

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**FILED**

**MAR 19 2001**

**IN RE:** )  
**VITAMINS ANTITRUST LITIGATION** )

NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

) Misc. No. 99-197 (TFH)  
) MDL No. 1285

**THIS DOCUMENT RELATES TO:** )  
**ALL ACTIONS.** )

**MEMORANDUM OPINION Re:**  
**CANADIAN PLAINTIFFS' MOTION TO INTERVENE**

Pending before this Court is the Motion of Canadian Plaintiffs to Intervene for the Limited Purpose of Seeking Modification to Protective Order, entered by this Court on November 3, 1999. Based upon careful consideration of the intervention motion, Defendants' opposition, Defendants' Motion to Stay and the opposition thereto, oral argument at the March 7, 2001 status conference, and the entire record herein, this Court will grant that portion of Canadian Plaintiffs' Motion seeking intervention. However, the Court will defer ruling on the portion of the Canadian Plaintiffs' Motion seeking modification of the Protective Order, access to Verilaw, and attendance at depositions of the Niacin Defendants until the appeals process in the Canadian courts is exhausted or otherwise concluded, or until such time as this Court determines that it is otherwise appropriate to decide these issues.<sup>1</sup>

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<sup>1</sup> Also pending before the Court is a related motion, Defendants' Motion to Stay Proceedings on the Intervention Motion of Certain Canadian Plaintiffs Pending the Disposition of an Application for Injunctive Relief in the Ontario Courts. To the extent that the Court grants intervention to the Canadian Plaintiffs, Defendants' Motion to Stay will be denied. To the extent that the Court defers ruling on the remainder of the Canadian Plaintiffs' Motion, Defendants' Motion to Stay will be granted.

## I. BACKGROUND

Movants (“Canadian Plaintiffs” or “Movants”) are Plaintiffs in three cases pending in Canadian courts.<sup>2</sup> The Canadian Plaintiffs have filed suit in various Canadian provincial courts alleging price fixing, market allocation, and other anti-competitive behavior in violation of Canadian fair competition laws.<sup>3</sup> The Canadian actions are in large part similar to the Vitamins action filed in the United States.<sup>4</sup> Pursuant to Fed. R. Civ. P. 24(b), the Canadian Plaintiffs seek to intervene in litigation pending before this Court, In re Vitamins Antitrust Litigation, for the limited purpose of modifying the stipulated Protective Order<sup>5</sup> (“Protective Order” or “Order”)

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<sup>2</sup> Ford v. F. Hoffman-LaRoche Ltd., et al., Sup. Ct. Justice File No. 771/99 (Ontario, Canada); Ritchie-Smith Feeds, Inc. v. F. Hoffman-LaRoche, et al., Supreme Ct. No. C994010 (British Columbia, Canada); and Vitapharm Canada Ltd., et al. v. F. Hoffman-LaRoche, Ltd., Sup. Ct. Justice File No. 99-GD-46719 (Ontario, Canada).

<sup>3</sup> See, e.g., Competition Act, R.S. ch.19, § 19 (1985 & 2d Supp.). As recounted by Justice Cumming in his Reasons for Decision, there are seven pending Ontario actions, four additional Ontario actions that have been stayed as a result of a carriage motion, a class action commenced in British Columbia, Ritchie-Smith, and two class proceedings in Quebec. See Reasons for Decision ¶¶ 10-12 at 7. Plaintiffs in the British Columbia Ritchie-Smith action joined with the Ontario Ford and Vitapharm actions for purposes of bringing the intervention motion in this Court; however, the Ritchie-Smith plaintiffs do not accede that the Ontario court’s disposition of the Defendants’ Canadian injunction motion governs those plaintiffs regarding the motions pending in this Court.

<sup>4</sup> The Canadian actions differ from the U.S. actions in one key respect, namely that the Canadian actions are brought on behalf of vitamins purchasers, both direct and indirect, who are located in Canada.

