

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



ORIGINAL

_____)
In the Matter of)
)
Impax Laboratories, Inc.,)
a corporation,)
)
Respondent)
_____)

DOCKET NO. 9373

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

Complaint Counsel respectfully moves the Court for an Order, pursuant to Rule 3.41(d), 16 C.F.R. § 3.41(d), designating certain witnesses as adverse to Complaint Counsel and permitting Complaint Counsel to use leading questions with these witnesses in their direct examination. To facilitate trial preparations, Complaint Counsel requests that this motion be briefed on an expedited basis, pursuant to the schedule established for *in limine* motions set forth in the Second Revised Scheduling Order, so that Respondent file its response to this motion no later than October 10, 2017.

Specifically, Complaint Counsel moves the Court for an Order:

- (1) Designating the current employees of Respondent Impax Laboratories, Inc. (“Impax”) called by Complaint Counsel as witnesses to testify at trial, including Todd Engle, Bryan Reasons, and Margaret Snowden, as witnesses adverse to Complaint Counsel; and,
- (2) Designating the former employees of Respondent Impax called by Complaint Counsel as witnesses to testify at trial, including John Anthony, Joseph Camargo, Art Koch, and Chris Mengler, as witnesses adverse to Complaint Counsel; and

- (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 friendly to Respondent and, therefore, precluding counsel for Respondent from using leading questions with these witnesses.

The grounds for this motion are more fully set forth in attached memorandum.

A Proposed Order is attached.

Respectfully submitted,

Dated: October 12, 2017

/s/ Charles A. Loughlin

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Counsel Supporting the Complaint

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:

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The Honorable D. Michael Chappell
Administrative Law Judge
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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 Designate 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), 16 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 Reasons, 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 Bingol 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 at trial and counsel for Respondent shall be precluded from using leading questions with these witnesses.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated: _____

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 fact witnesses at trial: (1) current employees of Respondent Impax Laboratories, Inc., (2) former employees of Impax, and (3) former employees of Endo Pharmaceuticals, Inc., 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 hostile, 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 it 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 co-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 in 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 Mengler. 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

variety of reasons, Impax's former employees should be viewed as aligned with Impax, and adverse to Complaint Counsel.¹

First, Impax employed each of these witnesses at the time of the settlement with Endo, and each witness was directly involved in activities at issue in this case: [REDACTED]

[REDACTED] See, Mengler Dep. 67:8-69:22, 73:6-74:11; Koch Dep. 38:15-18, 59:19-24; Anthony Dep. 49:20-23; Camargo Dep. 64:12-16.² Under these circumstances, each witness has an "inherent interest in the outcome of the litigation." See *SEC v. AIC, Inc.*, 2013 U.S. Dist. LEXIS 191621, at *9 (E.D. Tenn., Sept. 19, 2013). And, therefore, leading questions are appropriate even without a showing of actual hostility or evasiveness at trial. See *id.*; *Chonich v. Wayne Cnty. Cmty. Coll.*, 874 F.2d 359, 368 (6th Cir.

¹ Courts look to a variety of factors in assessing a witness's alignment with an opposing party. See Rule 3.41(d); see also Federal Rule of Evidence 611(c), and its predecessor, Federal Rule of Civil Procedure 43(b).

Fed. R. Civ. P. 43(b) provided that:

A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

Fed. R. Evid. 611(c) provides:

Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. 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.

² Complaint Counsel will provide copies of the deposition transcripts at the Court's request.

1989); *Melton v. O.F. Shearer & Sons, Inc.*, 436 F.2d 22, 26 (6th Cir. 1970); *Ellis*, 667 F.2d at 613; *Wilbon v. Plovanich*, 2016 U.S. Dist. LEXIS 30333, at *27-28 (E.D. Ill., Mar. 6, 2016); *Esprit Health LLC v. Univ. of Del.*, 2015 U.S. Dist. LEXIS 119505, at *1-2 (D. Del., Sept. 9, 2015); *Garden v. Gen. Elec. Co.*, 1992 U.S. Dist. LEXIS 11695, at *5 (D.N.J., July 6, 1992).

