



GOETZ FITZPATRICK LLP
Attorneys at Law
One Penn Plaza, New York, NY 10119 | (T) 212-695-8100 | (F) 212-629-4013
www.goetzfitz.com

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Ronald D. Coleman
Partner
rcoleman@goetzfitz.com

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BY ECF

Hon. Joanna Seybert, U.S.D.J.
United States District Court
Eastern District of New York
Alfonse M. D'Amato Federal Building
Central Islip, NY 11722-4443

Re: S&L Vitamins v. Australian Gold
05-CV-1217 (JS) (MLO)

Dear Judge Seybert:

We represent the plaintiff S&L Vitamins, Inc. and counterclaim defendant Larry Sagarin (jointly "S&L") in the referenced action and write in opposition to the application of defendant Australian Gold per its letter dated November 20, 2008 to make a host of substantive amendments to the Joint Pretrial Order ("PTO"). Defendant's proposed changes are not merely matters of housekeeping or completeness. Rather, such amendments would represent a fundamental diversion of this case from the one pleaded, the one on which two years of discovery and motion practice was premised, and result in a substantial injustice upon S&L.

It is notable that S&L's articulated grounds for declining to stipulate to the amendment defendant seeks here are glossed over, and not addressed, in a throwaway paragraph on page 4 of defendant's moving letter. S&L's responsive letter – typically the second exhibit in such an application following the initial letter requesting stipulation – is relegated to the last exhibit of defendant's submission, in the hope that the Court will not give it any shrift. The relevant text of that response is set out in the margin below¹ for the Court's convenience.

¹ Dear Scott and Frank:

I write in response to Scott's letter of October 31.

We object to any amendment of the pretrial order, de jure or otherwise. All the information sought to be added appears to be inadmissible pursuant to Fed. R. Evid. 402. But we certainly object to the inclusion of



Not only are defendant's proffered last-minute amendments offensive to the concept of a pretrial order itself, but if permitted they would divest plaintiff of substantive due process rights by allowing them to try an entirely new case based on previously undisclosed testimony and documents procured outside of the discovery process. On top of this, defendant has made an utterly inappropriate submission that attempts to pre-try by correspondence the case scheduled for a jury trial next month, to color the Court's view of the facts and to mislead the Court as to S&L's attitude toward the truth-seeking process that is civil litigation.

We write, therefore, to counteract these misguided efforts and to set out plainly the straightforward reasons why, rather than grant defendant's requests, this Court should impose sanctions on defendant for, among other things, willful and contumacious failure to comply with the Rules of Civil Procedure with respect to timely disclosure of evidence and the continuing obligation on parties to amend discovery responses, as set forth in detail below.

any materials not provided during discovery, regardless of the reason proffered for such omission.

Not only is AG's approach offensive to the very concept of the final pretrial order in the most obvious sense. It is also premised on your client's obtaining information for use at trial or which might otherwise lead to the discovery of admissible evidence **without disclosing** what, when and from whom it was obtaining that information. This deprived our client of the opportunity to take countervailing discovery, i.e., to seek the deposition of any persons AG has interviewed or, if they are corporations, their representatives, or to issue document subpoenas or utilize whatever other methods of disclosure have been provided by the Federal Rules of Civil Procedure. There is every reason to believe that the identity of these sources of information was well known to AG during the discovery period and should have been disclosed at that time. To the extent that any such information only became available later, it still should have been disclosed and our client given the opportunity to conduct its own interviews and investigations.

Indeed your letter confirms that AG has violated Fed. R. Civ. P. 26(e)(1)(A) for a period of time and to an extent we cannot know. Even as AG has requested the augmentation of its case via amendment of the pretrial order with "new information," it has ignored its obligation to serve amended voluntary disclosures, interrogatory answers or responses to our document demands and to reveal "what, when and whom" as to the documents and testimony AG now seeks to add. It need not be added that AG certainly did not do so "in a timely manner," as required by the Rule. . . .

In summary, for purposes of the evidence it seeks to use at trial, AG has proceeded as if the discovery schedule and the pretrial order in this case are merely suggestions, outlines or starting points. On the other hand in terms of disclosure, it has conducted covert, ex parte discovery and clearly intends to do so right up until the day of trial. Having seen nearly all its meritless claims shut down one by one, it continues spinning new theories of recovery unrelated to the pleadings, unearthing new witnesses, and generating and "finding" new documents to be inserted into the case under the guise of ministerial adjustments. All along the way, AG is utilizing this undisclosed information in an undisclosed manner to wrongfully deny supplies of merchandise to our client, and hence depress its revenues, to undermine S&L's ability to conduct both its lawful business and its litigation.

Our view, however, is that the case was "closed" and sealed for trial with the filing of the pretrial order, absent good cause shown as determined by the Court, and that the fruit of your clients' investigations, undertaken through counsel but done without timely disclosure, is not only inappropriate for inclusion in the trial but arguably sanctionable. In light of the foregoing we cannot imagine how Judge Seybert could find good cause or otherwise give you the leave you seek without severely prejudicing our client's due process rights. For these reasons S&L will not stipulate to your requests.



Defendant could have discovered the information it seeks to add to the PTO during the discovery period. Defendant in its letter details the process by which – two years after this litigation was initiated and after the close of discovery in which it turned up that supported its claim that S&L bought product directly from defendant’s distributors – it decided to extend its investigation to surveillance of S&L’s premises. By this process it claims to have determined that S&L was receiving merchandise via UPS. Defendant was subsequently granted leave after the close of discovery to subpoena records of UPS which, it claims, “prove” the legally irrelevant fact that one of its distributors may have “drop shipped” merchandise to S&L “in the 18 months preceding the date of production by UPS.”

But nothing prevented defendant from beginning surveillance of S&L or subpoenaing UPS for records regarding shipments to S&L prior to the close of discovery. For that matter, defendant was not only free to subpoena all of its own distributors during the discovery period to seek such information: defendant has, and has always had, a contractual right to do so without resort to legal process.

Why does this matter? It demonstrates the lack of justification for defendant’s late insertion of the information it seeks to add to the PTO. “Recently discovered” does not mean “recently bothered to find” or “recently revealed to have in our possession, custody or control.” Information obtained from its own distributors was always available to it, and there was no reason to delay this case by months last winter merely because defendant was squeamish about approaching its own distributors to find out which, if any, had any information it considered relevant. Nor is there any factual basis of record or even coherent explanation on which to credit the claim that the recent passing of Floyd Raley had anything to do with this delay.

But more significantly, the fact that defendant could have obtained this information at any time prior to a month and a half before trial illustrates the method by which defendant hid both its investigation and the fruits of that investigation from defendants during the discovery process. By attempting to insert this information now, long after discovery has closed, and without a seasonable amendment of its discovery responses at any point, defendant has deprived S&L of the opportunity to:

- depose the sources of defendant’s information;
- make its own document demands on those parties;
- examine the full body of information from which the proffered exhibits have been culled and, by all indications, redacted; and
- take such other discovery of other persons and parties as may have been indicated by virtue of “opening the door” on the timely disclosures by defendants, in its own defense.



For these reasons, as set out in detail below, granting defendant's request would work a profound injustice here and undermine the entire premise of both the pretrial order as a governing document and of modern pretrial disclosure.

Defendants do not meet the required standard to amend a pretrial order.

"The court may modify the order issued after a final pretrial conference only to prevent manifest injustice." Fed. R. Civ. P. 16(e). The decision to permit amendment of the proposed joint pretrial order rests within the discretion of the Court and should be granted when "the interests of justice make such a course desirable." *Madison Consultants v. Fed. Deposit Ins. Corp.*, 710 F.2d 57, 62 n.3 (2d Cir. 1983). In making such a determination, the court should balance "the need for doing justice on the merits" against judicial efficiency. See *Laguna v. American Export Isbrandtsen Lines, Inc.*, 439 F.2d 97, 101 (quoting 3 J. Moore, Federal Practice P16.20, at 1136 (3d ed. 1968)). The Court should also "consider whether any prejudice to the opposing side will result." *Ismail v. Cohen*, 706 F. Supp. 243, 255 (S.D.N.Y. 1989).

Applying these factors to the facts and procedural posture here, and on consideration of the cases involving comparable facts, it is clear that defendants' last-minute motion to amend to the PTO should be denied. As the cases below make clear, where, as here, defendant could have obtained the information it claims to have "newly discovered" during the discovery period, and where, as here, it "sits on" that information regardless of when learned, planning only to "spring it" on its adversary on the eve of trial, courts routinely deny a request to amend.