<sup>5</sup> The Protective Order provides, *inter alia*, that “[a]ll information produced or discovered in this litigation, regardless whether designated confidential shall be used solely for the prosecution or defense of this litigation, unless that information has become publicly available without a breach of the terms of this Order.” Protective Ord. ¶ 1. The Order further provides that “Confidential Information,” as defined *infra* note 7 may be disclosed to and used only by: employees, including in-house counsel, or officials of parties to the litigation; the Court; court

entered by this Court in the Vitamins case on November 3, 1999.<sup>6</sup> This Order governs the

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reporters; Special Masters; mediators; parties' outside counsel; consulting or testifying experts; others specially identified and authorized by a disclosing source; and the direct staff of the foregoing persons. See id. ¶ 8.

<sup>6</sup> Canadian Plaintiffs seek to modify the Protective Order as follows:

- A. Paragraph 1 of the Protective Order is modified by striking the first word "All" and substituting for it: "Except as otherwise provided in Paragraph 20 herein, 'all.'"
- B. New paragraph 20 is added to the Protective Order as follows:  
"Plaintiffs in Ford v. Hoffman-LaRoche Ltd., et al., Sup. Ct. Justice File No. 771/99 (Ontario, Canada), Vitapharm Canada, Ltd. et al. v. F. Hoffman-LaRoche, Ltd., et al., Sup. Ct. Justice File No. 99-GD-46719 (Ontario, Canada), and Ritchie-Smith Feeds, Inc. v. F. Hoffman-LaRoche, Ltd., et al., Supreme Ct. C994010 (British Columbia, Canada), shall be deemed 'Parties' hereunder for the purpose of obtaining access to discovery materials. The Plaintiffs in the above-listed Canadian actions shall be permitted to use such discovery materials in their cases in any manner permitted by the courts in which those cases are pending, and their counsel shall be deemed 'counsel' for all purposes under the Protective Order. For the purposes of this Paragraph, the persons and entities listed in Paragraph 8 in the Order shall be deemed to include all of their respective counterparts in the Canadian actions listed in this Paragraph. The Plaintiffs in the Canadian actions are bound by the terms of this Order not to use such materials for any purpose other than for the prosecution of their own litigation, and are bound to abide by the non-disclosure provisions of this Order except as modified in this Paragraph."

Prop. Order ¶ 4.

disclosure and use of confidential information<sup>7</sup> in the Vitamins litigation.<sup>8</sup>

Canadian Plaintiffs request that this Court modify the Order so as to allow them access, on the same terms as parties to the Vitamins action, to discovery materials, including documents, interrogatory responses, responses to requests for admission, and other discovery papers produced by the Niacin Defendants.<sup>9</sup> Movants also seek a further order that (1) will allow Canadian Plaintiffs to access, at their cost, the Verilaw service,<sup>10</sup> and (2) will permit Canadian

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<sup>7</sup> The Protective Order defines “Confidential Information” as “information that the disclosing party or non-party (hereafter ‘source’) designates ‘Confidential’ or ‘Confidential and Lawyers Only’ (collectively referred to as ‘Confidential Information’). Id. ¶ 3. Pursuant to the Order, “[t]he designation ‘Confidential’ shall be limited to information that the source reasonably believes is of a proprietary or commercially sensitive nature, or should otherwise be subject to confidential treatment.” Id. “Confidential and Lawyers Only” is limited to information that contains trade secrets, is of a highly sensitive commercial nature, or otherwise derives from Confidential Information regarding “pricing, production, cost, marketing, strategic planning or customers.” Id. ¶ 4.

<sup>8</sup> On September 13, 2000, this Court entered a Consent Order modifying the November 3, 1999 Protective Order. The September 13, 2000 Order modifies Paragraphs 8 and 9 of the November 3, 1999 Protective Order to encompass “[d]ocument copying services or other document vendors utilized by the parties” as persons to whom Confidential Information may be revealed.

