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April 30, 2020

VIA E-FILING

The Honorable Thomas M. Moore, P.J.Cv.
Superior Court of New Jersey
Essex County Historic Courthouse
470 Martin Luther King Jr. Boulevard, 2nd Floor
Newark, New Jersey 07102

Re: Robyn P. Winter and Wendy Schwartz v. Sanofi-Aventis US LLC
Docket No. ESX-L-4013-17
Defendant's Opposition to Plaintiff's Motion to Re-Open Discovery
Return Date: May 8, 2020
Telephonic Oral Argument is Requested

Your Honor:

Defendant sanofi-aventis US LLC ("Sanofi") submits this letter brief in opposition to Plaintiffs' motion to re-open discovery and compel depositions. Because no "exceptional circumstances" exist as required by law, re-opening discovery to allow any further depositions at this late stage in this 2017 case is unwarranted and should be denied.

PRELIMINARY STATEMENT AND PERTINENT FACTS

Plaintiffs in this employment law case are former Sanofi pharmaceutical sales representatives who allege claims of whistleblower retaliation under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, *et seq*. (CEPA), and gender discrimination under the Law Against Discrimination, N.J.S.A. 10:5-1, *et seq*. (LAD). The decision to terminate Plaintiffs' respective employment was made by Sanofi Human Resources Business Partner Hanna Duffy due to Plaintiffs' admission they falsified sales calls in violation of Sanofi policy.

For more than two years (and 830+ days of discovery), Sanofi worked closely, respectfully, cooperatively, and diligently with Plaintiffs' counsel, Eric Lubin, Esq., to accommodate Plaintiffs' myriad discovery requests—including their notice to depose Ms. Duffy. This mutual cooperation with Mr. Lubin also included Sanofi consenting to five requests to extend discovery to, among other things, accommodate Ms. Duffy's unexpected back surgery, from which she is still recovering. (Saloman Cert., ¶¶ 2, 15, 17-18, 20).[1]

[1] Sanofi relies upon the Certification of Mark A. Saloman, Esq. with annexed exhibits ("Saloman Cert., ¶__"), submitted herewith and incorporated herein by reference.

But instead of filing another timely motion in January 2020 to extend the last discovery end date (to which Sanofi twice consented), Plaintiffs decided *not* to move to extend and to allow the discovery period to close without the benefit of Ms. Duffy's deposition. (Saloman Cert., ¶ 3). Indeed, this motion is Plaintiffs' transparent attempt to alter that decision based on Sanofi's summary judgment motion. Now armed with Sanofi's motion papers as a roadmap, Plaintiffs seek to re-open discovery to depose Ms. Duffy and Sanofi Head of Employee Relations Kelly Byrne.

Plaintiffs' groundless motion fails to meet the onerous legal standard and should be denied because:

- neither of the witnesses were "new;" rather, both were well known to Plaintiffs since early in the discovery process;

- despite these admitted facts, Plaintiffs *chose* to allow the discovery period to close and not to move to extend discovery—even after Mr. Lubin was told a motion was needed because Ms. Duffy remained on a medical leave and Sanofi twice consented to that motion. Rather than use this free and unimpeded opportunity to obtain sufficient additional time to depose Ms. Duffy by simply moving to extend the February 7, 2020 discovery end date, Mr. Lubin told Sanofi he would not do so;

- Sanofi always was transparent about Ms. Duffy's medical leave, the severity of her unanticipated medical condition, and her uncertain ability to appear (either sitting or standing) for a deposition during the discovery period; and

- Plaintiffs never noticed Ms. Byrne's deposition nor that of any Sanofi corporate designee.

(Saloman Cert., ¶¶ 4-8).

The facts relevant to this motion are straightforward: Throughout 2018, the parties propounded discovery responses and produced documents. Plaintiffs never sent a deficiency letter to Sanofi, never accused Sanofi of withholding any information, and never served requests for supplemental information based on any perceived deficient discovery responses. Ms. Duffy signed Sanofi's discovery responses and she is identified in a raft of e-mails about Plaintiffs' respective terminations. Ms. Byrne too was identified with precision as a defense witness. (Saloman Cert., ¶¶ 13-14).

On December 6, 2018, Plaintiffs submitted the parties' stipulation for the **first**, 60-day discovery extension. In February 2019, Plaintiffs noticed the deposition of Ms. Duffy, who decided to terminate Plaintiffs' employment. On February 12, 2019, Plaintiffs obtained a **second** extension of discovery with Sanofi's consent. On August 2, 2019, Plaintiffs obtained a **third** discovery extension with Sanofi's consent. (Saloman Cert., ¶¶ 15-18).

