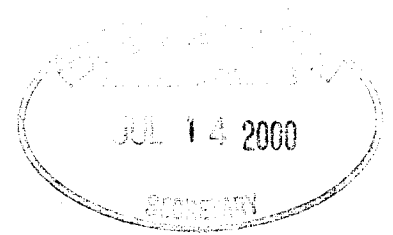


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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.

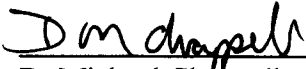
Service upon Melnyk, through delivering subpoenas bearing his name at Biovail's offices in Ontario, Canada apparently fails to comply with Canadian and international law. Accordingly, for the reasons set forth above, the subpoenas served on Melnyk are hereby quashed.

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