<sup>9</sup> Canadian Plaintiffs seek access to discovery by defendants who participated in the manufacture and sale of niacin and niacinamide (“Niacin Defendants” or “Defendants”), all of whom have been sued by the Canadian Plaintiffs in Canadian courts. These defendants include Lonza Inc., Lonza AG, Alusuisse Lonza Group Ltd., Degussa-Huls AG, Degussa-Huls Corp., Reilly Industries, Inc., Reilly Chemicals, and Nepera, Inc. Prop. Order ¶ 4. Nine corporate members and three individuals have pled guilty to charges in Canada and have paid fines to the Canadian government. Canadian Plaintiffs seek discovery of documents and testimony from the Niacin Defendants who have not pled guilty to criminal charges in Canada. The Canadian Plaintiffs do not seek access to materials produced by Vitamins plaintiffs.

<sup>10</sup> Verilaw is an electronic service website, accessible only to parties to the Vitamins litigation, through which the parties effectuate service of process, schedule depositions, and post correspondence relevant to the Vitamins litigation.

Plaintiffs to attend depositions, through their counsel, of Niacin Defendants and those Defendants' current and former officers and employees.

Certain Defendants oppose this motion and further moved for a stay pending the disposition of injunctive proceedings in Ontario.<sup>11</sup> A hearing on the Canadian injunction motion was held on January 12, 2001 before Justice Cumming. On January 26, 2001, Justice Cumming dismissed the motion for an injunction against prosecution of the Canadian intervention motion. On March 6, 2001, the Ontario Superior Court of Justice granted leave to appeal Justice Cumming's decision. At the March 7, 2001 Vitamins status conference, this Court heard oral arguments on the pending intervention motion.

## II. DISCUSSION

### A. Motion to Intervene

The Canadian Plaintiffs seek permissive intervention in this action pursuant to Fed. R. Civ. P. 24(b).<sup>12</sup> In this case, the Canadian Plaintiffs do not seek to intervene for the purpose of litigating a substantive claim, but rather for the limited purpose of modifying the Protective Order entered by this Court on November 3, 1999. In this Circuit, there are three necessary

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<sup>11</sup> The parties seeking an injunction in Canadian courts are BASF Canada, Inc., Hoffman-LaRoche, Ltd., Degussa-Huls Canada, Inc., Takeda Chemical Industries, Ltd. and Alusuisse-Lonza Canada, Inc.

<sup>12</sup> In order to intervene in an action in federal court, a party must proceed according to Rule 24 of the Federal Rules of Civil Procedure. Rule 24 provides for two different types of intervention – intervention of right and permissive intervention. Rule 24(b) provides that “[u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant’s claim or defense and the main action have a question of fact or law in common.” FED. R. CIV. P. 24(b). The instant case involves only permissive intervention, as the Canadian Plaintiffs have not asserted a basis for intervention of right.

prerequisites for allowing permissive intervention pursuant to Rule 24(b).<sup>13</sup> In deciding whether or not to grant a motion to intervene, the Court must strike a “balance between keeping class litigation manageable and allowing affected parties to be adequately heard.” Twelve John Does v. District of Columbia, 117 F.3d 571, 575 (D.C. Cir. 1997). Rule 24 states that in exercising its discretion, “the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Fed. R. Civ. P. 24(b).

Accordingly, this Court will first assess whether the Canadian Plaintiffs meet the threshold criteria for permissive intervention. If these three criteria are met, the Court will then engage in a balancing of the interests of the parties to determine whether to grant the motion to intervene. Even if the Court grants the motion to intervene, the Court still must determine whether to modify the Protective Order as requested by the Canadian Plaintiffs.