On October 21, 2019, Sanofi promptly emailed Mr. Lubin after learning Ms. Duffy had commenced an indefinite medical leave to accommodate spinal surgery. Based on Ms. Duffy's anticipated prolonged absence, Plaintiffs moved for and obtained a **fourth** discovery extension, again with Sanofi's obvious and immediate consent. (Saloman Cert., ¶¶ 19-20).

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Sanofi always was upfront and transparent in providing updates on Ms. Duffy's medical leave status when asked by Mr. Lubin. He and the undersigned discussed Ms. Duffy's condition and medical leave status several times before the expiration of the February 7 discovery period, including at each deposition held between October 2019 and January 2020. (Saloman Cert., ¶¶ 21-23).

On January 9, 2020, Mr. Lubin and I again discussed Ms. Duffy's medical condition and I again told him she remained out of work with no return date. That day, Mr. Lubin requested another discovery extension to allow time for Ms. Duffy to be deposed when she was well enough. Sanofi again consented to extend discovery for a **fifth** time and fully expected Plaintiffs to promptly file another unopposed motion to extend time for discovery. (Saloman Cert., ¶¶ 24-25).

After reviewing the docket and noting Plaintiffs motion was missing, defense counsel called Mr. Lubin on January 17, 2020 to ask if Plaintiffs intended to move to extend discovery, as understood from our January 9 conversation. Mr. Lubin's exact response was, "No, I'm good, but I'll consent if you file a motion" to extend time for discovery. (Saloman Cert., ¶¶ 26-27).

Wanting to provide Plaintiffs every chance to depose Ms. Duffy, I called Mr. Lubin back that day and told him Plaintiffs must move to extend time for discovery if they wanted to depose Ms. Duffy, who was still out on medical leave of absence. Mr. Lubin replied he was "too busy" to file the motion and asked if my office could file the motion on his behalf. After initially volunteering my colleague to draft Plaintiffs' motion, I immediately emailed Mr. Lubin to make clear my office was "unavailable to file the motion to extend" but Sanofi "will not oppose if you file one." (Saloman Cert., ¶¶ 28-29). Importantly, Mr. Lubin never responded to my email, did not contact me, and never filed Plaintiffs' motion to extend time for discovery—though he had Sanofi's oral and written consent and still had ample time to do so. The discovery period ended three weeks later on February 7, 2020. Though Plaintiffs obtained prior discovery extensions due to Ms. Duffy's medical absence, knew of her medical status, and twice secured Sanofi's consent to extend the discovery end date, Plaintiffs simply chose to allow the discovery end date to lapse. (Saloman Cert., ¶¶ 30-31).

Following the close of discovery on February 7, 2020, the court promptly set a trial date of April 27, 2020, which was adjourned to July 6, 2020. On February 13, 2020, six days *after* the close of discovery, Mr. Lubin inquired about Ms. Duffy's availability. Sanofi promptly and truthfully responded Ms. Duffy remained on her medical leave of absence. Plaintiffs raised no further inquiry related to Ms. Duffy. (Saloman Cert., ¶¶ 32-33).

On April 9, 2020, after *two more months* of silence from Plaintiffs about Ms. Duffy, Sanofi filed its summary judgment motion so it could be adjudicated well before the July 6 trial date. As Plaintiffs surely must have expected, Sanofi's summary judgment motion included certifications from Ms. Duffy and Ms. Byrne detailing Sanofi's legitimate non-retaliatory reasons for Plaintiffs' terminations. These certifications follow the information already in the copious record and confirm Ms. Duffy decided to terminate Plaintiffs' employment. (Saloman Cert., ¶¶ 35-36).

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ARGUMENT

PLAINTIFFS' MOTION FAILS TO MEET THE ONEROUS STANDARD OF PROVING "EXCEPTIONAL CIRCUMSTANCES" SUFFICIENT TO WARRANT RE-OPENING DISCOVERY IN THIS 2017 CASE

Plaintiffs' motion to re-open discovery and compel depositions is governed by *Rule* 4:24-1, which mandates: "no extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless *exceptional circumstances* are shown." *See R.* 4:24-1(c) (emphasis added). Since a trial date of July 6, 2020 is set, the exceptional circumstances standard must apply here. Plaintiffs' motion fails to demonstrate anything remotely approaching exceptional circumstances under the Rule.

To satisfy the onerous "exceptional circumstances" standard as a matter of law, Plaintiffs must show: (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; **and** (4) the circumstances presented were clearly beyond the control of the attorney and the litigant seeking the extension. *Rivers v. LSC Partnership*, 378 N.J. Super. 68, 79 (App. Div.), *certif. denied*, 185 N.J. 296 (2005) (citing *Vitti v. Brown*, 359 N.J. Super. 40, 51 (Law Div. 2003) (emphasis added).

