FILED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAY 16 2000

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

IN RE: VITAMINS ANTITRUST LITIGATION,	)	
	)	**Misc. No. 99-197 (TFH)**
THIS DOCUMENT REFERS TO: ALL ACTIONS.	)	

ORDER

The Court has recently received a letter from the Embassy of Switzerland on behalf of F. Hoffman-La Roche, Ltd., urging this Court to use the Hague Convention for any discovery that may be ordered against the Swiss party in this action. Since the letter addresses issues related to this proceeding, it is hereby

ORDERED that a copy of the letter filed by the Embassy of Switzerland on behalf of F. Hoffman-La Roche Ltd. will be posted on the Court's Vitamins website.

May 16 14, 2000

Thomas F. Hogan
United States District Judge

EMBASSY OF SWITZERLAND

RECEIVED
MAY 0 8 2000
Judge
THOMAS F. HOGAN

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05/05/2000

The Honorable Thomas F. Hogan
United States District Judge
United States Courthouse
333 Constitution Avenue, N.W.
Room 4435
Washington, D.C. 20001

Our reference 454.1-WEM

Re: Vitamin Antitrust Litigation, MDL No. 1285, Misc. No. 99-0197 (TFH)
Letter filed on Behalf of F. Hoffmann-La Roche Ltd, Basel Switzerland

Dear Judge Hogan:

In the proceedings related to the above-referenced matter, I sent a letter to the Honorable Paul Friedman on January 22, 1999 (Re: Donaldson & Hasenbein Inc. v. F. Hoffmann-La Roche Ltd. Et al. [Civil Actions Nos. 98-0762 and 98-1116]). Following the opting out by several claimants from a settlement agreement and their motions of evidence based on U.S. Federal Rules of Civil Procedure, there are growing concerns about matters regarding Swiss sovereignty and the procedures applicable to the obtaining of evidence from Switzerland for use in a civil proceeding in a United States court. I am writing to inform you of the views of the Government of Switzerland on this subject and to again urge the Court to require the use of international assistance.

I wish to emphasize that the Government of Switzerland has no independent knowledge of, and takes no position on, the merits of the case before you. The comments in this letter are limited strictly to the procedures used for taking evidence in Switzerland. Although it is with the Court's authority to determine its jurisdiction, my letter seeks to avoid conflict between the laws of the United States and Switzerland by urging use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970 for any discovery that may be ordered against the Swiss party in this action.

I note that the United States federal courts, pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, are expressly authorized to consider any relevant material or source in determining foreign law, whether or not submitted by a party. I therefore trust that you will be able to give full consideration to these comments.

Like many other civil law countries, Switzerland exercises more control over the collection of evidence in judicial matters than does the United States. The taking of evidence within Switzerland is considered a domestic judicial function, and it is the sovereign and exclusive right of the Swiss authorities to take compulsory measures against persons, including corporations, that are located in Switzerland. A unilateral attempt by a United States court to compel the release of documents from Switzerland or the taking of depositions from Swiss citizens or residents without the participation or consent of Switzerland would be an infringement of Swiss sovereignty. A judgment of the court entered against a Swiss company in violation of Swiss law and sovereignty would in all likelihood not be enforceable in Switzerland.

Judicial sovereignty is an important concept in Switzerland. For many years the Swiss Penal Code has made it a crime for any person to take evidence on Swiss territory for use in foreign court proceedings without prior authorization of the appropriate authorities, even if there is no violation of the privacy laws. This prohibition has been enforced through criminal prosecutions. Even when compulsory measures are taken outside the territory of Switzerland, Swiss sovereignty is affected, due to the fact that a person is forced by foreign authorities to provide evidence in or from Switzerland.

Swiss judicial sovereignty and the laws that protect it should not be viewed as "blocking statutes" designed to frustrate United States discovery procedures. Rather, they are a reflection of a national political tradition that places great value on the sovereign independence of the nation and the individual autonomy of its citizens.

I emphasize that Swiss judicial sovereignty does not preclude a foreign litigant from obtaining evidence from Switzerland. Rather, it requires that certain procedures be followed in requesting and obtaining the evidence.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970 ("Hague Convention") applies between Switzerland and the United States. When ratifying the Hague Convention, the Government of Switzerland made an express declaration that Switzerland regards this Convention to be exclusively applicable among the Contracting States. The Hague Convention allows evidence to be taken in Switzerland in a manner which is consistent with Swiss sovereignty, while offering the possibility to a party from a common law nation, such as the United States, to use the evidence-gathering methods of its home country rather than those of Switzerland.

It should be noted that the Hague Convention provides in Chapters I and II for two fundamentally different ways of gathering evidence abroad. While under Chapter I a judicial authority of the requested State acts on the basis of a letter of request and according to its own rules of civil procedure, under Chapter II the evidence is gathered by a diplomatic officer, a consular agent or a commissioner appointed by the Court of the requesting State who acts in accordance with the rules of civil procedure of the requesting State. (Because the person taking the evidence cannot impose compulsory measures, Chapter II applies only when the subject party is willing to cooperate.)

Before acting, the designated diplomatic officer, consular agent or commissioner must apply for an authorization by the Government of Switzerland to take evidence in Switzerland, according to the reservation made by Switzerland to Articles 15-17 and 35(b) of the Hague Convention. The application must be filed with the cantonal Central Authority, and the authorization is granted by the Federal Department of Justice and Police.

As already mentioned, the person designated to take the evidence acts according to the rules of civil procedure of the court where the lawsuit is pending. In particular, this means that when evidence is being taken for use in a United States judicial matter, cross-examination is possible, oaths and affirmations can be administered and depositions can be recorded by stenographers. It also means that the proceeding can be conducted in the language of the court where the lawsuit is pending, in this case English. Article 21 (b) of the 1970 Hague Convention requires only that any notice to appear must be in the language of the place where the evidence is taken.

All types of evidence may be taken, provided it is not incompatible with the local law. Although it cannot be guaranteed that such an issue will never arise, to this day, no case of incompatible evidence has been brought to the attention of the Swiss Federal Department of Justice and Police.

Conflicts between the legal requirements of the United States and Switzerland should be avoided whenever possible. Insofar as the evidence is obtained from Switzerland through international judicial assistance, the goal of the United States proceeding would be accomplished without violating Swiss sovereignty, and there would be no conflict.

Especially because the Government of Switzerland has repeatedly stressed, and demonstrated, its continuing willingness to assist the Government of the United States and the United States courts in these types of matters, I respectfully urge you to require the use of international judicial assistance in this case.

Sincerely,

THE AMBASSADOR OF SWITZERLAND

Alfred Defago

Alfred Defago

Copy:

- U.S. Department of Justice, Office of Foreign Litigation, Civil Division, attn: Mr. David Epstein, Room 8102, 550 11th St., N.W., Washington, D.C. 20530
- U.S. Department of Justice, Criminal Division , OIA, attn: Mrs. Randy Toledo, 1301 New York Avenue, N.W., Washington, D.C. 20520
- U.S. Department of State, Office of German, Austrian and Swiss Affairs, Room 4228, 2201 C St., N.W., Washington, D.C. 20520

- Scott Muller, DAVIS POLK & WARDWELL, 1300 I St., N.W., Washington, D.C. 20005