Comparable cases. The facts here bear remarkable similarity to those with respect to a decision issued in this Court only last year by Magistrate Judge Orenstein. In *Alfano v. National Geographic Channel*, 2007 WL 2982757 (E.D.N.Y. 2007), Judge Orenstein considered the question of whether a witness, previously omitted both from initial disclosures under Rule 26 and subsequent responses to discovery, could be added to the trial witness list of plaintiff Alfano via amendment to the joint pretrial order ("JPTO" in the decision). Denying Alfano's request, he wrote as follows, in language that applies here perfectly as to both witnesses and documents:

[E]ven if I were inclined to overlook the Rule 26 violation, I would not overlook Alfano's further abuse of the discovery process in responding to the defendants' specific requests. On April 6, 2007, Corbis asked Alfano to provide, in addition to other information, the answers to the following interrogatories:

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There is no dispute that Galli's name was responsive to both of those interrogatories. Even if Alfano had not yet decided to call Galli as a witness, he had no unilateral right



to deprive the defendants of their opportunity to assess the utility of Galli's information by withholding his name.

Discovery has closed. Allowing Alfano to add Galli's name to the JPTO would therefore result in one of two forms of unfairness: it would either allow him to present Galli's testimony without the level of pretrial disclosure that would put the defendants in a position fairly to meet it, or it would require me to re-open discovery for extensive and costly proceedings to explore not only Galli's testimony, but other information, including the testimony of several other witnesses, pertinent to the subject matter of that testimony.

Another analogous situation was before the court in *Lara v. Unified School Dist. 501*, 2008 WL 920596 (D. Kan. 2008), an employment discrimination case, in which the plaintiff sought leave to amend a pretrial order **merely two weeks after** discovery had closed (not, as here, well over **two years**) so it could include additional medical conditions that could provide a basis for a finding of discrimination at trial. The court denied the motion, finding that:

Discovery has now been over for quite some time, and had been over for two weeks at the time that Plaintiff sought to amend the Pretrial Order to assert claims based upon these additional medical conditions. If Plaintiff had included these conditions in his original response, or supplemented that response to include this information at some point during discovery, Defendant would have had the opportunity to investigate these conditions, question Plaintiff about them during his deposition, or perhaps seek an independent medical examination. Plaintiff's failure to include these medical conditions in his response to Defendant's interrogatory deprived Defendant of the option to pursue any of these avenues of discovery. Moreover, because discovery has now ended in this case, there is no ability to cure this harm without re-opening discovery, which would slow and disrupt the progress of this case.

Id. at 2. See also, *Hawthorne Partners v. AT&T Technologies, Inc.*, 1994 WL 63054 (N.D. Ill. 1994) (“Allowing Hawthorne Partners' amendment would also likely engender another amendment to the final pretrial order to allow defendants to present new evidence to meet Hawthorne Partners' new evidence”); *Cartier, Inc. v. Four Star Jewelry Creations, Inc.*, 2004 WL 169746 (S.D.N.Y. 2004) (amendment on eve of trial denied); *Newby v. News Market, Inc.*, 170 Fed. Appx. 204, 2006 WL 616275 (2d Cir. 2006) (affirming denial of motion to amend where new witness's identity could have been provided during discovery).



The cases overwhelmingly support S&L's position here. In contrast, the cases cited by defendant in support of its application only demonstrate precisely the contrary result it seeks. In *S.E.C. v. U.S. Environmental, Inc.*, 2002 WL 31357809 (S.D.N.Y. 2002), the court permitted the amendment of a pretrial order upon a finding that it was "clear to the Court that evidence of this alleged fraudulent conduct by a registered representative of Castle has surfaced only recently, and plaintiff's counsel brought this evidence to the Court's attention as soon as they became aware of the recent developments." *Id.* at 2. Here, by contrast, the information in question came from defendant's own distributors. It was always available to defendant, and there is no indication at all that it has come forward with this information at the earliest possible moment.

The same was the case in *Miller v. Phillips Bryant Park, LLC*, 2005 WL 3116171 (S.D.N.Y. 2005), second of the three cases cited by defendant: The new evidence was truly new, and, indeed, the court there permitted supplementary discovery to give the opposing party a fair opportunity to probe the new information.

