

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)
VITAMINS ANTITRUST LITIGATION)

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

THIS DOCUMENT RELATES TO:)
ALL ACTIONS.)

FILED

DEC 18 2002

ORDER
Re: Bioproducts' Rule 53 Objection

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

In accordance with the accompanying Memorandum Opinion adopting the Special Master's Revised Report and Recommendations Respecting Plaintiffs' Joint Motion to Compel Bioproducts to Produce its Governmental Submissions Report and Recommendation, it is hereby

ORDERED that Plaintiffs' Joint Motion to Compel Bioproducts to Produce its Governmental Submissions is hereby **GRANTED IN PART** and **DENIED IN PART**. It is further hereby

ORDERED that Defendant Bioproducts produce (1) its submissions to the European Commission, and (2) the following documents submitted to Canada:

Ten letters, including some duplicates, of counsel for Bioproducts to counsel for Canada, concerning the terms on which Bioproducts would meet with Canada's Competition and Consumer Law Division to proffer information in support of a request for immunity (Bates Nos. 1-15, 143);

A 15-page "Bioproducts Incorporated Timeline (Revised 5.25.99)" identifying separately for each listed meeting during the years 1991 through 1998, the date, location, attendees, subjects discussed, and documents relating thereto, along with miscellaneous comments (Bates Nos. 16-30);

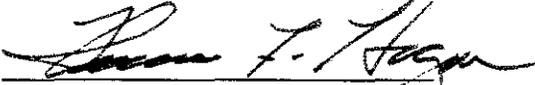
Two letters of Bioproducts' counsel to counsel for Canada relating to transmittal of Bioproducts' documents turned over to the United States Department of Justice (Bates Nos. 38-39 and an unnumbered page);

Four letters of Bioproducts' counsel transmitting to counsel for Canada executed copies of an agreement with the Canadian Commissioner of Competition respecting the terms for interview of Mr. T. Sigler, and employee of Bioproducts (Bates Nos. 53-58, 124-30); and

A letter of Bioproducts counsel to counsel for Canada enclosing execution copies of the "Agreed Statement of Facts" signed by the President and CEO of Bioproducts and counsel for the Attorney General of Canada (Bates Nos. 135-42).

SO ORDERED.

December 18, 2002


Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)
VITAMINS ANTITRUST LITIGATION)
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) Misc. No. 99-197 (TFH)
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MEMORANDUM OPINION
Re: Bioproducts' Rule 53 Objection

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

Pending before the Court are Rule 53 Objections to the Special Master's Revised Report and Recommendations Respecting Plaintiffs' Joint Motion to Compel Bioproducts to Produce its Governmental Submissions ("September 17 Report").¹ After carefully considering the Special Master's Report, the objections filed by the defendant and by amicus curiae, the plaintiffs' responses, and the entire record herein, the Court will adopt the Special Master's Report and Recommendations.

Specifically, the Court will deny plaintiffs' motion to the extent that it seeks to compel production of certain documents submitted to Canada, including the executed Plea Agreement, and drafts of the Plea Agreement, drafts of Agreed Statement of Facts, drafts of the Indictment, drafts of the Prohibition Order, drafts of the Immunity Letter, and drafts of the cover letter to the Agreed Statement of Facts, as well as the letters of Bioproducts' counsel commenting on these drafts. The Court will also deny the plaintiffs' motion to the extent that it seeks an award of fees

¹The Special Master submitted an initial report on September 17, 2002. The Special Master submitted a Revised Report and Recommendation on September 27, to insert the words "Special Master" on page 40, where they had been omitted by mistake.

and costs. The Court will grant plaintiffs' motion in part, specifically with respect to the remainder of the documents submitted to Canada, and with respect to all documents submitted to the European Commission.

I. BACKGROUND

In his September 17, 2002 Report and Recommendation, the Special Master laid out in exhaustive detail the background of the plaintiffs' motion underlying the current Rule 53 Objection. In brief, on November 30, 2001, plaintiffs served discovery requests on all defendants which included requests for all documents produced to the United States Department of Justice and law enforcement agencies in Canada, Europe, Japan, or elsewhere. For various reasons including the pendency of a ruling by the Court regarding similar submission of documents by foreign defendants to foreign governmental officials, Bioproducts did not produce the documents at issue. After the Court's April 4, 2002 ruling ordered production of similar submissions by foreign defendants, on April 5, 2002, plaintiffs filed the instant motion to compel Bioproducts to produce its governmental submissions.

Because the current discovery request raises issues related to those which have been the subject of extensive briefing by the parties, a report by the Special Master, and the April 4, 2002 ruling of the Court, a review of the interrelated procedural histories is in order. While less thorough than that rendered by the Special Master, the background of the motion is substantially as follows.

A. Discovery of Foreign Defendants' Governmental Submissions

On January 23, 2001, plaintiffs served discovery requests on foreign defendants

which included requests for documents produced to the United States Department of Justice ("DOJ") and law enforcement agencies in Canada, Europe, Japan or elsewhere ("Governmental Submissions"). In response, 13 foreign defendants moved for a protective order narrowing the scope of the requests and requiring plaintiffs to proceed under the Hague Convention. On April 23, 2001, the Special Master issued a Report recommending approval of certain of the discovery requests, including requests for Governmental Submissions. That report was subsequently amended, pursuant to stipulation between the parties, to provide that the requests for Governmental Submissions be deferred without prejudice.

On June 20, 2001, the Court affirmed the report in relevant part, and pursuant to stipulation, ordered that the defendants produce privilege logs for all "core conspiracy" documents withheld on privilege grounds. On August 17, 2001, again pursuant to stipulation of the parties, the Court issued a facilitating order clarifying that the defendants' privilege logs should include all "Written Substantive Communications" from such foreign defendants to United States Department of Justice, the European Commission ("EC"), and similar foreign law enforcement agencies. Each of the foreign defendants subsequently produced a log detailing its submissions.

