

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



ORIGINAL

In the Matter of)
)
)

Impax Laboratories, Inc.,)
a corporation,)

Respondent.)
_____)

DOCKET NO. 9373

**ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINT COUNSEL'S MOTION ON ADVERSE WITNESSES**

I.

On October 4, 2017, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion to Designate Current and Former Employees of Respondent and of Third Party Endo Pharmaceuticals, Inc. as Adverse to Complaint Counsel ("Motion"). Respondent Impax Laboratories, Inc. ("Respondent" or "Impax") filed an opposition to the Motion on October 10, 2017 ("Opposition"). As set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

II.

Complaint Counsel moves pursuant to FTC Rule 3.41(d) for adverse witness designations, and permission to use leading questions, with respect to (1) certain current and former employees of Impax (the "Impax witnesses") and (2) former employees of Endo Pharmaceuticals, Inc. ("Endo"). Endo is a party to the settlement agreement challenged in this case (the "Challenged Settlement"), but is not a party in this matter. The former employees of Endo are identified as Demir Bingol and Roberto Cuca (collectively, the "Endo witnesses"). Complaint Counsel further requests that the Endo witnesses and the Impax witnesses be deemed friendly to Respondent for the purpose of examination at trial, and that counsel for Respondent be precluded from using leading questions with these witnesses.

Respondent's Opposition states that it does not oppose Complaint Counsel's request to designate the Impax witnesses as adverse. Opposition at 3 n.9. With regard to using leading questions to examine the Impax witnesses, Respondent states: "While Impax does not presently seek leave to ask leading questions to any current or former Impax employees who may testify at trial, Impax reserves the right to seek this Court's permission to do so if and when circumstances

may justify.” Opposition at 7 n.16. Respondent opposes Complaint Counsel’s request for a determination, prior to trial, that the Endo witnesses are adverse to Complaint Counsel. Respondent further opposes Complaint Counsel’s request to preclude Respondent from using any leading questions in its examination of the Endo witnesses.

FTC Rule 3.41(d) states:

(d) Adverse witnesses. An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him or her.

16 C.F.R § 3.41(d).

III.

Complaint Counsel asserts that Mr. Bingol and Mr. Cuca were involved in Endo’s “plans for dealing with generic Opana ER, and that Mr. Cuca was directly involved in financial projections used to support the negotiations of the Endo Credit.”¹ Motion at 5. Complaint Counsel argues that Impax and Endo, as coparties to the Challenged Settlement, “have similar, if not identical interests” in this case. *Id.*

Complaint Counsel further argues that Mr. Bingol and Mr. Cuca should be treated as adverse witnesses because Endo is a codefendant with Impax in a civil action for treble damages, brought by private plaintiffs, that challenges the same settlement agreement as challenged in the instant case, *In re Opana ER Antitrust Litigation*, MDL No. 2580, Case No. 14-cv-10150 (N.D. Ill.) (the “private action”), and because Endo has a “a joint defense and common interest relationship” with Impax in that case. Motion at 6. Complaint Counsel further states that Endo is paying its counsel to represent Mr. Bingol and Mr. Cuca in this case and to prepare them for their testimony, and that the testimony of Mr. Bingol and Mr. Cuca in this case can be used in the private action against Impax, Endo, and/or the witnesses themselves. Complaint Counsel concludes that, because of the relationship between Endo and Mr. Bingol and Mr. Cuca, and the mutual interest of Endo and Impax in the private action, Mr. Bingol and Mr. Cuca should be designated as adverse to Complaint Counsel. Based on the same asserted identity of interests, Complaint Counsel argues that Respondent should be prohibited from using leading questions in examining the Endo witnesses, just as it would be in examining Impax witnesses.