**1. Fed. R. Civ. P. 24(b)**

Rule 24(b) provides that “[u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant’s claim or defense and the main action have a question of fact or law in common.” Fed. R. Civ. P. 24(b). Ostensibly, Rule 24 would appear to impose a procedural barrier upon parties seeking to intervene for the purpose of challenging a protective order. Rule 24(b)(2) requires that a potential intervenor assert a “claim or defense” in common with the original parties to the action in which intervention is sought. Rule 24(c) similarly appears to impose upon a would-be intervenor a requirement of seeking to intervene for the purpose of litigating a substantive claim insofar as the rule requires “a pleading setting forth the claim or defense for

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<sup>13</sup> See discussion infra Part II.A.2.

which intervention is sought.” FED. R. CIV. P. 24(c). However, federal appellate courts considering the issue have interpreted the requirements of Rule 24 flexibly and have uniformly concluded that third parties may permissively intervene for the purpose of contesting protective orders. See EEOC v. Nat’l Children’s Center, Inc., 146 F.3d 1042, 1045 (D.C. Cir. 1998) (surveying decisions from the First, Second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits that have granted permissive intervention for the purpose of challenging a protective order). Moreover, courts considering the issue are nearly uniform in holding that intervention is the proper means for challenging or modifying a protective order. See, e.g., Nat’l Children’s Center, 146 F.3d 1042; Autry v. K Mart Corp., Inc., No. 92-105-Civ-3-BR, 1995 U.S. Dist. LEXIS 18253, at \*2-3 (E.D.N.C. Nov. 22, 1995) (citing cases from First, Second, Sixth, Ninth, and Tenth Circuits); Beckman Indus. Inc. v. Int’l Ins. Co., 966 F.2d 470, 472 (9<sup>th</sup> Cir. 1992) (citing cases from First, Second, Fifth, Sixth, and Tenth Circuits).

## **2. Three criteria for granting Rule 24(b) permissive intervention**

The traditional requirements for permissive intervention pursuant to Rule 24(b)(2) are: (1) an independent basis for subject matter jurisdiction, (2) a timely motion, and (3) a claim or defense that shares a common question of law or fact with the action in which intervention is sought. See Nat’l Children’s Center, at 146 F.3d 1046. The requirements for permissive intervention are to be construed liberally, “with all doubts resolved in favor of permitting intervention.” FED. R. CIV. P. 24. The criteria are interpreted flexibly when a non-party seeks to intervene for the limited purpose of contesting or modifying a protective order. See Nat’l Children’s Center, at 146 F.3d at 1047.

### **a. An independent basis for jurisdiction**

“The first requirement for permissive intervention - an independent basis for jurisdiction -

stems not from any explicit language in Rule 24(b), but rather from the basic principle that a court may not adjudicate claims over which it lacks subject matter jurisdiction.” Nat’l Children’s Center, 146 F.3d at 1046 (citing FED. R. CIV. P. 82). However, courts have crafted a narrow exception to this jurisdictional requirement where a third party seeks to intervene for the limited purpose of contesting or modifying a protective order. See id., 146 F.3d at 1047 (explaining that “[t]he rationale for this exception is simple - such intervenors do not ask the district court to exercise jurisdiction over an additional claim on the merits, but rather to exercise a power that it already has, namely the power to modify a previously entered confidentiality order”); see also In re “Agent Orange” Product Liability Litigation, 821 F.2d 139, 145 (2d Cir.) (noting the power of a district court to modify protective orders that it has entered), cert. denied, 484 U.S. 953 (1987), aff’g 104 F.R.D. 559, 567 (E.D.N.Y. 1985). In cases such as the instant motion, where intervention is sought for the limited purpose of modification to a protective order, it is not necessary for the Court to find an independent basis for jurisdiction. Accordingly, the Canadian Plaintiffs satisfy the first prong for permissive intervention.

**b. Timeliness of the motion**

The second requirement for permissive intervention pursuant to Rule 24(b)(2) is a timely motion. Courts have flexibly interpreted the requirement of a timely motion in the context of intervention for the purposes of contesting a protective order. See Nat’l Children’s Center, 146 F.3d at 1047.

Although addressing the timeliness issue in the context of Rule 24(b) intervention as of right, this Circuit has stated that “timeliness is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the

applicant's rights, and the probability of prejudice to those already parties in the case.” United States v. AT&T, 642 F.2d 1285, 1295 (D.C. Cir. 1980).