Pursuant to a January 11, 2002 Report and Recommendation of the Special Master ("January 11 Report"), the foreign defendants produced all documents which had been submitted to Australia, Brazil, Japan, New Zealand, and Switzerland or the European Commission. According to the logs produced by the foreign defendants, these were (with the addition of Mexico) all of the governmental authorities to whom submissions had been made. In

recommending that the submissions be produced, the Special Master considered arguments that submissions to Australia, Japan, and the EC were made pursuant to specific assurances from governmental authorities of those countries that the documents would be held in confidence. The Special Master also considered arguments that considerations of international comity warranted shielding the submissions from disclosure. In addition to exhaustive briefing on the issues, the defendants included letters between the parties and certain officials representing the EC and Australia, expressing their concerns regarding production of voluntary submissions to those bodies. After full consideration, the Special Master concluded that concerns raised by the EC and Australia were outweighed by the United States' interests in open discovery and enforcement of its antitrust laws. On April 4, 2002, the Court affirmed the Special Master's January 11 Report.

B. Discovery of Bioproducts' Governmental Submissions

Shortly before the Special Master's January 11 Report, on November 30, 2001, plaintiffs' served the initial discovery request underlying the current motion. Plaintiffs served the request on all defendants, including Bioproducts, seeking documents produced to the United States DOJ and law enforcement agencies in Canada, Europe, Japan or elsewhere. Bioproducts objected to certain of those requests due to prior agreements between the parties that outside counsel files need not be searched. On January 16, 2002, plaintiffs requested by letter that Bioproducts comply with the January 11 Report and produce their Governmental Submissions. Bioproducts responded that plaintiffs' motion to compel, which resulted in the January 11 Report, was not filed against Bioproducts, and that because the January 11 Report was under

consideration by the Court, response at that time would be premature. As noted above, the Court affirmed the January 11 Report in an order dated April 4, 2002.

On April 5, 2002, plaintiffs filed the motion to compel at issue before the Court, seeking production Bioproducts' "written submissions to Australia, Brazil, Japan, New Zealand, Switzerland, the EC or any agency of the United States Government consistent with the January 11 Report and the April 4, 2002 Order of this Court." On July 31, 2002, following a hearing by the Special Master, plaintiffs filed an amended motion, adding Canada to the list of governments identified in the original motion. Having agreed to produce submissions to the DOJ and stating that it would defer to the Special Master's and the Court's rulings on intervention by the EC, Bioproducts filed an opposition representing that it had only made submissions to the United States, the EC, and Canada. Asserting that it had learned on the day of filing of plaintiffs' request respecting submissions to Canada, Bioproducts explained that such submissions had not been included in a privilege log due to the parties' prior agreement that it would not be necessary to search outside counsel's files for privileged documents and that any such documents need not be included in a privilege log.

On April 24, 2002, plaintiffs filed their reply in support of their joint motion to compel Bioproducts to produce its governmental submissions. On May 8, 2002, Canada filed an amicus curiae brief in opposition to plaintiffs' joint motion. On May 30, 2002, plaintiffs filed a response. Canada filed a motion for leave to reply to plaintiffs' response, along with its reply, on June 20, 2002. On July 1, 2002, plaintiffs filed an opposition to Canada's motion for leave to reply and a surreply in support of their motion to compel.

On May 16, 2002, the EC, appearing as amicus curiae, filed an opposition to plaintiffs' motion to the extent that it seeks to compel Bioproducts to produce its submissions to the EC. The plaintiffs filed a response on May 31, 2002. On August 1, 2002, the EC's counsel submitted a letter to the Special Master responding to questions posed at the July 29, 2002 hearing. On August 9, 2002, plaintiffs moved for leave to respond to the EC's August 1, 2002 letter and to supplement the record, to which the EC responded by memorandum of August 14, 2002.²

The Special Master heard oral argument on all issues related to plaintiffs' motion on July 29, 2002. On August 8, 2002, at the request of Canada and without objection by the parties, Bioproducts presented documents submitted to Canada for in camera review by the Special Master. Upon completion of the review, and after consideration of the pleadings, the Special Master submitted a recommendation with respect to the foregoing.

In the written report dated September 17, 2002, the Special Master concluded that, with respect to Bioproducts' submissions to the EC, the April 4, 2002 ruling represents law of the case on the issue. The Special Master considered arguments asserted by the EC in its amicus pleadings, but determined that the EC's arguments did not justify departure from law of the case, particularly given that the prior rulings of the Court were based on a comity analysis and a consideration of investigative privilege conducted by the Special Master. As such, the EC's arguments presented an insufficient showing of intervening change in the law or that the January 11 Report was erroneous or would work a manifest injustice.

²As none of the parties has objected, the Court adopts the Special Master's recommendation with respect to the August 1, 2002 letter, Plaintiff's reply memorandum of August 9, 2002, and the EC's response of August 14, 2002, and receives them for the record.

With respect to the defendant's submission to Canada, the Special Master concluded that plaintiffs' failure to specifically identify Canada in its motion was technical at most, and non-prejudicial given that the defendant responded as if Canada were included in the original motion, and defendant, plaintiffs, and representatives of Canada have been heard on this issue. The Special Master nonetheless concluded that Bioproducts' omission of its submissions to Canada on its privilege log did not result in a waiver of its right to object to the production of the documents, given the prior agreement between the parties that outside counsel files need not be searched.

