

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

10 12 2017
588434

In the Matter of)

Impax Laboratories, Inc.,)
a corporation,)

Respondent)

DOCKET NO. 9373

ORIGINAL

- (3) Designating the former employees of Endo Pharmaceuticals, Inc. (“Endo”) called by Complaint Counsel as witnesses to testify at trial, including Demir Bingol and Roberto Cuca, as witnesses adverse to Complaint Counsel; and
- (4) Authorizing Complaint Counsel to interrogate these witnesses by leading questions and to contradict or impeach these witnesses; and
- (5) Designating these individuals as witnesses

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2017, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

October 12, 2017

By: s/ Rebecca E. Weinstein

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

_____)	
In the Matter of)	
)	
Impax Laboratories, Inc.,)	
a corporation,)	DOCKET NO. 9373
)	
Respondent)	
_____)	

[PROPOSED] ORDER

Upon Motion of Complaint Counsel to Depose Current and Former Employees of Respondent Impax Laboratories, Inc. (“Impax”) and of Third Party Endo Pharmaceuticals, Inc. (“Endo”) as Witnesses Adverse to Complaint Counsel and after consideration of the briefs in support and in opposition thereto, it is hereby

ORDERED, that pursuant to Rule 3.41(d) C.F.R. § 3.41(d), the following witnesses shall be deemed adverse or hostile to Complaint Counsel for the purposes of their examination at trial, and Complaint Counsel shall be permitted to interrogate these witnesses by leading questions and to contradict or impeach these witnesses:

1. The current employees of Impax named as witnesses by Complaint Counsel, including Todd Engle, Bryan Reas, and Margaret Snowden; and
2. The former employees of Impax named as witnesses by Complaint Counsel, including John Anthony, Joseph Camargo, Art Koch, and Chris Mengler; and
3. The former employees of Endo Pharmaceuticals, Inc. (“Endo”) named as witnesses by Complaint Counsel, including Demir Bingul and Roberto Cuca; and it is further

ORDERED, that these named individuals shall be deemed witnesses friendly to Respondent for the purposes of their examination and counsel for Respondent shall be precluded from using leading questions with these witnesses.

ORDERED:

Dated: _____

D. Michael Chappell
Chief Administrative Law Judge

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

In the Matter of)	
)	
Impax Laboratories, Inc.,)	
)	DOCKET NO. 9373
Respondent)	

COMPLAINT COUNSEL’S MEMORANDUM IN SUPPORT OF MOTION TO
DESIGNATE CURRENT AND FORMER EMPLOYEES OF RESPONDENT
AND OF THIRD PARTY ENDO PHARMACEUTICALS, INC. AS
WITNESSES ADVERSE TO COMPLAINT COUNSEL

Complaint Counsel anticipates calling three sets of witnesses at trial: (1) current employees of Respondent Impax Laboratories, (2) former employees of Impax, and (3) former employees of Endo Pharmaceuticals, the other party to the agreement challenged in this case. Under Rule 3.41(d), Complaint Counsel may use leading questions in its direct examination of an “adverse witness,” i.e., “[a]n adverse party, or an officer, agent, or employee thereof, and any witness who appears to be unwilling, or evasive.” By this motion, Complaint Counsel seeks a designation of these three sets of witnesses as adverse to Complaint Counsel, and permission to use leading questions with these witnesses in their direct examination. Respondent does not object to the designation of the current and former employees of Impax as adverse to Complaint Counsel, but opposes this designation of the Endo witnesses.

The Impax and Endo witnesses are “adverse” to Complaint Counsel. Each witness has interests aligned with Impax, either in this case or in a related private case challenging the same settlement and in which Impax and Endo are defendants. Each witness is represented by either Impax’s or Endo’s counsel, and each will be prepared by those counsel for their testimony.

Here, there is no concern that leading questions will allow Complaint Counsel to shape testimony or put words in the mouths of these witnesses.

The pre-trial resolution of this issue will facilitate Complaint Counsel's trial preparations and it will expedite trial. Accordingly, Complaint Counsel moves the Court for an order designating these witnesses as adverse and permitting Complaint Counsel to use leading questions during our direct examination of these witnesses.

I. Impax's Current Employees May Be Examined With Leading Questions

Complaint Counsel plans to call three current Impax employees as our case-in-chief: Todd Engle, Bryan Reasons, and Margaret Snowden. By its terms, Rule 3.41(d) allows Complaint Counsel to use leading questions in its direct examination of an adverse party's employees. Respondent does not object to designating current Impax employees as hostile. See Exhibit A. Thus, absent a contrary order from this Court, Complaint Counsel plans to use leading questions during its examination of Impax's current employees.