Impax responds that, unlike Federal Rule of Evidence 611(c), FTC Rule 3.41(d) does not allow a witness to be treated as adverse on the basis of asserted “identification” with an adverse

¹ According to Complaint Counsel’s Pre-trial Brief, the “Endo Credit” refers to a provision of the Challenged Settlement that provided for a cash payment to Impax in the event Endo’s sales of its original Opana ER product fell below 50% of their peak.

party.² Under Rule 3.41(d), Respondent argues, unless the witness is an adverse party, or an employee or agent of the adverse party, adverse witness designation must be based upon the witness' appearing "to be hostile, unwilling, or evasive." 16 C.F.R. § 3.41(d). Moreover, Respondent states, Endo is not a named party in this case, having settled with the FTC before the Complaint was issued, and Impax and Endo have no joint defense or common interest relationship in the instant case. Respondent argues that, under these circumstances, any determination as to whether the Endo witnesses are adverse to Complaint Counsel must await trial, and be based upon whether the witnesses appear "hostile, unwilling or evasive" on the witness stand. In addition, Respondent argues, it is premature to decide whether and to what extent Impax may pose leading questions to Mr. Bingol or Mr. Cuca because, if these witnesses appear hostile, unwilling, or evasive under questioning by Respondent, Respondent may then properly seek permission to ask leading questions pursuant to Rule 3.41(d).

IV.

Endo is not an adverse party in this case. Therefore, under the plain language of Rule 3.41(d), whether either Mr. Bingol or Mr. Cuca should be designated as an adverse witness, and examined through leading questions, depends on each witness' demeanor on the witness stand, i.e., whether the witness appears "hostile, unwilling, or evasive." 16 C.F.R. § 3.41(d). This determination is not properly made prior to trial before the witnesses have even taken the stand. Accordingly, the Motion is premature.

In addition, Federal Rule of Evidence 611(c) is materially different from Rule 3.41(d) because, unlike Rule 3.41(d), the federal rule allows designating a witness as adverse if the witness is "identified with an adverse party." For this reason, the federal cases upon which Complaint Counsel relies are not authoritative. *See In re Gemtronics, Inc.*, 2010 FTC LEXIS 40, at *10 (Apr. 27, 2010) (holding that Rule 11 of Federal Rules of Civil Procedure was not authority for obtaining sanctions in an FTC case, where the FTC Rules did not provide for such sanctions). Moreover, the cases Complaint Counsel cites in support of designating Mr. Bingol and Mr. Cuca as adverse witnesses are factually distinguishable because they do not involve persons or entities that had never been adverse parties in the case. *See, e.g., United States v. Uarte*, 175 F.2d 110, 113 (9th Cir. 1949) (upholding adverse witness designation for witness that was a former defendant in the action); *Maryland Casualty Co. v. Kador*, 225 F.2d 120, 123 (5th Cir. 1955) (upholding adverse witness designation for defendant's insured, who had been defendant in the action previously); *Union P. R. Co. v. Ward*, 230 F.2d 287, 290 (10th Cir. 1956) (upholding adverse witness designation for employee of defendant). In *Sadid v. Idaho State University*, 2013 U.S. Dist. LEXIS 172361 (D. Idaho Dec. 5, 2013), also cited by Complaint Counsel, the court granted a motion for adverse witness designation as to former defendants in the action as well as to certain former employees of the defendant. It is noteworthy, however, that the court denied the motion as to two former employees of the defendant, stating that the court "will need to observe their demeanor at trial." *Id.* at *7.

² Federal Rule of Evidence 611(c) provides in pertinent part: "Ordinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party."

Accordingly, for all the foregoing reasons, the Motion is DENIED with respect to the Endo witnesses, and is GRANTED as to the Impax witnesses, except that Respondent is not precluded from seeking leave of court to ask leading questions of an Impax witness at trial should appropriate circumstances arise.

ORDERED:

Dm Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: October 18, 2017

Notice of Electronic Service

I hereby certify that on October 18, 2017, I filed an electronic copy of the foregoing Order Granting in Part and Denying in Part Counsel's Order on Adverse Witnesses, 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 18, 2017, I served via E-Service an electronic copy of the foregoing Order Granting in Part and Denying in Part Counsel's Order on Adverse Witnesses, 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

Lynnette Pelzer
Attorney