Having reviewed in camera the documents Bioproducts submitted to Canada, the Special Master concluded that to the extent that a portion of the 144 documents represent attorney work product, for the reasons spelled out in the Special Master's January 11, 2002 report, such privilege was waived upon voluntary submission of the documents to Canada. The Special Master further conducted a comity review and found that the balance weighed slightly in favor of disclosure with respect to the first four of the five elements of the comity analysis. However, the Special Master found the fifth element of the analysis to be dispositive to the overall comity balance. The Special Master therefore recommended that those documents that would reveal Canada's negotiating positions and potentially affect Canada's ability to negotiate settlements with other potentially cooperating parties should be protected from disclosure. Specifically, the Special Maser found that the executed Plea Agreement, and drafts of the Plea Agreement, Agreed Statement of Facts, Indictment, Prohibition Order, Immunity Letter, and cover letter to the Agreed Statement of Facts, as well as the letters of Bioproducts' counsel commenting on these

drafts, should be protected from disclosure. The Special Master concluded that the balance favored production with respect to the remaining documents, which did not reveal Canada's negotiating position. Finally, the Special Master recommended denial of plaintiffs' request for an award of fees and costs in conjunction with the motion. The Special Master concluded that the issues raised by Bioproducts and Canada in opposition to plaintiffs' motion were significant and deserved consideration, and that the parties attempted negotiation with respect to Bioproducts' European submissions at the time the motion was filed likewise did not warrant an award of fees or costs.

On September 23, 2002, Bioproducts filed Rule 53 Objections to the Special Master's September 17 Report, objecting to the Special Master's recommendation with respect to submissions to Canada. Plaintiffs responded in turn. On September 24, 2002, the EC moved for Leave to File Rule 53 Objection to the September 17 Report. Plaintiffs filed an objection to the EC's motion on the grounds that as amicus, the EC lacked standing to object, and that there was no live controversy between the parties with respect to Defendant's submissions to the EC given Bioproducts' failure to object to that portion of the September 17 Report. In its September 26, 2002 reply, the EC argued that the Court's grant of amicus status granted them the right to file objections, and that their Rule 53 Objection was timely filed, rendering Plaintiffs' objections moot. Plaintiffs filed a Response to the EC's Rule 53 Objection on October 10, 2002.

Subsequent to the submission of the September 17 Report and the Rule 53 Objections thereto, the Court received the EC's Notice of Supplemental Authority, in which they asserted

that a July 29, 2002 order issued in the In re Methionine Antitrust Litigation³ was relevant to the motion before the Court as it addressed the issue of discoverability of documents submitted to the EC under its leniency program. Plaintiffs filed a motion for leave to respond to the submission of the Methionine order, arguing that Bioproducts had previously submitted the June 17, 2002 Report and Recommendation of the Special Master with respect to submissions to the EC in the Methionine case, which the July 29, 2002 order affirmed without opinion.

II. DISCUSSION

Pending before the Court is the Rule 53 Objection of Bioproducts to the Special Master's September 17, 2002 Report and Recommendation ("September 17 Report") concerning plaintiffs motion to compel Bioproducts to produce materials submitted to the the EC and to Canada.⁴ The European Commission and Canada participated as amicus curiae⁵ with respect to the discovery motion, and participated in briefing and in oral arguments before the Special Master. The EC further filed a Rule 53 Objection to the Special Master's report and a Notice of Supplemental Authority, both of which were opposed by plaintiffs.

A. The European Commission

³In re Methinine Antitrust Litigation is a multidistrict litigation, MDL No. 1311, pending in the Northern District of California. Case No. C-99-3491 CRB (JCS).

⁴As noted in the Background section, supra, defendants agreed to produce documents submitted to the United States DOJ.

⁵On May 6, 2002, the Court granted the EC's motion for leave to appear as amicus curiae. On the same date, the Court also granted leave for Canada to appear as amicus curiae, pursuant to stipulation by the parties.

Neither the plaintiffs nor defendant Bioproducts contest the September 17 Report finding that Bioproducts should produce its submission to the EC. However, the EC petitioned the Court for leave to file a Rule 53 Objection, and has submitted the same, as well as supplemental authority for the Court's consideration. Plaintiffs respond that the EC does not have standing to object to the Special Master's report.

1. Rule 53 Objection of Amicus Curiae

The participation of amicus curiae, including the fact, extent, and manner of participation, is within the discretion of the trial court. See Pennsylvania Environmental Defense Foundation v. Bellefonte Borough, 718 F. Supp. 431, 434 (M.D. Pa.1989); United States v. Gotti, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991); Leigh v. Engle, 535 F.Supp. 418, 420 (N.D. Ill.1982). The Court will therefore grant the EC's motion to file a Rule 53 Objection. Plaintiffs argue that amicus curiae have no standing to oppose, and there is some precedent to support such arguments. See Wyatt by and through Rawlins v. Hanan, 868 F. Supp. 1356, 1358-59 (M.D. Ala. 1994) (recognizing that bright line exists between amici and named parties, and that amici have no right to initiate, extend, or enlarge issues, nor to appeal or dismiss issues). However, the EC's participation in this case is consistent with accepted roles for an amicus curiae, as the EC has "interest in some other case that may be affected by decision in present case, . . . [and] has unique information or perspective that can help court beyond help that lawyers for parties are able to provide." Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1997); see also Fed. R. App. P. 29. Further, to the extent that the EC went beyond its proper role, the Court may protect the interests of the parties. See Concerned Area Residents for The Environment v.

Southview Farm, 834 F.Supp. 1410, 1413 (W.D.N.Y. 1993). Finally, the Court concludes that the concerns of the EC should be addressed out of respect for the EC as a foreign sovereign and as an aid to the Court. Accordingly, the Court grants the EC's request to file a Rule 53 Objection, and has considered the objection in reaching this opinion.

2. Applicability of Law of the Case

As the Special Master noted, both the Court and the Special Master have previously considered whether voluntary submissions to the EC by defendants in this case are discoverable, and have concluded that they were. See September 17 Report at 37. The Special Master notes that the January 11 Report was informed by substantial briefing by the parties, which included affidavits from attorneys knowledgeable about EC law respecting competition and the EC's leniency program. Id. at 37. The recommendation in the January 11 Report was also reached after consideration of a letter solicited by defendants from Georg De Bronett, Head of EC's Cartel Unit. Id. at 37-38. The Special Master further notes that the January 11 Report was informed by the results of a full comity analysis in which the EC's concern, that the effectiveness of the EC antitrust procedures would be undermined, was given full consideration. Id. at 38. This Court reviewed the entire record and the Special Master's recommendation, and affirmed the January 11 Report in an order dated April 4, 2002.

In considering the present motion, the Special Master considered the EC's arguments that "the legal and factual questions presented by this motion merit a different consideration from those previously before the Special Master." September 17 Report at 39 (quoting EC Mem. at 6). The EC argued that the legal and factual issues merited "a different consideration" because the

EC “as a public body did not previously file an amicus curiae brief advancing its belief that maintaining confidentiality is critical for the effectiveness of the leniency program.” Id. at 39-40 (quoting EC Mem. at 6). The Special Master considered the EC’s additional contention that opinions expressed by Mr. De Bronett did not invoke any privilege, nor did he have the authority to speak for the EC. Nonetheless, the Special Master found that the distinctions asserted by the EC did not justify a departure from law of the case.

Prior rulings are law of the case unless “there is an intervening change in the law or if the previous decision was ‘clearly erroneous and would work manifest injustice’” Kimberlin v. Quinlan, 199 F.3d 496, 500 (D.C. Cir. 1999) (citation omitted), cert. denied, 531 U.S. 871 (2000). The Special Master recognized that this standard would apply to the issue of discoverability of documents submitted to the EC, given the Court’s April 4, 2002 ruling. Still the Special Master considered the arguments advanced by the EC, as noted above, which do not address either intervening change of law or the erroneous or manifestly unjust nature of the Court’s prior ruling. September 17 Report at 38-40.

Applying the Kimberlin standard, the Special Master found that law of the case, in this instance, was grounded in the January 11 Report and the Court’s April 4, 2002, Order, which were based on a full comity analysis. Id. at 40. The comity analysis conducted by the Special Master included consideration of the interests of the EC as expressed by Mr. De Bronet, acting head of the EC’s Cartel unit, in a letter which was copied to three high-ranking EC officials. Id. As the Special Master points out, it is therefore unreasonable to believe that the EC was unaware of Mr. De Bronet’s letters, and the EC did not repudiate them either at the time that a Rule 53

Objection was filed with respect to the January 11 Report nor at any time in connection with the current motion. The Special Master accordingly found that Mr. De Bronet had apparent authority sufficient to bind the EC for these purposes. Id. at 40.

The Special Master next considered and rejected the EC's assertions of investigative privilege, which it contended were not invoked by Mr. De Bronet. Id. at 41. The Special Master noted that assertions of investigative privilege were invoked by defendants and rejected in the January 11 Report. Id. While acknowledging that the decision in that report was based on assertion of the privilege by private parties, and that the current invocation is on behalf of the government agency, the Special Master found that this distinction was insufficient to require reconsideration of that privilege. Id. The Special Master pointed out that the scope of the investigative privilege was fully considered in the January 11 Report, and that the views of the EC, as expressed by Mr. De Bronet, were given full consideration in reaching that conclusion. Further, the Special Master found that the EC had failed to provide support for an argument that a governmental authority might invoke privilege with respect to documents in the hands of a third party. Id. Conceding that there was no dispositive precedent on the matter, the Special Master pointed out that the relevant case law takes the opposite view, and holds that privilege may only be invoked by a governmental authority with respect to documents in its possession. Id. at 41-42 (citing In re Sealed Case, 856 F.2d 268, 261 (D.C. Cir. 1988); In re United Telecomms., Inc. Sec. Litig., 799 F. Supp. 1206, 1209 (D.D.C. 1992)). For all of the foregoing reasons, the Special Master concluded that there was insufficient reason to find that there had been any "intervening change in the law" or that the January 11 Report and subsequent April 4,

2002, Order were “clearly erroneous and would work a manifest injustice.” Id. at 42. The Special Master further concluded that the EC could not invoke investigative privilege to protect documents in the hands of Bioproducts. Id.

The EC contends that Special Master’s analysis was flawed in two general ways. First, the EC argues that the EC’s interests in non-disclosure did not receive a thorough analysis due to the application of law of the case doctrine. Second, the EC argues that the Special Master’s analysis failed to give sufficient consideration to the EC’s interests in nondisclosure in balancing the EC’s interests against the Plaintiffs’ interest in discovery. The EC suggests that the Special Master failed to address potential harm to the EC’s ongoing investigations and to its written proffer procedure, and fails to address the EC’s contention that the plaintiffs will not be prejudiced if their motion is denied.

Specifically, the EC argues that law of the case should not apply given that the EC did not receive an opportunity to appeal the January 11 Report. The EC characterizes the doctrine as discretionary, and asserts further that the EC’s appearance as amicus curiae to represent its interest in ongoing investigation, and the EC’s contention that Mr. De Bronet did not have actual authority to properly invoke EC privileges, both signify that the EC should have the right to have its arguments addressed on their merits.

