

Unopposed Motion to Seal Denied: Declaration of Outside Counsel, Not Based on Personal Knowledge, Deficient Under Local Civil Rules

August 24, 2020

A recent Order entered by Magistrate Judge Joel Schneider illustrates the danger of submitting declarations from outside (and/or local) counsel – not based on personal knowledge – in support of sealing requests under our District’s Local Civil Rule 5.3 governing motions to seal.

In *Mitsubishi Tanabe Pharma Corp., et al., v. Aurobindo Pharma USA, Inc., et al.*, No. 17-5005, ECF No. 385 (Aug. 17, 2020), defendant Sandoz, Inc. (“Sandoz”), sought to seal a Stipulation of Infringement previously filed with the Court. Sandoz’s motion to seal was **unopposed**, *i.e.*, Sandoz reported in its motion papers that “[p]laintiffs do not take a position as to the confidentiality of the material sought to be sealed, but for purposes of this motion only do not oppose its sealing.” *Id.* at ECF No. 275-2 (Index in Support of Motion to Seal). The Court nonetheless held oral argument in connection with the motion – an unusual occurrence for an unopposed motion to seal in our District.

In its letter Order denying Sandoz’s motion, the Court addressed the Declaration submitted by Sandoz’s outside (and local) counsel in support of the sealing request. Magistrate Judge Schneider found the Declaration “deficient and will not be considered because counsel does not possess the personal knowledge required under the relevant local [civil] rules.” *Id.* at ECF No. 385, p. 1, n.2 (*Citing* L. Civ. R. 5.3(c)(3) and L. Civ. R. 7.2(a)).

Pursuant to Local Civil Rule 5.3 (c)(3), a motion to seal:

shall include as part of an affidavit, declaration, certification or other documents of the type referenced in 28 U.S.C. §1746, which shall be based on personal knowledge as required by Local Civil Rule 7.2(a), an index ... describing with particularity: (a) the nature of the materials or proceedings at issue; (b) the legitimate private or public interests which warrant the relief sought; (c) the clearly defined and serious injury that would result if the relief sought is not granted; [and] (d) why a less restrictive alternative to the relief sought is not available[. ...]

Local Civil Rule 7.2(a) states, in pertinent part, that “[a]ffidavits, declarations, certifications and other documents of the type referenced in 28 U.S.C. §1746 shall be restricted to statements of fact within the personal knowledge of the signatory.” The lack of an “appropriate Declaration” in support of Sandoz’s “claims of potential injury” was among the reasons cited by the Court in denying Sandoz’s sealing request. *Id.* at ECF No. 385, p. 6.

Going forward, parties filing motions to seal in the District of New Jersey should be wary of submitting affidavits, declarations, certifications or the like from outside (and/or local) counsel in support of their sealing requests. Most outside (and/or local) counsel do **not** possess the personal

knowledge required by Local Civil Rules 5.3(c)(3) and 7.2(a). Better to utilize a client representative with such personal knowledge, or risk having your motion to seal denied.

A copy of Magistrate Judge Schneider's August 17, 2020 letter Order in *Mitsubishi Tanabe Pharma Corp., et al., v. Aurobindo Pharma USA, Inc. et al.*, is attached.