Second, Impax's counsel is representing these witnesses and will carefully prepare these ex-employees for trial, as they did for their depositions. Mengler Dep. 5:14-15, 7:3-7, 9:2-13; Koch Dep. 31:18-32:3; Anthony Dep. 2, 191:23-192:2; Camargo Dep. 215:6-216:3, 220:23-221:4. This means that there is no risk that Complaint Counsel can prepare the witness and then use leading questions to "improperly suggest" the testimony discussed during the witness preparation. *Ellis*, 667 F.2d at 612; see *O'Shea v. Jewel Tea Co.*, 233 F.2d 530, 534-35 (7th Cir. 1956) (designating defendant's ex-employee as adverse to plaintiff because, *inter alia*, he had met with defendant's counsel before testifying).

Third, the representation of these witnesses by Impax counsel shows that Impax and these witnesses have a unity of interest. This principle was recognized by Judge McGuire in *Evanston Northwestern Healthcare*, where he ruled that complaint counsel could use leading questions with a former employee of the respondent because, while she had separate counsel, the respondent was paying her counsel's fees. Transcript of Trial Record at 686, *Evanston Nw. Healthcare Corp.* (F.T.C. Feb. 14, 2005) (No. 9315) (Exhibit B). In *Evanston*, the fact that Respondent was paying the fees of the former employee's own lawyer was enough to find that the former employee was adverse to complaint counsel without a showing of actual hostility on the witness stand. *Id.* Here, the unity of interests of Impax and its former employees is even clearer: their interests are sufficiently aligned that the ex-employees are represented by Respondent's trial counsel and, frequently, Respondent's current in-house counsel.

Fourth, [REDACTED]

[REDACTED]

Mengler Dep. 227:18-228:9; Koch Dep. 35:21-36:5; 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 at a *prior* 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 designated adverse to Complaint Counsel. Bingol and Cuca are two former employees of Endo, the pharmaceutical company that entered into the reverse-payment settlement with Impax. Both were involved in Endo's plans for dealing with generic Opana ER, and Cuca [REDACTED]

[REDACTED] Cuca Dep. at 78:9-15.

Although Endo is not a respondent, Impax and Endo have similar, if not identical interests in this case. Endo's settlement agreement with Impax "brings this case to court; [and] identifies the witness with" Impax. *See McLaughlin*, 1998 U.S. Dist. LEXIS 18588, at *4. And Endo and Impax are also co-defendants in a private treble-damage action pending in Chicago

challenging the same settlement. *In re Opana ER Antitrust Litigation*, MDL No. 2580 (Lead Case No. 14-cv-10150) (N.D. Ill.)

In the Chicago case, the private plaintiffs seek money damages from both Impax and Endo. Unsurprisingly, [REDACTED] Respondent Impax Laboratories' Supplemental Responses to Complaint Counsel's First Set of Interrogatories (May 22, 2017). And, the testimony of Bingol and Cuca in this case can be used in the treble damage action against Impax and Endo — and directly against these witnesses themselves. *See, e.g.*, F.R.E. 801(d)(1).

In light of this pending treble damage action against Endo, its former employees should be treated adverse to Complaint Counsel. This case and the private case challenge the same settlement. Thus, by opposing this designation of the Endo witnesses here, Respondent is 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 the private case in Chicago.

Courts have rejected this anomalous position in the past. In *United States v. Uarte*, for example, the Ninth Circuit held that a third party in federal court was adverse because that third party was also a co-defendant in a parallel action in another court “arising out of the same incident which gave rise to the instant case.” 175 F.2d 110, 113 (9th Cir. 1949). The pendency of the second lawsuit made it “natural” that the third party would be unwilling to “confess any error on his part,” and therefore he could be treated as adverse to the plaintiff in the first case. *Id.* Other courts have held similarly. *Sadid v. Idaho State Univ.*, 2013 U.S. Dist. LEXIS 172361, at *7-*8 (D. Id. Dec. 5, 2013) (third parties designated as adverse because they were defendants in related action); *Maryland Casualty Co. v. Kafor*, 225 F.2d 120, 123 (5th Cir. 1955) (nonparty

designated adverse in case against its insurance company); *Melton*, 436 F.2d at 26 (nonparty designated adverse because his conduct was at issue in case); *Union Pac. R.R. Co. v. Ward*, 230 F.2d 287, 290 (10th Cir. 1956) (nonparty designated as 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, [REDACTED]