While it is true that law of the case doctrine applies only where “a legal decision made at one stage of the litigation [went] unchallenged in a subsequent appeal when the opportunity to do so existed,” Kimberlin, 199 F.3d at 500, the Court agrees with the plaintiffs that this principle does not sufficiently express the entirety of the doctrine as described by Kimberlin. That

precedent also provides that “the same issue presented a second time in the same case in the same court should lead to the same result.” Id. (emphasis in original). Further, as plaintiffs point out, neither Bioproducts nor the EC were party to the prior motion, a fact which has necessitated the current round of briefing. Pls. Resp. to the EC’s Rule 53 Obj. to the September 17 Report (“Pls. EC Resp.”) at 7. While the Court suspects that Bioproducts’ failure to object to the instant report is likely due to in part to deference to the EC’s appearance as amicus curiae and the EC’s right to set forth its position,⁶ the Court agrees with the Special Master that while the EC’s appearance distinguishes the circumstances to some degree, the concerns raised by the EC in its pleadings and in the current objection are insufficient to justify a departure from law of the case. Further, the Court agrees that the EC’s asserted interests and privileges were considered in the January 11 Report, and that the EC’s official position is not sufficiently different as to change the analysis. As the Special Master noted, the January 11 Report was informed not only by the letter by Mr. De Bronet, but also by affidavits from attorneys knowledgeable about EC law respecting competition and the EC’s leniency program. September 17 Report at 37. The earlier report and the Court’s April 4, 2002 ruling were the result of a full comity analysis in which the EC’s concern that the effectiveness of the EU antitrust procedures would be undermined was given full consideration. Id. at 38.

The EC’s currently argued distinction, that Mr. De Bronet was authorized to send the letter to a private company, but that it repudiates any notion that Mr. De Bronet had authority to

⁶As the Special Master notes in his report, Bioproducts did not brief any issues relating to its submissions to the EC after learning that the EC might intervene, “[s]o as not to interfere with any rights or privileges of the EC but also not to burden the Court and the parties with potentially unnecessary briefing.” September 17 Report at 10 (quoting Bioproducts. Opp’n. at 2 n.1).

represent the EC in court proceedings, is unpersuasive. Defendants' request for guidance from the EC regarding the potential impact of disclosure of its submissions to the EC's leniency program makes clear that any response would be offered by the defendant for consideration by a United States court. See Pls. EC Resp., Exh. 1. The resulting letter by Mr. De Bronet was copied to three high-ranking EC officials. The Special Master's and the Court's reliance on Mr. De Bronet's apparent authority was reasonable for all of the reasons set forth by the Special Master and herein.

The EC further contends that the recommendation in the September 17 Report is flawed because the Special Master failed to address each of its arguments regarding potential harm to the EC's ongoing investigations and its written proffer procedure, and the contention that the plaintiffs will not be prejudiced if their motion is denied. The Court disagrees with this analysis.

As plaintiffs point out, the Special Master was clearly aware of the EC's arguments, and devoted a considerable portion of the September 17 Report to detailing the contents of the EC's pleadings. Pls. EC Resp. at 12.⁷ Plaintiffs further offer rebuttals to each of the arguments, reiterating responses included in earlier briefs, all of which were also included in the Special Master's report. While perhaps not at the length that the EC would have preferred, the Special Master rejected each of the arguments as insufficient to justify overruling law of the case.

As plaintiffs point out, courts consider the "risk of jeopardizing an ongoing investigation"

⁷In a footnote, plaintiffs' provide the following particularized account of where such arguments appear: "See September 17 Report at 30, 32, 33, 34, 35 n.27 (summarizing arguments regarding ongoing investigations); 31, 39 n.32 (oral versus written testimony); 32, 33, 35 n.27 (plaintiffs' ability to get information from Bioproducts from other sources)." Pls. EC Resp. at 12 n.10. Plaintiffs also point out that no authority provides that the Special Master must explicitly make a finding as to each contention that the EC made. Id.

in connection with the investigative privilege. The Special Master considered and rejected the EC's assertion of investigative privilege. The length of the Special Master's analysis reflects the fact that the Special Master and the Court have given assertions of investigative privilege prior consideration, and that such consideration was given in situations where investigations were ongoing. As plaintiffs note, investigations in the EC and in the DOJ were ongoing at the time of the Court's April 4, 2002 Opinion. Pls. EC Resp. at 10. More importantly, however, claims that ongoing investigations will be harmed by disclosure are undermined by the EC's admitted rule of allowing access to files, and the potential for publication of such voluntary submissions by the EC. September 17 Report at 57 (noting that these facts distinguish submissions to Canada from those submitted to the EC).

The Special Master also considered the EC's argument that the EC's lenience program policy of requiring written submissions, as opposed to oral submissions allowed by the DOJ, was not clearly outlined in the letter from Mr. De Bronet and thus did not received full consideration. Id. at 39 n.32 (citing Arg. at 209-11). As plaintiffs point out and the Special Master's citation attests, the issue of whether this difference in procedure places the EC at a disadvantage with respect to the proportion of governmental submissions that will be produced was argued by EC counsel at oral argument. The Special Master presided at that oral argument, and referred to the transcript in his ultimate decision that this difference was insufficient to render the January 11 Report clearly erroneous, making clear that the argument received consideration. Id. The Court agrees with the Special Master's assessment of this issue, and therefore, rejects the EC's contention that the Special Master should have addressed more fully each proffered argument.

Finally, the Court agrees with plaintiffs that the fact that Bioproducts submissions to the EC were not covered by either work product or investigatory privileges rendered the documents producible without a showing or analysis of need on the part of plaintiffs. Pls. EC Resp. at 12. Further, as both the Court and the Special Master have witnessed repeatedly in these proceedings, Bioproducts 30(b)(6) witnesses have been unable to testify regarding such communications and witnesses having knowledge have refused to testify on Fifth Amendment grounds. The Court therefore finds that the Special Master's omission of such an analysis was warranted.

While the EC has submitted an order rendered by the United States District Court for the Northern District of California in In re Methionine Antitrust Litigation⁸ as supplemental authority which constitutes a change in the law, the Court finds this ruling to be insufficient to justify a departure from law of the case in this instance. The Order in Methionine adopts without discussion the Report and Recommendation of a Special Master who notes that there are procedural and substantive differences between the Vitamins case and the Methionine case. Further, the Methionine Report and Recommendation was in the record and reviewed by the Special Master.⁹ The Special Master gave full consideration to the arguments raised by the EC in its submissions as amicus curiae, both with respect to the Kimberlin analysis and otherwise, and found that the EC had not shown that the April 4, 2002 Order compelling production of documents submitted to the EC was "clearly erroneous and would work a manifest injustice."