II. Impax's Former Employees Are Adverse to Complaint Counsel

Complaint Counsel also plans to call four former Impax employees in our case-in-chief: John Anthony, Joseph Camargo, Art Koch, and Chris Misgler. Respondent does not object to designating these former Impax employees as adverse to Complaint Counsel. See Exhibit A.

The general prohibition against leading questions on direct examination stems from the "risk of improper suggestion" inherent in the use of leading questions with friendly witnesses. *Ellis v. City of Chicago*, 667 F.2d 606, 612 (7th Cir. 1981). There is no such risk here. For a

1989); Melton v. O.F. Shearer & Sons, Inc., 436 F.2d 22, 26 (6th Cir. 1970); Ellis, 667 F.2d at 613;

Fourth,

Mengler Dep. 227:18-228:9; Koch Dep. 35:26:5; Anthony Dep. 192:15-17; Camargo Dep. 213:20-214:3. A witness's compensation arrangement with the opposing party is sufficient to designate the witness as hostile. See *United States v. McLaughlin*, 1998 U.S. Dist. LEXIS 18588, at *2, 7 (E.D. Pa., Nov. 19, 1998) (CPA who had worked for defendant was designated adverse because he had been compensated for his time testifying prior to trial of defendant even though he was not being compensated at the current trial).

Given that Respondent does not object to designating these former Impax employees as adverse to Complaint Counsel, absent a contrary order from this Court, Complaint Counsel plans to use leading questions during its examination of Impax's former employees.

III. Endo's Former Employees Are Adverse to Complaint Counsel

The only disagreement between Complaint Counsel and Respondent is whether Demir Bingol and Roberto Cuca should be

challenging the same settlement. In re Opana ER Antitrust Litigation, MDL No. 2580 (Lead

designated adverse in cases against its insurance company (Wilton, 436 F.2d at 26 (nonparty designated adverse because product was at issue in case); Union Pac. R.R. Co. v. Ward, 230 F.2d 287, 290 (10th Cir. 1956) (nonparty designated adverse even though “there was no evidence of hostility”).

In any event, the rationale for the rule against leading questions is not applicable here. Like Impax with its ex-employees,

Cuca Dep. 5:11-14, 5:18-20, 164:23-165:3; Bingol Dep. 2, 8:12-21; 15:13-14. With Endo's preparation of these witnesses, there is no concern that Complaint Counsel will become de facto witness through Bingol or Cuca. Endo's counsel will make sure that Complaint Counsel not use Bingol or Cuca “as some sort of testimonial TelePrompTer” at trial. *McLaughlin*, 1998 U.S. Dist. LEXIS 18588, at *7.

Given this strong and ongoing relationship between Endo and its former employees, and the convergent interests of Endo and Impax in this litigation due to the pending treble damage action in Chicago, the Court should designate Bingol and Cuca as adverse to Complaint Counsel.

IV. Impax Should Not Be Permitted to Ask Leading Questions

Finally, for the same reasons that Complaint Counsel should be allowed to use leading questions with witnesses associated with Impax and Endo, Impax's counsel should not. Impax's counsel is representing all the current and former Impax witnesses, and will prepare them for their trial testimony. Impax's counsel should not be allowed to use leading questions with its own clients: “[F]or the defense to be permitted to spoon-feed leading questions to their own man, would tend to make the examiner's task easy, to the detriment of the truth.” See *McLaughlin*, 1998 U.S. Dist. LEXIS 18588, at *4-*5. Indeed,

when an opponent's witness proves to be bias

to make the person under oath on the stand not the witness; rather, those shoes would tend to be filled by the lawyer representing the person with whom the friendly witness is identified.

Id. at *5-*6. See also *Ellis*, 667 F.2d at 612-13.

For the same reasons, Impax's counsel should not be allowed to lead the witnesses associated with Endo—its co-defendant in a related private suit

CONCLUSION

Complaint Counsel respectfully moves the Court for an order recognizing the witnesses from Impax and Endo as adverse to Complaint Counsel. Complaint Counsel requests that order in advance of trial to allow Complaint Counsel to better prepare, and hopefully present shorter, more efficient direct examinations.