New Jersey courts routinely refuse to find exceptional circumstances in situations far more deserving than that portrayed by Plaintiffs' motion. In *Bender v. Adelson*, our Supreme Court denied the request to reopen discovery to permit defendant to furnish the reports of three expert witnesses because there were "enough extensions" and defendants did not act with the diligence that the Rules of Court require). 187 N.J. 411, 428 (2006). Like here, the defendant also failed to provide reasoning for failing to extend the discovery end date before its expiration. *Id.*

Similarly, the *Vitti* court declined to find exceptional circumstances where, *as here*, defendants did not explain failing to move to extend time within the original discovery period. *See Vitti*, 359 N.J. Super. at 52-53. Defendants moved to reopen discovery more than six weeks after the discovery end date had passed and after the case was scheduled for mandatory arbitration. *Id.* The court found defense counsel's failure to attend to the matter within the time for discovery did not meet the exceptional circumstances test. Moreover, defendants failed to show that the additional discovery—the deposition and medical examination of plaintiff—were essential, reasoning "it would undoubtedly be helpful to defendants to be able to conduct plaintiff's deposition, and to have the plaintiff examined by a physician of defendants' choosing, but there has been no showing of any substantial prejudice." *Id.* at 53. *See also Chapadia v. Campbell*, 2006 N.J. Super. Unpub. LEXIS 1786, at * 15-17 (App. Div. 2006); *citing Szalontai v. Yazbo's Sports Cafe*, 183 N.J. 386 (2005) (denying motion to reopen discovery because plaintiff waited until after an unfavorable arbitration hearing to move and that "'allowing discovery to reopen at this point . . . would be using the arbitration procedure as almost a screening event to figure out where the weaknesses are.")

Here, Plaintiffs' motion must be denied because it fails to address—and cannot satisfy—any element of the exceptional circumstances test.

A. Plaintiffs Cannot Meet The Third Element Of The Exceptional Circumstances Test Because There Is No Justification For Counsel's Failure To Request An Extension Of The Time For Discovery Prior To February 7, 2020.

There is no reason Plaintiffs failed to move to extend the discovery end date within the original time period—February 7, 2020. Plaintiffs concede they knew of Ms. Duffy's involvement in Plaintiffs' terminations and noticed her deposition in February 2019. It was well known in October 2019 that Ms. Duffy went out on an indefinite medical leave, prompting Plaintiffs to obtain a fourth unopposed discovery extension with Sanofi's full consent. (Saloman Cert., ¶¶ 5-7; 21-22).

On January 9 and 17, 2020, Plaintiffs again asked to extend the discovery period, and Sanofi twice Sanofi consented. Instead, Mr. Lubin first told the undersigned he would not file the motion to extend and then—after being reminded and prompted by defense counsel to do so—said he was too busy. Under these circumstances, there can be no explanation (reasonable or otherwise) for Plaintiffs' failure to extend the discovery period or purposeful decision to let the February 7, 2020 end date lapse. *See, e.g., Rivers;Vitti; Bender, supra.*

B. Plaintiffs Cannot Meet The Fourth Element Of The Exceptional Circumstances Test Because Plaintiffs Were Not Prevented From Seeking The Extension—With Sanofi's Oral And Written Consent—By Circumstances "Clearly Beyond Their Control."

Plaintiffs knew of Ms. Duffy's and Ms. Byrne's involvement in Plaintiffs' terminations and were regularly updated on Ms. Duffy's medical leave status. Sanofi consented to four prior discovery extensions and twice consented to a fifth discovery extension (on January 9 and 17)—which Plaintiffs inexplicably chose not to request. Under these circumstances, Plaintiffs surely were not prevented from seeking or obtaining the fifth unopposed discovery extension. The opposite is true: Sanofi encouraged Plaintiffs to file the motion and they had every right and ability to do so. They simply chose not to seek an extension—undoubtedly so they could use Sanofi's summary judgment motion as a road map for what they hoped would be future depositions. As the *Szalontai* court noted, "'allowing discovery to reopen at this point . . . would be using the [Sanofi's summary judgment motion] as almost a screening event to figure out where the weaknesses are." *Id.* That is exactly what Plaintiffs seek to do here.

Plaintiffs' attempt to re-shape the narrative by relying on a February 13 email between counsel is misleading. It is beyond dispute that, by that point, the discovery period was already closed. The Plaintiffs waited 10 more weeks—until *after* the close of discovery and *after* the Court set a trial date and *after* Sanofi filed its summary judgment motion—to file this groundless motion.