The Canadian Plaintiffs seek to intervene in ongoing litigation in which the parties have not yet even concluded discovery. Given that many courts have held that intervention is timely long after the termination of litigation, see Nat’l Children’s Center, 146 F.3d at 1047, the Canadian Plaintiffs’ motion certainly appears to meet the timeliness requirement.

**c. Commonality of questions of law or fact**

The third requirement for Rule 24(b)(2) permissive intervention is a commonality requirement. Rule 24 states that a party may be entitled to intervene “when an applicant’s claim or defense and the main action have a question of fact or law in common.” FED. R. CIV. P. 24. As with the jurisdictional and timeliness requirements, courts have liberally construed the commonality requirement in the context of challenges to protective orders. Some courts have held that a movant satisfies the commonality requirement simply by virtue of having raised a common question in a suit in another jurisdiction. See Nat’l Children’s Center, 146 F.3d at 1047. Other courts have interpreted this requirement even more liberally, holding that “the issue of the scope or need for the confidentiality order itself presents a common question that links the movant’s challenge with the main action.” Id. However, as in Nat’l Children’s Center, in the instant case, there is no need to rely upon the more liberal construction of the commonality requirement afforded by some circuits because the Canadian Plaintiffs’ suits share many common questions with the Vitamins action.<sup>14</sup> Moreover, when intervention is sought in an

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<sup>14</sup> As stated in Movants brief, “Movants’ cases are based on the identical factual core as [the Vitamins] case: the global cartel, comprised mostly of multinational firms, to fix and control the prices charged to vitamins purchasers throughout the world, including Canada.” Can. Pls.’ Mem. P&A at 6.

action alleging anticompetitive conduct, “no stringent showing of a strong nexus of common fact or law is required.” Kerasotes Michigan Theaters, Inc. v. Nat’l Amusements, Inc., 139 F.R.D. 102, 103 (E.D. Mich. 1991) (citing Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc., 823 F.2d 159, 164 (6<sup>th</sup> Cir. 1981)).

Given the common questions raised by both the Vitamins action and the Canadian Plaintiffs’ actions, coupled with the antitrust basis of both suits, the Canadian Plaintiffs meet the third criteria for permissive intervention.

### **3. Balancing the interests of the parties**

However, even if a prospective intervenor satisfies all three requirements of Rule 24(b)(2), a court may still deny a motion to intervene. See Nat’l Children’s Center, 146 F.3d at 1048 (describing the “considerable discretion” that district courts have to either grant or deny a motion for permissive intervention, even if the requirements of Rule 24(b) are met); see also H.L. Hayden Co. of New York, Inc. v. New York, 797 F.2d 85, 89 (7<sup>th</sup> Cir. 1986) (stating that “a denial of permissive intervention has virtually never been reversed”) (quoting United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968, 990 n.19 (2d Cir. 1984)). Rule 24 states that in exercising its discretion, “the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” FED. R. CIV. P. 24(b).

Defendants assert that the intervention motion raises two important questions: (1) whether the special intervention doctrine . . . is available to litigants who are not [sic] litigants in foreign courts; and (2) whether it is proper to require that discovery materials brought to the United States . . . be automatically available in a third country when the countries from which such documents originated require resort to judicial assistance for civil discovery pursuant to the Hague Convention . . . or pursuant to other laws for non-Hague-signatory nations. Defs.’ Mot.

Stay at 3-4.

Like every other circuit to consider the issue, this Circuit has held that permissive intervention is the proper procedure for a non-party to seek modification of a protective order. See Nat'l Children's Center, 146 F.3d at 1045. And federal courts have granted sharing of discovery to litigants outside the court's jurisdiction. While the Court is cognizant of the fact that this is a case of first impression, because no other court has been called upon to consider foreign comity interests in deciding whether or not to grant intervention to a foreign plaintiff for the purpose of modifying a protective order, this Court finds no special exception to the limited intervention doctrine for non-party intervenors from foreign fora.