⁸See July 29, 2002 Order, supra note 4.

⁹See Supplemental Authority in Support of Bioproducts Incorporated's Opposition to Plaintiffs Joint Motion to Compel Bioproducts to Produce its Governmental Submissions (June 26, 2002). Plaintiffs also filed an "Unobjected-To Motion for Leave to Respond" regarding Bioproducts submission of the Methionine Report and Recommendation.

The Court agrees with the Special Master. Accordingly, the Court finds that Bioproducts must produce its submissions to the EC.

B. Canada

1. Plaintiffs Amended Motion

Rule 6(b) of the Federal Rules of Civil Procedure provides in pertinent part that when “an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.” Fed. R. Civ. P. 6(b). As the Supreme Court has suggested, “[t]he determination of ‘excusable neglect’ is ‘at bottom an equitable one taking account of all relevant circumstances surrounding the party’s omission . . . [including] . . . the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.’” Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380, 395 (1993); see also Ramirez v. District of Columbia, No. 99-803 (TFH), 2000 U.S. Dist. LEXIS 6146, at *3 (D.D.C. Apr. 28, 2000).

The Special Master considered the foregoing in reaching his conclusion that plaintiffs’ failure to specifically identify Canada in its motion was technical at most and constituted excusable neglect. September 17 Report at 44-45. The Special Master therefore found that receipt of the amended motion was warranted despite plaintiffs filing after the April 8, 2002, filing deadline.

As the Special Master points out, while the first paragraph of plaintiff's motion did not list Canada in the string of governments identified, the "WHEREFORE" paragraph referred to "all of its government submissions," and the November 30, 2001 discovery request called for all documents produced to "law enforcement agencies . . . in Canada . . . and elsewhere." September 17 Report at 44. Further, as the Special Master points out, pursuant to an agreement that outside counsel files not be searched, Bioproducts did not include submissions to Canada in its privilege log, and thus plaintiffs were not aware of the submissions. *Id.* at 44-45. Therefore, plaintiffs' failure to include Canada was beyond their control.¹⁰ Plaintiffs informed Bioproducts it would seek the materials immediately on learning of their existence, and amended their motion two days after the July 29, 2002 hearing at which the Special Master extended an invitation to do so. *Id.* (citing Arg. at 88, 253). As the Special Master points out, the foregoing suggest that plaintiffs acted in good faith. Further, Bioproducts responded as if Canada were included in the original motion, and both Bioproducts and Canada, as amicus, have been heard regarding the government submissions.¹¹ Thus, allowing plaintiffs to amend their motion will not substantially

¹⁰The Special Master notes that the record is confusing regarding whether plaintiffs were on notice before filing their motion that the defendants other than Bioproducts had made submissions to Canada. The Court agrees that any such notice would not constitute knowledge with regard to Bioproducts.

¹¹Pursuant to stipulation of the parties, the Court approved Canada's appearance as an amicus curiae. See Order of May 6, 2002. On May 8, 2002, Canada filed an amicus brief in opposition to plaintiffs' joint motion. See Brief of Amicus Curiae The Government of Canada in Opposition to Plaintiffs' Joint Motion to Compel Bioproducts to Produce Its Governmental Submissions (May 9, 2002). Canada further filed a motion for leave to reply to plaintiffs' response, along with its reply, on June 20, 2002. See Government of Canada's Reply to Plaintiffs' Response to Brief of Amicus Curiae the Government of Canada in Opposition to Plaintiffs' Joint Motion to Compel Bioproducts to Produce its Government Submissions (June 25, 2002). The Special Master considered Canada's reply in the September 17 Report, at 27-29, and the Court has considered it in reaching this Opinion. Accordingly, the Court will grant

impair these proceedings.

The defendant argues that the Special Master either incorrectly reads plaintiffs' motion as including Canada, or improperly permitted plaintiffs to submit an amended motion to correct without a proper motion for leave and required showing under Rule 6(b). Def. Bioproducts Inc.'s Rule 53 Obj. ("Def. Obj.") at 2-3. However, these arguments are summary statements made without support, and the Court finds them unpersuasive.

The Court agrees with the Special Master that the foregoing analysis demonstrates a lack of prejudice to the defendant or to the interest of efficient judicial administration, and demonstrates the good faith of plaintiffs, as required under Rule 6(b). Fed. R. Civ. P. 6(b). Plaintiffs' lacked notice that Bioproducts had made submissions to Canada, and the filing of the amended motion timely followed an invitation to file extended by the Special Master. Therefore, there is no compelling reason to find that it is outside the discretion of the Court to accept plaintiffs' amended motion, despite plaintiffs' failure to file a separate motion for leave to amend. See, e.g. Nelle v. Cilotti, 161 F.R.D. 568, 570 (E.D. Pa. 1993) (finding that although plaintiff failed to make this motion, order dismissing matter for lack of prosecution would be vacated where plaintiff demonstrated good faith sufficient to grant Rule 6(b)(2) motion); Blissett v. Casey, 969 F.Supp. 118, 124 (N.D.N.Y.,1997) (finding that ignorance of the Federal Rules may never be the basis of excusable neglect, yet finding that equitable nature of Rule 6(b) allowed for admission where good faith was present).

2. Comity Analysis:

Section 442(1)(c) of the Third Restatement of Foreign Relations Law provides: "In
Canada's Motion for Leave to Reply.

deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account [1] the importance to the investigation or litigation of the documents or other information requested; [2] the degree of specificity of the request; [3] whether the information originated in the United States; [4] the availability of alternative means of securing the information; and [5] the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.” Restatement (Third) of Foreign Relations Law of the United States § 442(1)(c) (1987), at 348.

