the summons. . . . To contend that the proceeding itself before the Commissioner . . . is also a civil case subject to the Rules of Civil Procedure . . . would be going too far.'" *Id.* (quoting *Falsone v. United States*, 205 F.2d 734, 742 (5th Cir. 1953)).

In addition, the Advisory Committee Notes to Fed. R. Civ. P. 45 expressly state:

> This rule applies to subpoenas ad testificandum and duces tecum issued by district courts . . . It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere in the United States. Among such statutes are the following: . . .U.S.C. Title 15, § 49 (Federal Trade Commission).

Furthermore, Commission precedent clearly holds that "the Federal Rules . . . do not control Commission proceedings." *L. G. Balfour Co.*, 61 F.T.C. 1491, 1492 (Oct. 5, 1962). See also *In re Ash Grove Cement Co.*, 77 F.T.C. 1660, 1661 (Oct. 22, 1970) ("Commission adjudicative proceedings are not governed by the Federal Rules of Civil Procedure; rather they are conducted under the Commission's own duly promulgated Rules of Practice."). Accordingly, the Federal Rules of Civil Procedure, and specifically Fed. R. Civ. P. 45(c)(3)(A)(ii), do not govern this dispute.

The Commission Rule governing prehearing subpoenas *ad testificandum* states only that the "Secretary of the Commission shall issue a subpoena, signed but otherwise in blank, requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena, who shall complete it before service." 16 C.F.R. § 3.34(a)(1). The statutory authority from which this rule is derived sets forth that the attendance of witnesses may be required "at any designated place of hearing." 15 U.S.C. § 49. Andrx designated New York as the place of hearing. Although it is common practice to negotiate with opposing counsel to arrange a mutually convenient alternative time and place, e.g., *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 311 (July 1, 1996), a third party cannot unilaterally insist on the time and location and impose restrictive conditions on the scope of the questioning. See *In re Champion Spark Plug Co.*, 1981 FTC LEXIS 108 (Nov. 16, 1981) (denying motion to quash and ordering third party witness to travel to Washington D.C. for deposition). See also *In re Chain Pharmacy Ass'n, Inc.*, 1990 FTC LEXIS 193, *2-3 (June 20, 1990) ("The unilateral decisions of counsel for [respondents] to limit the questioning of deponents because of alleged duplication of

questions and to withdraw deponents because depositions had lasted too long were not authorized by [the Administrative Law Judge] and are not permitted by the Commission's Rules of Practice.").

A third party opposing an agency's subpoena bears the burden of showing that "[t]he request is unreasonable." *Federal Trade Commission v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178, *13 (D.D.C. 1977). "Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Id.* *See also* *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965) ("Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case.").

Andrx's request to take the deposition of the Chairman of Biovail on a date and time Andrx selected is not unreasonable. Further, it is not unreasonable for Andrx to insist that it will not travel to another country and sit through the deposition of Melnyk taken by HMR in another proceeding before being able to present its own questions of Melnyk in this proceeding. Since the witness was served with Andrx's subpoena in New York, designating New York as the location of the deposition, Andrx is not required to travel to another country to conduct its deposition in this proceeding. Andrx is hereby permitted to take the deposition of Melnyk at a location and time designated by Andrx or as agreed to by the parties. However, Andrx is not permitted to ask questions previously asked of Melnyk by HMR and answered by Melnyk.

III. DOCUMENTS

Andrx' motion also seeks to compel the production of documents by Melnyk. The subpoena *duces tecum* served on Melnyk attaches twenty six specific requests for documents. These requests are the same twenty six requests for documents that Andrx attached to a subpoena it previously attempted to serve on Melnyk by delivery to Biovail's offices in Canada. The documents sought belong to Biovail, not Melnyk. In the July 14, 2000 Order Granting Motion of Biovail, Melnyk, and Cancellara to Quash Subpoenas, Andrx's previous subpoena *duces tecum* to Melnyk was quashed because Andrx failed to comply with Canadian law. Andrx has presented no arguments to support its motion to compel the production of documents.

Biovail has represented that it has 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 . . . [and] a full supplementation of any communications Biovail has had with the FTC or the media concerning topics relevant in this proceeding." This should be sufficient. In addition, Andrx is entitled to any documents reviewed by Melnyk in preparation for his deposition taken by Andrx in this proceeding. In all other respects, Andrx's motion to compel production of documents is DENIED.

IV. PRECLUSION

Andrx's motion seeks, in the alternative, that if Melnyk and Brydon are not compelled to provide deposition testimony, Complaint Counsel should be precluded from calling any witness from Biovail at trial or presenting any documents of Biovail at trial. Commission Rule 3.38(b)(3) sets forth that if a *party* or an *agent* of a party fails to comply with a subpoena, the Administrative Law Judge may "[r]ule that the party may not introduce into evidence or otherwise rely . . . upon testimony by such party, officer, or agent, or the documents or other evidence." 16 C.F.R. § 3.38(b)(3).

In most cases, a witness is not an agent or officer of a party. *In re Grand Union Co.*, 102 F.T.C. 812, 1089 (July 18, 1983). Where the circumstances of a witness' failure to comply with discovery requests suggest collusion between the witness and a party, they may be treated as one entity and sanctions may be properly imposed. *Id.* The record does not indicate impropriety on the part of Complaint Counsel. Accordingly, Andrx's request for preclusion of any witness from Biovail or any documents from Biovail is DENIED. However, Andrx's request for preclusion of Melnyk or Brydon is DENIED WITHOUT PREJUDICE.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: November 7, 2000