C. Plaintiffs Cannot Meet The First Element Of The Exceptional Circumstances Test Because Discovery Could Have Been Completed Before February 7, 2020.

This straightforward employment action is three years old. Plaintiffs extended the discovery period four times, resulting in 838 days of discovery. These facts alone warrant a finding against Plaintiffs on this prong. *See Bender,* 187 N.J. at 428 (defendant had "enough extensions" and the defendants had not acted with the diligence that the Rules of Court require).

As to Ms. Duffy, moreover, Plaintiffs' actions following October 2019 were not diligent because they knowingly allowed the discovery period to lapse despite knowing full well Ms. Duffy was (and remains) unavailable to be deposed.

And Plaintiffs fail to justify not deposing Ms. Byrne, who was known to Plaintiffs as a defense witness at least as early as April 10, 2019—10 months before the close of discovery. First, Sanofi's April 10, 2019 document production included "DEF1404," which listed "Kelly Byrne" as a "required attendee" at a meeting with Ms. Duffy on March 22, 2017 in "Kelly's office" to discuss the investigation which led to the termination of Plaintiff Winter's employment two days later on March 24, 2017. (Saloman Cert., ¶¶ 39-40).

Second, Plaintiffs' Third Document Request No. 5 requested copies of all documents relating to the meetings which led to the terminations of both Plaintiffs. Sanofi responded by precisely directing Plaintiffs to a handful of specific documents—told including "DEF1404." Hardly a "needle in a haystack" as Plaintiffs portray, Sanofi told the exact pages of Sanofi's production which identified Ms. Byrne as involved with Plaintiffs' respective terminations. (Saloman Cert., ¶¶ 41-42).

Third, under Rule 4:14-2(c), Plaintiffs had every opportunity to notice the deposition of a Sanofi corporate representative with knowledge of topics relevant to their claims and Sanofi's well-known defenses. Yet Plaintiffs chose not to do so at any time during the discovery period. (Saloman Cert., ¶ 43).

D. Plaintiffs Cannot Meet The Second Element Of The Exceptional Circumstances Test Because The Additional Discovery Sought Is Non-Essential.

As the *Vitti* court ruled, even the deposition and medical examination of the complaining *plaintiff* is not "essential" to the disposition of a case. *Vitti*, 359 N.J. Super. 40 at 52-53. If that precedent is followed here, the testimony of two non-party Sanofi employees likewise cannot be deemed "essential."

SANCTIONS ARE NOT WARRANTED AGAINST SANOFI

Plaintiffs also seek an award of sanctions against Sanofi including reimbursement of attorneys' fees incurred in bringing their motion and costs to depose Ms. Byrne and Ms. Duffy. (Pl. Cert. at 7). Plaintiffs allude to alleged "gamesmanship" and purported violation of discovery rules but provide zero factual support for their facile argument.

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Instead, Sanofi fully complied with its discovery obligations and was transparent regarding Ms. Duffy's medical condition and indefinite leave of absence. Plaintiffs also knew of Ms. Byrne's involvement based on the discovery provided. And Plaintiffs raised no deficiencies in Sanofi's discovery responses nor served a corporate representative notice on Sanofi. Plaintiffs' motion results from their own decision to allow the discovery end date to lapse, and nothing more. Blaming Sanofi is inappropriate and misplaced.

Indeed, Plaintiff make the specious contention Sanofi—a global leader in healthcare which is conducting discovery and several clinical trials for both a vaccine and treatment of COVID-19—is somehow using the COVID-19 pandemic to interfere with their ability to conduct discovery (beyond the discovery end date). Yet Sanofi repeatedly cooperated with and extended every courtesy to Mr. Lubin and his clients to:

- obviate the need for a single discovery motion during the discovery period;
- reach consensus on four discovery extensions;
- twice consent to a fifth discovery extension which Plaintiffs ignored;
- agree to last-minute postponements to accommodate Mr. Lubin's scheduling issues; and
- most recently, adjourn Sanofi's summary judgment motion to accommodate Mr. Lubin's personal needs during the pandemic.

Sanofi has only operated in good faith at all times toward Plaintiffs and Mr. Lubin. Sanctions, therefore, are entirely unjustified and unwarranted.

CONCLUSION

For the foregoing reasons, Sanofi respectfully requests Plaintiffs' motion to re-open discovery and compel depositions and for sanctions be denied in its entirety.

We thank the Court for its consideration and remain available at Your Honor's convenience.

Respectfully submitted,

FORD & HARRISON LLP

/s/ Mark A. Saloman

MARK A. SALOMAN
Partner

MAS/mg

Enclosure

cc: All Counsel of Record (*Via ECF*)
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