Having conducted an in camera review of Bioproducts’ submissions to Canada at the unopposed request of Canada, the Special Master conducted a comity analysis specific to those documents. The Special Master’s collectively considered all of the documents with respect to the first four factors set forth in the comity analysis. With respect to the fifth factor, or the balance between United States and Canadian interests in disclosure or nondisclosure, the Special Master conducted a review focusing on each of the six categories of documents contained in Bioproducts’ Canadian submissions.¹²

The Special Master found that the balance weighed in favor of disclosure when considering the first four factors of the comity analysis. The Special Master found that the

¹²The Special Master considered and rejected arguments (1) that a comity analysis should not be applied because Defendant Bioproducts is a United States corporation, and the submissions were likely created in or now located in the United States, making certain of the language in the Restatement arguably inapplicable, and (2) that the Court need not consider Canadian privileges as the submissions “touch base” with the United States. September 17 Report at 48-49.

documents were important to plaintiffs for purposes of the first and fourth factors, because the deadline for service of new discovery has closed, Bioproducts' knowledgeable witnesses have invoked their Fifth Amendment rights, and their 30(b)(6) witness was ignorant regarding the Defendant's participation in the conspiracy. September 17 Report at 50. Further, as this Court has found in previous Opinions, many of the participants in the alleged conspiracy avoided keeping contemporaneous records of their activities or destroyed existing records, leaving plaintiffs' with no alternative means for obtaining the information. Id.

While the plaintiff's request lacks specificity in that it is a general request for documents produced to law enforcement agencies in Canada, the Special Master found that this was as specific as reasonably could be expected for purposes of the second factor, given that Bioproducts did not produce a log of its governmental submissions. Id. at 51. As to the third factor, the Special Master found that it weighed modestly in favor of disclosure, as at least some of the documents appeared to have originated in the United States on in camera review, and those that originated in Canada were copied to United States Counsel. Further, the Special Master considered that the documents were communicated by counsel for a United States corporation and concerned an alleged conspiracy affecting the North America market for vitamins. Id. at 51.

However, the Special Master found that the fifth factor, the balance of the United States' interest in discovery and Canada's interest in noncompliance, was determinative with respect to ultimate balance of the comity analysis. Id. The Special Master conducted a separate analysis under the fifth factor with respect to each category of document and to the individual documents therein. The Special Master acknowledged that the documents would be protected from

disclosure under Canadian law as they were exchanged during settlement negotiations, and conducted his analysis under each category to ascertain whether, as Canada asserted, disclosure would substantially reveal Canada's negotiating positions and potentially affect Canada's ability to negotiate settlements with other potentially cooperating parties. Id. at 53.

Based on the in camera review of the documents, the Special Master found that the documents in categories (1), (4), and (5) were documents which did not discuss the alleged vitamins conspiracy. As such, the documents would fall into the category of "other written communications" as described in the Court's stipulated Order of August 17, 2001 and which, pursuant to the Court's Order of April 4, 2002, would be producible. The Special Master found that while some of the documents reflect positions of Bioproducts regarding terms on which it would provide information, documents and employees for interview by Canadian governmental agencies, the documents revealed "only marginal insight" into Canada's negotiating positions or tactics. Id. at 54. Canada's interest in nondisclosure being minimal, the Special Master found that the balance of the full comity analysis weighed in favor of disclosure of all documents in these categories. Id. at 55.

The Special Master reached a similar conclusion with respect to the 15-page Bioproducts Incorporated Timeline which comprises category (2) of Bioproducts' submissions to Canada. Id. The Special Master noted that there is no evidence on the document of why it was produced, who produced it, to whom it was submitted, or any other indication that would implicate the negotiating positions of the Attorney General of Canada. Id.

In contrast, the Special Master found that the majority of documents in categories (3) and

(6) refer to the alleged vitamins conspiracy. Id. As such, the documents would fall into the category of "written substantive communications" under the Court's stipulated Order of August 17, 2001. The Court's Order of April 4, 2002 ordered production of documents submitted to Australia and the EC which fell into this category. However, the Special Master found that sufficient concerns were raised with respect to the governmental submissions to Canada to distinguish certain of the documents from those considered in the January 11, 2002 Report, and ordered produced by the Court's April 4, 2002 ruling. Id. at 57.

The Special Master noted that most of the documents in these categories fall within the privilege for settlement negotiation materials recognized by the law of Canada. Id. at 56. Further, Canada agreed in writing that the executed Plea Agreement and other materials would be treated as confidential. With respect to the Plea Agreement, Canada further contends that it would never be made public. However, the Special Master noted that indictments and agreed statements of fact are, according to Counsel for Canada, made public once a plea agreement has been reached. Id. As to the prohibition orders or immunity letters, the record contains no indication of how such documents are treated under Canadian law. Id.

Given the foregoing, the Special Master concluded that the executed Plea Agreement, and drafts of the Plea Agreement, Agreed Statement of Facts, Indictment, Prohibition Order, Immunity Letter, and cover letter to the Agreed Statement of Facts, as well as the letters of Bioproducts' counsel commenting on these drafts and in some instances discussing other matters, should be protected from disclosure. Id. at 56-57. Noting that the issue is close, the Special Master concluded that such documents would reveal Canada's negotiating positions and

potentially interfere with Canada's power to settle antitrust cases within its borders. Id. at 57. The Special Master emphasized that Canada's written agreement to treat these documents as confidential and the absence of any evidence that the documents would be disclosed, absent an order from this Court, tip the balance of the comity analysis in favor of non-disclosure. Id. Further, these factors distinguish the issues here from those presented by the governmental submissions to Australia and the EC, which were subject to disclosure under the Court's April 4, 2002 Order.