As to the last case cited by defendant, its citation, considering the facts there, demonstrates the parlous state of its legal argument. *Giannone v. Deutsche Bank Securities, Inc.*, 2005 WL 3577134 (S.D.N.Y. 2005) not only bears no factual similarity to the case at bar, but stands for almost the opposite proposition: That where the evidence listed on a pretrial order by one party survives a motion *in limine*, but by virtue of her representations and subsequent submissions both the court and her adversary are found to understand the purported relevance of that evidence in a different light, **the opposing party** will be permitted to amend the pretrial order and to add its **adversary's submissions** to its own list of documents and witnesses. The case is certainly not helpful to defendant's campaign here.

Defendants should not be permitted to add new documents to the PTO. Defendant would leave the Court with the false impression that S&L seeks to keep consideration of its supposed wrongdoing out of this case. Defendant states that "From the outset of this case, Australian Gold has reasonably believed that S&L had to obtaining the products from a distributor." But in fact that "reasonable belief" has never been backed up by fact, and still is not. Not only were no distributors named in defendants' Rule 26 disclosures, but, significantly, in response to S&L's interrogatory requesting that defendant identify "all distributors from whom defendant contends plaintiff[] obtained defendant's products," defendant responded, "Australian Gold does not know the identity of the distributors at this time, but its investigation continues." Defendant's interrogatory responses, which were never supplemented, are submitted herewith as Exhibit A.

Defendant cynical suggests at p. 5 of its letter that its new documents should be added because they were "clearly identified" in the PTO. They manifestly were not; otherwise there would be no need for an amendment of the PTO. Even if they had been,



however, the time to disclose information responsive to discovery requests or otherwise relevant to the claims and defenses in a case is not the PTO. It is highly suggestive that while defendant acknowledges producing such documents to S&L only days before requesting the amendment sought here, it does not aver when it came into possession of those documents itself – or acknowledge that, because the source of them was its own distributors, it could have obtained them **any time**. Furthermore, notwithstanding its “continuing” “investigation,” to this day defendant’s interrogatory responses have **never been supplemented**. It provides no justification for this failure.

Defendant does not have good cause as a substantive matter to make the amendments sought. Besides its unjustifiable delay, defendant’s factual premise for making its amendment is entirely erroneous. Defendant has two “theories” about why the changes it seeks are justifiable. While we reject the implication that this is the time for the Court to weigh evidence, the extent of defendant’s rank speculation, as well as its unreasonable delay in obtaining what paltry “proof” it does seek to add now, do go to the consideration of the equities here.

One of defendant’s theories of liability is based on claimed shipments by Stay Tan North and Raley’s d/b/a American Tanning Distributors to S&L. This issue discussed below in the discussion regarding the proposed substitution by defendant of John Raley for his father, owner of the distributorship, the late Floyd Raley.

The second of defendant’s theories, raised for the first time in this case, is a fanciful conspiracy centered on a mysterious former distributor for defendant, Andre Saavedra. Defendant claims that Mr. Saavedra is a source of defendant’s merchandise for S&L. A close examination of defendant’s November 20th letter makes it clear, however, that **nothing** in the record actually shows that a single drop of defendant’s product were sold, shipped or otherwise transferred from Andre Saavedra, under any name claimed for him by defendant, to S&L. All defendant can say is the following:

Australian Gold then went back to the UPS records again and noticed several deliveries to S&L from a business named Blacklight Suncare, 436 Getty Ave., Clifton, NJ. Australian Gold has learned that this business also is owned by Andre Saavedra.

From this sentence, defendant then invites this Court to “connect the dots” and conclude that “this is likely another of S&L’s sources.”

Yet there is no submission by defendant, via affidavit or otherwise, to support the claim that “Blacklight Suncare,” or any of the businesses set out in footnote 3 in its letter is owned by Andre Saavedra. Indeed, the attached printout of the result of an Internet Yellow Pages query for “tanning salons” in Clifton, New Jersey shows a “Black Light, Inc.” at that location. If anything, this suggests – if we are to speculate and “connect the dots” – that any shipments from this location to S&L were in fact shipments from a retail



tanning salon, which is exactly what defendant insists be the source of all purchases to members of the public such as S&L. As to Andre Saavedra, not the slightest factual ground for accepting the naked representation of his involvement in such transactions – even assuming this were objectionable – is to be found in the record or defendant’s submissions.