Respectfully submitted,

Dated: October 4, 2017

/s/ Charles A. Loughlin

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Counsel Spp

EXHIBIT A

STATEMENT OF CONFERENCE WITH OPPOSING COUNSEL

Pursuant to Paragraph 4 of the Additional PufPvisonasof the AScheduling Order dated T0.0003 Tc -0.00

EXHIBIT B

575

1 FEDERAL TRADE COMMISSION

2 I N D E X

3 TRIAL VOLUME 3

4 PART 1, PUBLIC SESSION

5 FEBRUARY 14, 2005

6 WITNESS: DIRECT CROSS REDIRECT RECROSS VOIR

7 NEARY 581 629 643

8

9 CHAN 647 711 741 746 685

576

1 UNITED STATES OF AMERICA
2 FEDERAL TRADE COMMISSION

3
4

5 In the Matter of:)
6 Evanston Northwestern)
7 Healthcare Corporation,)
8 a corporation,)
9 and) Docket No. 09315
10 ENH Medical Group, Inc.,)
11 a corporation,)
12 Respondent.)

13 -----)

14

15 TRIAL, VOLUME 3
16 MONDAY, FEBRUARY 14, 2005
17 PART 1, PUBLIC SESSION
18 9:30 A.M.

19

20 BEFORE THE HONORABLE STEPHEN J. McGUIRE
21 Administrative Law Judge

22

23

24

25 Reported by: Susanne Bergling, RMR

1 MR. NOLAN: All right.

2 (A brief recess was taken.)

3 JUDGE MCGUIRE: At this time, complaint counsel
4 may call its next witness.

5 MR. NOLAN: Your Honor, before we call Ms. Chan,
6 I just wanted to say that Ms. Chan is the first of
7 several witnesses that complaint counsel requests leave
8 to question on direct using leading questions under Rule
9 611(c).

10 JUDGE MCGUIRE: All right, so noted.

11 Do you have any response, Mr. Sibarium?

12 MR. SIBARIUM: We object to that, Your Honor.

13 Ms. Chan is a formemployee who left almost five years

23 MR. NOLAN: Yes, Your Honor.

24 JUDGE MCGUIRE: Okay. And that's not to say I

25 won't entertain that later, but I think I was somewhat

650

1 premature to overrule the objection.

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1 JUDGE MCGUIRE: Okay, see, that's what I didn't

2

3 understand, but that is your understanding?

4

5 THE WITNESS: Yes.

6

7 JUDGE MCGUIRE: You understand that ENH is

8

9 paying your counsel fees. Is that correct?

10

11 THE WITNESS: Yes.

12

13 JUDGE MCGUIRE: All right, that's a little

14

15 clearer to me, then. On those grounds, you can be

16

17 heard.

18

19 If you want to be heard, go ahead, Mr. Sibarium.

20

21 MR. SIBARIUM: Your Honor, there's a -- Ms. Chan

22

23 needed to obtain counsel. We had -- there was no way

24

25 that we could represent Ms. Chan if she wanted us to

26

27 because of the conflict of interest. Given the

28

29 potential of a conflict of interest, we can't possibly

30

31 see how she can be identified with us for purposes of

32

33 permitting him to lead.

34

35 JUDGE MCGUIRE: Well, ENH, your client, is

36

37 paying her fees. Is that correct?

38

39 MR. SIBARIUM: Yes.

40

41 JUDGE MCGUIRE: Then I am going to rule on those
42
43 grounds, because of that, she can be questioned as an
44
45 adverse witness on this line.
46
47 Now, don't abuse that, because if you get too
48
49 far afield, I am going to cut you off, but on those

687

1 grounds, I am going to let him inquire of her as if she
2 were an adverse witness.
3 MR. NOLAN: Yes, Your Honor
4
5 *****

Notice of Electronic Service

I hereby certify that on October 12, 2017, I filed an electronic copy of the foregoing Complaint Counsel's Motion to Designate Current and Former Employees of Respondent and of Third Party Endo Pharmaceutical Inc. as Adverse to Complaint Counsel, with:

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Chief Administrative Law Judge
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Donald Clark
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I hereby certify that on October 12, 2017, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Motion to Designate Current and Former Employees of Respondent and of Third Party Endo Pharmaceuticals, Inc. as Adverse to Complaint Counsel, upon:

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I hereby certify that on October 12, 2017, I served via other means, as provided in 4.4(b) of the foregoing Complaint Counsel's Motion to Designate Current and Former Employees of Respondent and of Third Party Endo Pharmaceuticals, Inc. as Adverse to Complaint Counsel, upon:

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