The Special Master reached a different conclusion with respect to the executed Agreed Statement of Facts, which Canadian law and procedure provide will be made public once a plea is entered. September 17 Report at 57. The Special Master points out that Bioproducts agreed to enter a plea with the understanding that the Agreed Statement of Facts would be published, regardless of any other understanding regarding the confidentiality of other documents submitted to Canada. Id. Therefore Bioproducts could not reasonably believe that information contained in the Agreed Statement of Facts would remain confidential. The Special Master notes that the potential for ultimate publication by the EC of information provided by foreign defendants was one of the factors leading the Special Master and the Court to conclude that such documents were subject to disclosure in this action. Id. The Special Master therefore concluded that the full comity balance favored disclosure of the executed Agreed Statement of Facts. Id.

Finally, the Special Master considered Canada's request that any documents to be produced in this proceeding be reviewed and that any portions which would reveal the deliberative and investigatory processes of the Canadian government be redacted. Id. at 58. The

Special Master conducted such a review and concluded that, with respect to those documents to be produced, no such portions warrant redaction.

In its Rule 53 Objection, Bioproducts refers the Court to the grounds set forth in submissions to the Court by both itself and Canada, all of which were considered by the Special Master, with respect to its submissions to Canada. Def. Obj. at 2. Bioproducts adds that the September 17 Report found that the settlement privilege applied to all of the documents submitted to Canada, and urges the Court to consider the precedential ramifications of a subsequent finding that part of documents are producible notwithstanding those protections. Finally, Bioproducts argues that with respect to the Special Master's recommendation regarding the production of the executed Agreed Statements of Facts, the Special Master's conclusion is flawed in that it recommends production of that document "solely because of an expectation or anticipation that the documents would become public, when the document has not become public." Def. Obj. at 3.

Plaintiffs respond that the depth of the Special Master's comity analysis and specific consideration of the settlement negotiation privilege belie any such objections, and that the analysis is further consistent with conclusions reached regarding discovery of documents produced to the EC and Australia. Pls. Opp'n to Def. Rule 53 Obj. at 4-5.

The Court agrees with plaintiffs' assessment of the Special Master's analysis. The Special Master conducted a full comity review with respect to all of the factors set forth in the Restatement. The Special Master conducted the comity analysis after in camera review of the documents submitted by Bioproducts to the Canadian government, and made specific

determinations with respect to disclosure issues connected with each category of documents where such disclosure of the documents implicated the Canadian government's interest in protecting the viability of its practices and procedures.

As to Bioproducts' argument that the Special Master determined that the Agreed Statement of Facts was producible solely on the expectation that it will become public, the Court disagrees that this is an accurate representation of the Special Master's finding. The Special Master conducted a comity analysis of each category of documents with respect to all of the prongs set out in the Restatement, and found that where the interests of the government of Canada were not involved, the balance of the comity analysis weighed in favor of disclosure. The Court agrees that the eventual publication of the Agreed Statement of Facts distinguishes it from those documents that the Special Master concluded should not be produced due to comity concerns. The Court also agrees that the potential for eventual publication distinguishes the documents that the Special Master has concluded should be protected from disclosure from those submitted to the EC.

Accordingly, the Court will adopt the Special Masters recommendation with respect to Bioproducts submissions to Canada. The Court will deny plaintiffs' motion to the extent that it seeks to compel production of the executed Plea Agreement, and drafts of the Plea Agreement, drafts of Agreed Statement of Facts, drafts of the Indictment, drafts of the Prohibition Order, drafts of the Immunity Letter, and drafts of the cover letter to the Agreed Statement of Facts, as well as the letters of Bioproducts' counsel commenting on these drafts. The Court will grant plaintiffs' motion in part, with respect to the remainder of the documents submitted to Canada.

3. Fees and Costs:

Plaintiffs' motion includes a request for fees and costs incurred for having to file the instant motion because the issue of discoverability of defendants' governmental submissions has already been litigated extensively before the Special Master and the Court. In considering this request, the Special Master noted that Bioproducts' failure to produce its submissions was not unreasonable pending the ruling of the Court. September 17 Report at 58. Further, the Special Master pointed out that the issues raised by Bioproducts and Canada were significant and deserved consideration, as is demonstrated by the Special Master's conclusion that certain of the documents are not discoverable. Id.

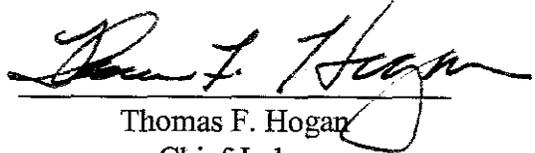
With respect to the EC, the Special Master found that other circumstances made an award of expenses unjust. Id. at 58. The Special Master noted that Bioproducts has stated that it was in the process of negotiations with respect to its European submissions when it learned that the EC was determining whether to intervene, and that plaintiffs' have not refuted this statement. Id. at 58-59.

The Court agrees that the foregoing represent sufficient grounds to conclude that an award of fees and costs would be unjust. Therefore, the Court will adopt the Special Master's recommendation and deny plaintiffs' motion to the extent that it seeks such an award.

IV. CONCLUSION

For the foregoing reasons, the Court adopts the Special Master's Report and Recommendations Respecting Plaintiffs' Joint Motion to Compel Bioproducts to Produce its Governmental Submissions. Thus, the Court will deny plaintiffs' motion to the extent that it seeks to compel production of certain documents submitted to Canada, specifically the executed Plea Agreement, and drafts of the Plea Agreement, drafts of Agreed Statement of Facts, drafts of the Indictment, drafts of the Prohibition Order, drafts of the Immunity Letter, and drafts of the cover letter to the Agreed Statement of Facts, as well as the letters of Bioproducts' counsel commenting on these drafts. The Court will grant plaintiffs' motion in part, with respect to the remainder of the documents submitted to Canada, and with respect to all documents submitted to the European Commission. Finally, the Court denies the request for an award of fees and costs. An Order will accompany this Opinion.

December 18, 2002


Thomas F. Hogan
Chief Judge