SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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DOMINICK TENUTO,

: DCM PART 4

Plaintiff, : Present:

-against- : HON. Robert J. Gigante

LEDERLE LABORATORIES, DIVISION OF AMERICAN CYANAMID COMPANY, and : DECISION AND ORDER
JOHN BISHOP, as Executor of the Estate of Leory L. Schwartz, M.D., : Index No. 1134/81

Defendants. Motion No. 1107-008

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The following papers numbered 1 to 4 used on this motion the 4th day of May, 2007.

	Papers Numbered
Notice of Motion to Vacate by Defendant Lederle Laboratories, with Supporting Papers, Exhibits and Memorandum of Law (Dated April 10, 2007)	1
Affirmation in Opposition by Plaintiff Dominick Tenuto, with Exhibits (Dated April 26, 2007)	2
Affirmation in Partial Support by Defendant John H. Bishop, (Dated April 30, 2007)	3
Affirmation in Reply with Memorandum of Law (Dated May 3, 2007)	4

Upon the foregoing papers, the motion for a protective order is granted only to the extent indicated hereinbelow.

Defendant Lederle Laboratories, a division of American Cyanamid Company (hereafter "Lederle"), moves by notice of motion for a protective order pursuant to CPLR 3103 seeking (1) to vacate plaintiff's requests for, inter alia, admissions, answers to interrogatories and pretrial

depositions, and (2) to preclude plaintiff from seeking additional discovery until he complies with this Court's order dated February 28, 2007. Defendant John H. Bishop, as Executor of the Estate of Leroy L. Schwartz, M.D. (hereafter " Dr. Schwartz"), joins in so much of Lederle's application as seeks to preclude plaintiff from seeking additional discovery until he has produced the trial exhibits previously ordered by the Court. Plaintiff opposes the motion in its entirety.

On January 15, 1980, plaintiff commenced this action against defendants for damages arising out of his alleged acquisition of polio from contact with his daughter, who had been recently immunized against the disease by Dr. Schwartz using a Lederle vaccine. According to the amended complaint, Dr. Schwartz had prescribed and administered Orimune, an oral Poliovirus vaccine ("OPV") manufactured by Lederle, to his infant daughter in 1979, and had failed to provide him with appropriate warnings regarding the risk of contracting the disease. It is further alleged that Lederle failed to provide adequate information to Dr. Schwartz. The complaint alleges causes of action sounding in negligence, breach of warranty and strict products liability. Issue was joined on July 19, 1984, when Lederle served an amended answer denying liability, interposing affirmative defenses and asserting a cross claim against Dr. Schwartz.[1]

In support of its application, Lederle contends that plaintiff has conspicuously failed to prosecute this case, which was commenced on January 15, 1980. Lederle claims that between 1982

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[1]By decision and order dated December 22, 1992, Justice Amann of this Court granted a motion for summary judgment by Dr. Schwartz dismissing the complaint against him. Said decision was affirmed by the Appellate Division (Tenuto v Lederle Labs, 207 AD2d 541). However, the Court of Appeals reversed (Tenuto v Lederle Labs, 90 NY 2d 606) and reinstated the complaint. Subsequently, Justice Amann, denied the doctor's motion for summary judgment dismissing Lederle's cross claim, but that order was later reversed on appeal and the cross claim dismissed (Tenuto v Lederle Labs, 234 AD2d 284). Lederle never appealed the dismissal of its cross claim against Dr. Schwartz (Tenuto, 90 NY2d at p 609). Thereafter, cross motions for summary judgment by plaintiff and Lederle were denied by the decision and order of Justice Mastro dated June 30, 1999 (181 Misc 2d 367).

to 1985 it dutifully responded to plaintiff's discovery demands, resulting in the production by Lederle of over 10,000 pages of documents. In addition, Lederle claims that it has responded to plaintiff's demand for a bill of particulars; fully responded to plaintiff's first set of interrogatories; and provided plaintiff with answers to supplemental interrogatories as recently as March of 2002. According to Lederle, the Court directed the parties to exchange trial exhibits in October of 2005, and while Lederle complied, plaintiff has yet to produce a single trial exhibit. Thus, in June of 2006, the Court re-scheduled the production of trial exhibits for August 1, 2006, and plaintiff once again failed to comply. On February 28, 2007, plaintiff was granted leave to produce his long overdue trial exhibits, but instead served a notice to admit requiring 441 responses and a second set of interrogatories. This was followed, on April 3, 2007, with a notice to depose Lederle on April 23, 2007, with documentary disclosure to be completed by April 9, 2007. To date, plaintiff has yet to produce a single trial exhibit. As a result, Lederle prays that a protective order be entered precluding plaintiff from seeking any further discovery until the court-ordered production of trial exhibits has taken place.

In opposition, plaintiff alleges that its notice of admit is entirely proper and merely requests that Lederle concede uncontested facts. In addition, plaintiff alleges it is entitled to depose Lederle relevant to its claims of manufacturing defects and the failure to warn. Finally, plaintiff alleges that it is currently in the process of preparing some 850 exhibits which he intends to serve shortly. Therefore, any stay of discovery at this juncture is alleged to be improper.

As is relevant, CPLR 3101(a) provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action". While it is beyond cavil that this section is to be liberally construed, the ultimate determination rests within the sound discretion of the trial court (*see* Kavanagh v Ogden Allied Maintenance. Corp., 92 NY2d 952; Cynthia B v New Rochelle Hosp.

Med. Ctr, 60 NY2d 452, 461). Thus, discovery demands which are unduly burdensome or otherwise improper will be stricken (*see* Scalone v Phelps Mem Hosp. Ctr, 184 AD2d 65). However, the fact that the Notice is rather lengthy, encompassing 441 questions, standing alone does not mandate that it be stricken, in light of the complexity of the issues involved in this case (see, Sarbro Realty Corp. V. Kradjian, 116 AD 2d 866).

In furtherance of the court's obligation and broad discretion to supervise and control discovery (Maiorino v. City of New York, 39 AD 3d 601 (2d Dept.)), it is

ORDERED, that plaintiff shall provide defendants with the trial exhibits as previously ordered, and it is further

ORDERED, that only after compliance with the foregoing, defendants shall respond to plaintiff's Notice to Admit and Set of Interrogatories served on or about February 28, 2007. If defendants claim that a particular matter in the Notice to Admit is factually contested, or seeks legal or factual conclusions, or interpretations of law, or clearly irrelevant matters, or opinions, they shall so indicate in their response, and it is further

ORDERED, that following service of defendants' responses to the foregoing, defendant Lederle shall submit to a deposition in response to plaintiff's Notice therefore served on or about April 3, 2007, within 30 days, and it is further

ORDERED, that the motion is granted in accordance herewith.

E N T E R

Dated: October 5, 2007

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Robert J. Gigante
JSC

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