[REDACTED] 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 a *de facto* witness through Bingol or Cuca. Endo’s counsel will make sure that Complaint Counsel cannot 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 too 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 biased in favor of the cross-examiner, the danger arises that leading questions will avoid the complete truth, and such questions may be forbidden Were I to allow defense counsel to lead this witness, it would tend

to make the person under oath on the stand not the *de facto* 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 [REDACTED]

[REDACTED]

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 Supporting the Complaint

EXHIBIT A

STATEMENT OF CONFERENCE WITH OPPOSING COUNSEL

Pursuant to Paragraph 4 of the Additional Provisions of the Scheduling Order dated February 17, 2017, as amended, Complaint Counsel represents that it has conferred with Counsel for Respondent in an effort in good faith to resolve by agreement the issues raised by the motion and based on the conference states that (i) Respondent does not object to Complaint Counsel's request to designate present and former employees of Respondent Impax Laboratories, Inc., as adverse to Complaint Counsel pursuant to Rule 3.41(d); and (ii) Respondent does not agree that the former employees of third party Endo Pharmaceuticals, Inc. should be designated as adverse to Complaint Counsel pursuant to Rule 3.41(d).

Respectfully submitted,

Dated: October 4, 2017

/s/ Charles A. Loughlin

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Counsel Supporting the Complaint

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

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of:)
Evanston Northwestern)
Healthcare Corporation,)
a corporation,)
and) Docket No. 09315
ENH Medical Group, Inc.,)
a corporation,)
Respondent.)
-----)

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

BEFORE THE HONORABLE STEPHEN J. McGUIRE
Administrative Law Judge

Reported by: Susanne Bergling, RMR

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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 former employee who left almost five years
14 ago from the company. She was deposed in
15 investigational hearing by complaint counsel.
16 Respondents didn't have notice that she was contacted
17 for an investigational hearing. I don't think there's
18 any reason to --

19 JUDGE MCGUIRE: Overruled.

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JUDGE MCGUIRE: Before we go into that, I want

18 to augment my earlier ruling. You intend to call her
19 and some others as a hostile witness?

20 MR. NOLAN: Yes.

21 JUDGE MCGUIRE: I want to say that maybe we

22 should establish her as that at some point during your
23 questioning. If she is unable or cannot answer
24 questions, then maybe at that time I will entertain your
25 motion. I think otherwise, I was somewhat premature to
649

1 overrule the objection.

2 MR. NOLAN: May I be heard, Your Honor?

3 JUDGE MCGUIRE: Yes.

4 MR. NOLAN: I just wanted to put on the record,
5 there was no need before, that Ms. Chan worked for
6 Highland Park for the -- before the merger for a number
7 of years in the contract negotiation role. She was on
8 the transition team through the period of the merger,
9 and she worked in managed care contracting for Evanston
10 Northwestern.

11 In addition, Your Honor, I just asked some
12 opening questions in an open-ended manner because I
13 didn't see any need to lead at this point --

14 JUDGE MCGUIRE: Well, I have no problem with
15 that, if you just want to expedite her early education,
16 training and such --

17 MR. NOLAN: Okay.

18 JUDGE MCGUIRE: -- but what I'm saying is I
19 don't want to treat her at this juncture as a hostile
20 witness until you can show me at some point, you know,
21 during your examination that, in fact, she is such.

22 Are we clear on that?

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.

Page 686

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?

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11 THE WITNESS: Yes.

12

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

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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

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

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27 because of the conflict of interest. Given the

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

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

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33 permitting him to lead.

34

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

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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 Pharmaceuticals, Inc. as Adverse to Complaint Counsel, with:

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Chief Administrative Law Judge
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Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
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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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