This Court also finds Justice Cumming's Reasons for Decision to be instructive on this issue. Although a fair portion of the opinion centers on a discussion of 28 U.S.C. § 1782, a statute not invoked by Movants,<sup>15</sup> Justice Cumming's Reasons for Decision reflects a permissive attitude toward the Canadian Plaintiffs' efforts to gain access to U.S. discovery materials. In dismissing the injunction motion, the court explained that "[t]he plaintiffs' action in seeking access to the U.S. discovery is not oppressive or unfair to the defendants in the Canadian proceedings. To the contrary. Such access is consistent with the three policy objectives underlying the CPA." Reasons for Decision ¶ 49 at 13. The court also noted that "[a] Canadian court generally will be reluctant to prevent someone from gathering evidence extraterritorially, as its ultimate admissibility in a Canadian proceeding will be determined by the Canadian courts." Id. ¶ 45. In making its determination, the court ultimately reasoned that "[t]he plaintiffs' request

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<sup>15</sup> The Canadian Plaintiffs do not seek judicial assistance pursuant to 28 U.S.C. § 1782, but rather seek permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

for access to discovery evidence which they believe necessary to prepare their case in Canada . . . does not violate the rules and procedure of this court. There is no consequential unfairness to the defendants in the Canadian class proceedings.” Id. ¶ 50 at 14.

As discussed above, the Movants appear to meet the three criteria for permissive intervention. And Justice Cumming’s rationale bolsters Movants’ position, at least as far as intervention is concerned. However, even if this Court grants the Motion to Intervene, it still must determine whether to modify the Protective Order as requested by the Canadian Plaintiffs. As noted by Defendants, the Motion raises a question of first impression insofar as whether it is proper to allow intervention by nonparties who are not United States residents and seek to use the requested discovery in litigation outside of the United States.

**B. Modification of the November 3, 1999 Protective Order**

Concluding that the Canadian Plaintiffs satisfy the requirements for permissive intervention pursuant to Rule 24(b) does not mandate that this Court must modify the contested Protective Order. See, e.g., Florida ex. rel. Butterworth v. Jones, 148 F.R.D. 282 (M.D. Fla. 1993) (explaining that although the movants had met the requirements for intervention, that the court must still undertake a separate inquiry to determine whether to modify the protective order). A district court has broad discretion to modify a protective order. See Agent Orange, 821 F.2d at 147 (noting that [w]hether to lift or modify a protective order is a decision committed to the sound discretion of the trial court); Bayer AG v. Barr Laboratories, Inc., 162 F.R.D. 456, 460 (S.D.N.Y. 1995) (stating that “the case law is clear [] that the Court has discretion to modify a protective order”). Generally, “[t]he decision to lift or modify a protective order is proper where changed circumstances eliminate ‘a continued need for protection.’” Autry, 1995 U.S. Dist. LEXIS 18253, at \*5 (quoting Omega Homes, Inc. v. Citicorp Acceptance Co., 656 F. Supp

393, 403 (W.D. Va. 1987)). Protective orders may also be modified to meet the need of parties in other litigation. See Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc., 823 F.2d 159164 (6<sup>th</sup> Cir. 1987). Courts have used various formulae in determining whether to modify a protective order.<sup>16</sup> In balancing competing interests, courts have weighed, inter alia, efficiency concerns,<sup>17</sup> reliance interests upon the continued integrity of the protective order,<sup>18</sup> and the public interest in

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<sup>16</sup> Courts have considered factors such as: whether the movant is a party to the original litigation or non-party intervenor, whether the protective order was agreed upon by the parties, whether the party seeking intervention is the government or a private party, and whether modification is sought for purely private reasons or for public reasons.

<sup>17</sup> See, e.g., Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 896 (7<sup>th</sup> Cir. 1994) (explaining that “where a third party wishes to modify a protective order so as to avoid duplicative discovery in collateral litigation, policy considerations favoring the efficient resolution of disputes justifies modification unless such an order would tangibly prejudice substantial rights of the party opposing modification”); but see Kerasotes Michigan Theaters, Inc. v. Nat’l Amusements, Inc., 139 F.R.D. 102, 104-05 (E.D. Mich. 1991) (noting that permitting modification for the benefit of third party intervenors tends to undermine efficient discovery, but also acknowledging the countervailing efficiency of avoiding duplicative discovery).

