

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY

PART IAS MOTION 48EFM

Justice

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INDEX NO. 650463/2018

OTSUKA AMERICA, INC, PHARMAVITE LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002, 005

- v -

CRUM & FORSTER SPECIALTY INSURANCE COMPANY,

DECISION + ORDER ON MOTION

Defendant.

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MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 82, 83, 84

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 005) 89, 90, 93, 94, 95, 96 were read on this motion to/for STAY

In this action for breach of contract, plaintiffs Otsuka America, Inc. and Pharmavite LLC (collectively, Plaintiffs) principally allege that defendant Crum & Forster Specialty Insurance Company (CF) improperly disclaimed coverage under a policy that insured Plaintiffs' multivitamins. (NYSCEF Doc. No. 1 at ¶ 63). Plaintiffs recalled their multivitamins in connection with an audit by The Food and Drug Administration, and allegedly destroyed the multivitamins. (NYSCEF Doc. No. 1 at ¶¶ 27-28; NYSCEF Doc. No. 50). CF initially moved in motion sequence number 002 for spoliation sanctions, arguing that the complaint should be dismissed because without the vitamins, CF could not adequately defend itself at trial. Plaintiffs opposed, and subsequently moved in motion sequence number 005 to stay, or deny without prejudice, the motion for sanctions. Both motions were fully submitted, but in an incredible turn of events, the

parties notified the court that Plaintiffs are still in control of a small quantity of recalled product. The parties have met and conferred on this development and requested further briefing. Because a spoliation sanction must "reflect an appropriate balancing under the circumstances," it would be unfair to all of the parties here for this court to issue a decision without more information. (*Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609 [1st Dept 2016][internal quotation marks and citation omitted].) Indeed, the landscape has changed since the briefing of motion sequence numbers 002 and 005.

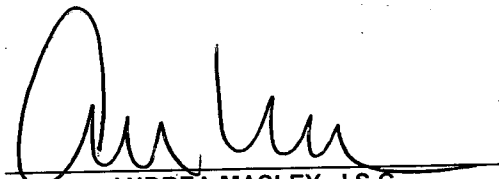
Accordingly, it is

ORDERED that motion sequence number 002 is denied with leave to renew; and it is further

ORDERED that motion sequence number 005 is granted to the extent that the motion for spoliation sanctions is denied without prejudice.

Motion Seq. No. 002

8/30/19
DATE



ANDREA MASLEY, J.S.C.

HON. ANDREA MASLEY

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

Motion Seq. No. 005

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE