

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

10 11 2017
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In the Matter of:

IMPAX LABORATORIES, INC.,

a corporation.

Docket No. 9373

ORIGINAL

**RESPONDENT IMPAX LABORATORIES, INC.'S
OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO DESIGNATE
FORMER EMPLOYEES OF THIRD PARTY ENDO PHARMACEUTICALS, INC.
AS ADVERSE TO COMPLAINT COUNSEL**

action.⁶ Impax took a different course, choosing to litigate this case on the merits and prove that its conduct was not just legal, but procompetitive and good for consumers. It should come as no surprise, therefore, that Impax and Endo do not have a joint defense or common interest agreement in this proceeding.⁷

Given this history, Complaint Counsel's assertion that Impax and Endo have "similar, if not identical interests"⁸ is implausible, and cannot justify Complaint Counsel's request that this Court preemptively and categorically designate Endo's former employees, Demir Bingol and Roberto Cuca, as adverse witnesses. *See, e.g., SEC v. World Info. Tech., Inc.*, 250 F.R.D. 149, 151 (S.D.N.Y. 2008) (denying as premature SEC's motion to declare a defendant who had settled with the(s)-iendaj EC.(S)-e [(s)1()4([(s)1()4(.T(S)-4(E)1(C)-3()-3(om)-2(pl I)3(S)-4(.D)2(.N) o

from asking Messrs. Bingol and Cuca any leading questions—even, apparently, under circumstances where Rule 3.41(d) would otherwise permit leading. This request is improper and premature. The trial itself is the appropriate venue for deciding whether and to what extent Impax—and Complaint Counsel, for that matter—may lead an Endo witness.

This Court should deny Complaint Counsel’s requests (1) to categorically designate Endo’s former employees as adverse, and (2) to preclude Impax from asking any leading questions to Endo’s former employees.⁹

ARGUMENT

I. The Rules of Practice Do Not Permit Complaint Counsel to Categorically Treat Former Endo Employees as Adverse Witnesses.

Complaint Counsel contends that Endo’s former employees should be designated as adverse witnesses because their “interests [are] aligned with Impax.” (Mot. at 1.) This argument fails for the simple reason that it applies the wrong rules. While Complaint Counsel cites Rule of Practice 3.41(d) in passing, it relies all but entirely on Federal Rule of Evidence 611(c) and its predecessor in the Federal Rules of Civil Procedures, and exclusively cites case law applying the federal rules. (Mot. at 3 n.1; *see id.* at 2-8.) In so doing, Complaint Counsel evades a critical distinction between Federal Rule of Evidence 611(c) and Rule of Practice 3.41(d): whereas Rule 611(c) allows an examiner to pose leading questions to “a hostile witness, an adverse party, *or a witness identified with an adverse party*,” Fed. R. Evid. 611(c)(2) (emphasis added), Rule 3.41(d) does *not* permit the use of leading questions as to a witness who is merely “identified with” an adverse party.¹⁰ Rather, Rule 3.41(d) limits categorical leading to an “adverse party”

⁹ Impax does not oppose Complaint Counsel’s request to designate current and former Impax employees as adverse witnesses.

¹⁰ Complaint Counsel also cites Rule of Evidence 611(c)’s predecessor, the former Federal Rule of Civil Procedure 43(b). (Mot. at 3 n.1.) Similar to Rule of Practice 3.41(d), the former Federal

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Id. These facts do not map on to this case in the least. Here, **(1)** the witnesses have never been adverse to the FTC or Complaint Counsel in their individual capacity; **(2)** the witnesses' former employer, Endo, has never been an "adverse party" in this action, and in fact is no longer adverse to the FTC or Complaint Counsel in any sense; **(3)** unlike the plaintiff in *Uarte*, Complaint Counsel is not a party to the separate action (the *Opana ER MDL*) and has stressed that private

for the relief it seeks, Complaint Counsel resorts to misdirection. The Motion characterizes Impax as “taking the anomalous position that these Endo witnesses are somehow friendly to Complaint Counsel, even though these same witnesses will be treated as adverse to plaintiffs in

may pose leading questions to Mr. Bingol or Mr. Cuca. *World Info. Tech., Inc.*, 250 F.R.D. at

Dated: October 10, 2017

By: /s/ Edward D. Hassi

Edward David Hassi
ehassi@omm.com

Edward D. Hassi
ehassi@omm.com
Michael E. Antalics
mantalics@omm.com
Benjamin J. Hendricks
bhendricks@omm.com
Eileen M. Brogan
ebrogan@omm.com
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414

Anna M. Fabish
afabish@omm.com
Stephen J. McIntyre
smcintyre@omm.com
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2017, I emailed a copy of the foregoing to the following individuals:

Markus Meier
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759
Email: mmeier@ftc.gov

Jamie Towey
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759
Email: jtowey@ftc.gov

Eric Sprague
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759
Email: esprague@ftc.gov

Chuck Loughlin
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759
Email: cloughlin@ftc.gov

By: */s/ Stephen J. McIntyre* _____

Stephen J. McIntyre
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
Tel.: (213) 430-6000
Fax: (213) 430-6407

Notice of Electronic Service

I hereby certify that on October 11, 2017, I filed an electronic copy of the foregoing **RESPONDENT IMPAX LABORATORIES, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO DESIGNATE FORMER EMPLOYEES OF THIRD PARTY ENDO PHARMACEUTICALS, INC. AS ADVERSE TO COMPLAINT COUNSEL**, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on October 11, 2017, I served via E-Service an electronic copy of the foregoing **RESPONDENT IMPAX LABORATORIES, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO DESIGNATE FORMER EMPLOYEES OF THIRD PARTY ENDO PHARMACEUTICALS, INC. AS ADVERSE TO COMPLAINT COUNSEL**, upon:

Bradley Albert
Attorney
Federal Trade Commission
balbert@ftc.gov
Complaint

Daniel Butrymowicz
Attorney
Federal Trade Commission
dbutrymowicz@ftc.gov
Complaint

Nicholas Leefer
Attorney
Federal Trade Commission
nleefer@ftc.gov
Complaint

Synda Mark
Attorney
Federal Trade Commission
smark@ftc.gov
Complaint

Maren Schmidt
Attorney
Federal Trade Commission
mschmidt@ftc.gov
Complaint

Eric Sprague
Attorney
Federal Trade Commission
esprague@ftc.gov
Complaint

Jamie Towey
Attorney
Federal Trade Commission
jtowey@ftc.gov
Complaint

Chuck Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Alpa D. Davis
Attorney
Federal Trade Commission
adavis6@ftc.gov
Complaint

Lauren Peay
Attorney
Federal Trade Commission
lpeay@ftc.gov
Complaint

James H. Weingarten
Attorney
Federal Trade Commission
jweingarten@ftc.gov
Complaint

Edward D. Hassi
O'Melveny & Myers, LLP
ehassi@omm.com
Respondent

Michael E. Antalics
O'Melveny & Myers, LLP
mantalics@omm.com
Respondent

Benjamin J. Hendricks
O'Melveny & Myers, LLP
bhendricks@omm.com
Respondent

Eileen M. Brogan
O'Melveny & Myers, LLP
ebrogan@omm.com
Respondent

Anna Fabish
O'Melveny & Myers, LLP
afabish@omm.com
Respondent

Stephen McIntyre
O'Melveny & Myers, LLP
smcintyre@omm.com
Respondent

Rebecca Weinstein
Attorney
Federal Trade Commission
rweinstein@ftc.gov
Complaint

Garth Huston
Attorney
Federal Trade Commission
ghuston@ftc.gov
Complaint

I hereby certify that on October 11, 2017, I served via other means, as provided in 4.4(b) of the foregoing RESPONDENT IMPAX LABORATORIES, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO DESIGNATE FORMER EMPLOYEES OF THIRD PARTY ENDO PHARMACEUTICALS, INC. AS ADVERSE TO COMPLAINT COUNSEL, upon:

Markus Meier
Attorney
Federal Trade Commission
mmeier@ftc.gov
Complaint

Eileen Brogan
Attorney