<sup>18</sup> See, e.g., Jochims v. Isuzu Motors, Ltd., 145 F.R.D. 499, 502 n.7 (S.D. Iowa 1992). In evaluating a motion for modification of a stipulated order by a party to that order, the court described approaches taken by various courts:

One line of authorities, illustrated by the decisions in Grady and Ernst & Ernst, place the burden on the intervening party moving for modification. The rationale for this line of cases is that a party to a protective order is entitled to rely upon it. A second line of cases, however, hold that the party seeking to continue a protective order bears the burden of demonstrating good cause. The rationale underscoring this line of cases is that to place the burden on the party seeking discovery of documents covered by a protective order would place an undue burden on the public’s right of access and generally ignores the fact that civil litigants have an obligation to produce all relevant information.

Id. (quotations and citations omitted).

open access to records and documents.<sup>19</sup> A significant factor for many courts is whether the discovery sought will obviate the need for that party to engage in duplicative discovery. See, e.g., Wilk v. American Medical Ass'n, 635 F.2d 1295, 1300 (7<sup>th</sup> Cir. 1980). Implicit in this consideration is a determination of the discoverability of the materials sought. See id. (stating the principle that “a collateral litigant has no right to obtain discovery materials that are privileged or otherwise immune from eventual involuntary discovery in the collateral litigation”) (citing AT&T v. Grady, 594 F.2d 594, 597 (7<sup>th</sup> Cir. 1978)). In the instant case, such a determination would require this Court to engage in an exegesis of Canadian procedure and discovery principles. Although Justice Cumming has stated that granting access to Plaintiffs does not offend Canadian procedure, this is only one Ontario court’s interpretation of existing Canadian law.<sup>20</sup> And the decision does not purport to be binding on the litigation pending in other Canadian provinces.<sup>21</sup> A decision by this Court to modify the Protective Order would

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<sup>19</sup> See, e.g., Wilk v. American Medical Ass'n, 635 F.2d 1295, 1299 (7<sup>th</sup> Cir. 1980) (articulating the widely cited proposition that “pretrial discovery must take place in the [sic] public unless compelling reasons exist for denying the public access to proceedings”).

<sup>20</sup> Although the injunction motion was heard in Ontario, one of the applicants is from British Columbia. Additionally, there are actions pending in Quebec. If this Court grants access to the Ontario Canadian Plaintiffs, this will set the precedent for plaintiffs in other Canadian provinces to gain access to discovery materials.

<sup>21</sup> As an additional consideration, the Canadian court asserts that it has “plenary jurisdiction to control its own process” and thus the authority to grant or deny the requested injunction, id. ¶ 25, at 9-10, but this Court queries whether such jurisdiction extends to supervising Movants’ compliance with provisions of a U.S. protective order. The Canadian Plaintiffs have agreed to submit to the jurisdiction of this Court for the purposes of enforcing the provisions of the Protective Order, but Defendants argue that there is no realistic way for this Court to enforce the Protective Order against the Canadian Plaintiffs. Defs’ Opp. Mem. P&A at 19. In his Reasons for Decision, Justice Cumming notes that the Canadian Plaintiffs “will consent to an order of this court if the defendants see that to be of assistance

surely require this Court to engage in its own evaluation of various Canadian provincial procedures. Based on pragmatic considerations, this Court determines that such an inquiry, if undertaken at all, is best left until the conclusion of the Canadian appellate process. This Court is reluctant to rule on issues that are a matter of first impression not only in the U.S., but in Canadian courts as well, particularly in light of the fact that subsequent Canadian appellate decisions may effectively moot the Motion pending before this Court.<sup>22</sup> Even if the Canadian courts decline to overturn Justice Cumming's denial of the injunction sought by the Defendants, the appellate opinions are likely to provide valuable guidance to this Court in making its determination. Accordingly, the Court will defer ruling on the portion of the Canadian Plaintiffs' Motion requesting modification to the Protective Order until the appellate process in the Canadian courts is exhausted or otherwise concluded, or until such time as this Court determines that it is otherwise appropriate to decide these issues.