Even then, these “deliveries” of unspecified quantity or quality from “Black Light” to S&L could have been of a product manufactured by others; of merchandise that was not suntan lotion at all; or of baby gifts, used clothing or anything else unrelated to either party’s business. One can only speculate because defendant declined to investigate its own distributors’ shipments or to seek to subpoena these UPS records in 2004, 2005, 2006 or most of 2007. If it had done so perhaps it would have “noticed” these shipments at that time, and then deposed Mr. Saavedra. This would have given S&L the opportunity to cross-examine him, to take complementary discovery as may have been required and to make its own investigation. Defendant’s cynical offer to essentially reopen this case and depose Mr. Saavedra now (footnote 4) comes with particularly ill grace under these circumstances.

For that matter, defendant suggests no authority for the suggestion that receiving a shipment from a party to a contract, absent evidence of **any** contact, communication or other indicia of “inducement,” direct or otherwise, by the receiving party, constitutes “interference” with that contract by that receiving party – much less that receiving it from another, third party, could do so. Nor is there an iota of proof, even if the Court were to grant the amendments sought, that Mr. Saavedra’s source, International Tan Makers, had any knowledge or awareness of how any person it shipped merchandise to was to dispose of it – and no one disputes that knowledge is an essential element of tortious interference. No representative of International Tan Makers is even listed as a witness by defendant. How many imaginary dots will the Court “connect” to allow defendant to find some way to salvage its facts-free case?

Defendant should not be rewarded for failing to supplement its discovery responses. Despite the fact that all the information it seeks to add to the PTO now was obtained from its own distributors and was entirely within its custody and control, defendant made no supplement to its Rule 26 disclosures or its interrogatory answers in which it stated that defendant knew of **no** distributor from which S&L obtained products. Indeed, even upon the suggestion, in its letter to defendant, of S&L’s counsel that such amendment be made, defendant has obstinately refused to do so, even upon its submission of this motion.

Thus S&L was eminently justified in relying on defendant’s representation that defendant had indeed no information as to distributors that had “supplied” S&L, and to decline to go on a fishing expedition subpoenaing and deposing a score of unknown and unidentified distributors to get



*information about an imagined “inducement to breach”
S&L itself knew did not exist.²*

There is no good cause for adding the updated marketing materials, product catalogs or product guides. Defendant says “Australian Gold believes that the updated marketing materials will provide the jury with a clearer understanding of its product line.” This is a charming idea, but defendant fails to enunciate what aspect of proof in its case this “understanding” will provide to the jury in considering the specific claims in this case. In fact, S&L has had no opportunity to depose a representative of defendant regarding these marketing materials, which, there is every reason to believe, have by this point in time been saturated with the advice of counsel and is full of self-serving, litigation-focused copy. At this juncture, defendant’s canny response as to its reasons for adding these new materials to the PTO fails to meet the standard for good cause, much less the high standard of the prevention of “manifest injustice” required to authorize such an amendment.

There is no good cause to substitute John Raley for Floyd Raley. Defendant included the late Floyd Raley among the ten or so distributors it named as possible witnesses. It stated the following as a preamble to its witness list:

Defendants do not intend to call every witness listed below, however because of the uncertainty of a trial date and the availability of witnesses, Defendants have included witnesses who are anticipated to testify on the same topics. Once the Court sets a trial date and each witness’ availability is confirmed, this list will be narrowed substantially.

Under the circumstances, this statement would appear to be tailor-made to address just this situation: One of these witnesses, Mr. Raley, is regrettably unavailable. Because defendant named a host of other witnesses “who are anticipated to testify on the same topics,” it seems that defendant’s problem is solved.

Defendant argues in its letter, however, that its post-discovery investigation has indicated that Floyd Raley was, among all these distributors, the one who shipped directly to S&L, implying that the others were not, and that his testimony is the one that is most needed at this juncture. But Floyd Raley has passed away, and defendant makes no showing whatsoever that his son, John Raley, whose name is previously unknown in

² Defendant makes much of the fact that S&L’s principals testified that they personally picked up the merchandise they purchased, whereas UPS records suggest that merchandise was shipped to S&L. This is an utter red herring, because defendant does not have, nor is there, a single document or other source of proof suggesting that this testimony, given in March of 2006, was false or misleading in any way at the time it was given. This point was addressed at great length in the undersigned’s correspondence to Magistrate Judge Orenstein of November 6, 2007.



this case, knows what Floyd Raley was purported to know. For this reason he cannot merely be his late father's "pinch hitter."

Unlike Floyd Raley, John Raley is not a signatory to either of the distributorship contracts with Australian Gold on defendant's exhibit list. Nor does his name appear in any discovery response of defendant as a person with knowledge of facts relevant to this case. Regardless of his late father's knowledge, and regardless of the general policy of non-disclosure by defendant, John Raley should have been disclosed by defendant in discovery as such a person when it learned that he had the knowledge defendant now claims for him. Instead, defendant seeks merely to insert him, as if he were its hand puppet, in his father's place, almost suggesting that Mr. Raley were prepared to give any testimony defendant instructs him to upon pain of losing his presumably profitable distributorship.

This is not the time, however, for defendant to express its regrets regarding the passing of Floyd Raley. In fact, as Exhibit B makes clear, Mr. Raley actually passed away in February – a month **before** he was named by defendants in the PTO! It is understandable that defendant thoughtlessly named a dead man to its witness list, perhaps. But what was defendant waiting for to make this proposed amendment? Far from seeking to bootstrap its listing of Floyd Raley, and S&L's non-objection to that witness, into a *de facto* listing of Johnny Raley, it would appear that the proper approach would be to regard the naming of a deceased person to the witness list as a complete nullity and an indication that defendant merely larded the witness list with name. But it is hardly a legal basis for "grandfathering" in his "newly found" son to read defendant's script on the stand. This application, too, should be denied.

Defendant's failure to supplement discovery should subject it to sanction. Fed. R. Civ. P. 26(e)(1)(A) requires a party to supplement its initial disclosures "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect." Rule 37(c) sets forth sanctions for failing to make initial disclosures. It provides that, if a party fails to provide information required under Rule 26(a), "the party is not allowed to use that information ... to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Such preclusion may be imposed for failure to supplement initial disclosures as required by Rule 26(e)(1)(A). See *Hollis v. Stephen Bruce & Associates*, 2008 WL 4570490 (W.D. Okla. 2008). Accord, *Triola v. Snow*, 2006 WL 681203 (E.D.N.Y. 2006) (precluding testimony not seasonally disclosed to adversary); *Nance v. Ricoh Electronics, Inc.*, 2008 WL 926662 (N.D. Ga. 2008) (same).

The same principle applies to interrogatories which are not amended in a timely manner. Fed. R. Civ. P. 33(b)(2) requires the responding party to "serve its answers and any objections within 30 days after being served with the interrogatories." In addition, Rule 26(e) requires a party to supplement or correct its disclosure or response "in a timely manner," and failure to supplement information in accordance with that Rule precludes the party from using that information "on a motion, at a hearing, or at a trial,



unless the failure was substantially justified or harmless” under Fed. R. Civ. P. 37(c)(1). See *Walls v. Paulson*, 250 F.R.D. 48, 53 (D.D.C. 2008) (sanctioning non-compliant party with preclusion and taxing of attorneys’ fees). Accord, *Coclanes v. City of Chicago*, 1994 WL 10007 (N.D. Ill. 1994).

Defendant by its own admission has violated Fed. R. Civ. P. 26(e)(1)(A), for a period of time and to what extent we do not know. Even as defendant has requested the augmentation of its case via amendment of the pretrial order with “new information,” it has ignored its obligation to serve amended voluntary disclosures, supplemented interrogatory answers or responsive responses to S&L’s document demands. It need not be added that defendant certainly did not do so “in a timely manner,” as required by the Rule, but rather has sprung its “new information” on S&L and on the Court at the last possible moment, little more than a month before trial. And despite being invited to explain this delay and even to make a late amendment of discovery by S&L’s response to its November 20th letter, defendant has stood its ground and assumed a posture, not only of guiltlessness, but of entitlement.

For these reasons, this Court should deny defendant’s application and, instead, enter an order to show cause why defendant should not be sanctioned, including by preclusion of all the undisclosed materials sought to be introduced at trial and which are the subject of defendant’s pending motion as well as attorney’s fees incurred in connection with both its request to stipulate and this submission, pursuant to the foregoing Rules, with an opportunity for response by S&L.

Respectfully submitted,

Ronald D. Coleman