**C. Access to Verilaw and Attendance at Depositions**

As a final matter, in addition to requesting modification of the Protective Order, the Canadian Plaintiffs also request access to the Verilaw system, including the deposition scheduling feature, and also seek to attend depositions of the Niacin Defendants. The Court will defer ruling on these issues as well until it considers the Canadian Plaintiffs' requested

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in maintaining confidentiality and the sanctity of the Protective Order.” Reasons for Decision ¶ 47, at 13. Unfortunately, the Canadian court does not provide this Court with any insight as to the nature of such a hypothetical order. Nor does the Canadian court clearly delineate the jurisdiction of the Canadian court to enforce a U.S. protective order.

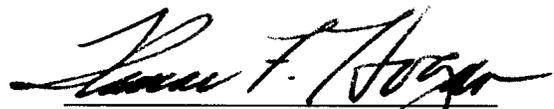
<sup>22</sup> As a further consideration, discovery is not slated to begin in Canada until early 2002. Defs.' Mot. Stay at 3. Therefore, this Court does not see the urgency in issuing a ruling that may usurp the autonomy of Canadian courts to decide matters of first impression currently pending before those courts.

modification to the Protective Order.<sup>23</sup>

### III. CONCLUSION

The Canadian Plaintiffs meet the criteria for permissive intervention and the Court accordingly will Grant that portion of the Canadian Plaintiffs' Motion that seeks intervention in the Vitamins litigation at this time. However, the Court will defer ruling on the portion of Canadian Plaintiffs' Motion seeking modification to the Protective Order, access to Verilaw, and attendance at depositions of the Niacin Defendants until the appeals process in the Canadian courts is exhausted or otherwise concluded, or until such time as this Court determines that it is otherwise appropriate to decide these issues. An Order will accompany this Opinion.

March 19<sup>70</sup>, 2001

  
Thomas F. Hogan  
United States District Judge

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<sup>23</sup> Although not ruling on these issues at this time, the Court notes that in regard to Verilaw access, the Court is chiefly concerned with granting access under the current site setup. Specifically, granting the Canadian Plaintiffs access to Verilaw at this time would give them access not only to documents pertaining to the specified Niacin Defendants, but also to the entire site.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**FILED**

**MAR 19 2001**

NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

IN RE:  
VITAMINS ANTITRUST LITIGATION

v.

THIS DOCUMENT RELATES TO:  
ALL ACTIONS.

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) Misc. No. 99-197 (TFH)  
) MDL No. 1285  
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**ORDER Re: CANADIAN PLAINTIFFS' MOTION TO INTERVENE**

In accordance with the accompanying Memorandum Opinion, it is hereby:

**ORDERED** that Canadian Plaintiffs' Motion to Intervene is **GRANTED** in part, to the extent that it seeks limited intervention in the Vitamins litigation pending before this Court. However, the Court will **DEFER** ruling on the portion of the Motion to Intervene seeking modification to the Court's November 3, 1999 Protective Order, access to Verilaw, and attendance at depositions of the Niacin Defendants until the appeals process in the Canadian courts is exhausted or otherwise concluded, or until such time as this Court determines that it is otherwise appropriate to decide these issues. It is further

**ORDERED** that Defendants' Motion for a stay is **DENIED** in part to the extent that it seeks to have this Court enjoin Canadian Plaintiffs' intervention in the Vitamins action, but **GRANTED** in part to the extent that the Court defers ruling on the remainder of the Canadian Plaintiffs' Motion.

March 19<sup>th</sup>, 2001



Thomas F. Hogan  
United States District Judge

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