UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONNA SCARPINATI DE OLIVEIRA,

Plaintiff,

-v- **1:11-CV-393 (NAM/CFH)**

CAIRO-DURHAM CENTRAL SCHOOL DISTRICT; CAIRO-DURHAM BOARD OF EDUCATION; CAIRO-DURHAM TEACHER'S ASSOCIATION; SALLY SHARKEY, Individually and as Superintendent of Schools as aider and abettor; SUSAN KUSMINSKY, Individually and as President of the Board of Education as aider and abettor; JUSTIN KARKER, Individually and as President of the Cairo-Durham Teachers Association as aider and abettor,

Defendants.

APPEARANCES:

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Hon. Norman A. Mordue, Senior U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

Presently before the Court are three motions: (1) plaintiff's motion (Dkt. No. 116) for partial summary judgment on liability against defendants Cairo-Durham Central School District, Cairo-Durham Board of Education, Sally Sharkey, and Susan Kusminsky (collectively, "District defendants"); (2) the District defendants' motion (Dkt. No. 117) for summary judgment; and (3) plaintiff's motion (Dkt. No. 119) for sanctions against the District defendants and their counsel (Dkt. No. 119). As set forth below, the Court grants plaintiff's motion for partial summary judgment; denies the District defendants' motion for summary judgment; and denies plaintiff's motion for sanctions. The Court also finds that the September 30, 2014 Judgment (Dkt. No. 99) granting summary judgment dismissing the action remains in effect with respect to plaintiff's claims against Cairo-Durham Teachers Association and Justin Karker ("Association defendants"). The Clerk is directed to designate the Association defendants as terminated as of September 30, 2014.

BACKGROUND

The Court assumes the reader's familiarity with the history of the case. For purposes of the pending motions, the Court sets forth this brief background.

In her amended complaint (Dkt. No. 4), plaintiff, an elementary school teacher formerly employed by defendant Cairo-Durham Central School District ("District"), alleges that the District wrongfully dismissed her after she took maternity leave. The amended complaint asserts claims under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601; Title VII of the

Civil Rights Act, 42 U.S.C. § 2000e et seq.; 42 U.S.C. § 1983; the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; and the New York State Human Rights Law, Executive Law §§ 290 et seq.

After completing discovery, all parties moved for summary judgment. This Court denied plaintiff's motion for summary judgment and granted summary judgment dismissing the amended complaint as to all defendants. *See De Oliveira v. Cairo-Durham Cent. Sch. Dist.*, 2014 WL 4900403 (N.D.N.Y. Sept. 30, 2014), *aff'd in part, vacated in part, remanded*, 634 F.App'x 320 (2d Cir. 2016). On plaintiff's appeal, the Second Circuit affirmed the summary dismissal of all claims except plaintiff's claim that the District defendants interfered with her FMLA rights by failing to give her notice that she would not accrue seniority while on unpaid FMLA leave. *Id.*, 634 F.App'x at 322. Plaintiff claims that, due to this failure of notice, she took 23 days of unpaid FMLA leave at the beginning of the 2009-2010 school year that she would not otherwise have taken, and, that, due to the resultant loss of seniority, she was one of the teachers laid off for the 2010-2011 school year when the District reduced its staff for budgetary reasons. As to this claim, the Second Circuit vacated the dismissal and remanded for further proceedings, holding as a matter of law that the District defendants had failed to provide the required notice, and finding a question of fact on the issue of whether such notice violation constituted "an interference with, restraint, or denial of the exercise of [plaintiff's] FMLA rights." The Second Circuit wrote:

> With respect to plaintiff's failure-to-provide-notice interference claim under the FMLA, we conclude that the District Court erred in granting defendants summary judgment. Under 29 C.F.R. § 825.604, "established school board policies and practices ... and collective bargaining agreements," among other things, govern "[t]he determination of how an employee is to be restored to an equivalent position upon return from FMLA leave." 29 C.F.R. § 825.604 (internal quotation marks omitted). Moreover, "[t]he established policies and collective bargaining agreements used as a basis for restoration must be in

> writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave." *Id.* (internal quotation marks omitted).
>
> Here, under the District's policies, practices, and agreements, plaintiff was to be restored to an equivalent position after FMLA leave but would not continue to accrue service credit during unpaid FMLA leave. Although this policy did not, as plaintiff argues, diminish plaintiff's restoration rights upon her return – indeed, she retained the same tenure she held before taking unpaid FMLA leave, even if others increased their tenure during that time and thereby gained seniority – the policy nonetheless served as a "basis for restoration" insofar as plaintiff's restoration rights included retention of the same tenured position she held before she took unpaid FMLA leave. The District therefore had a duty under § 825.604 to inform plaintiff in writing about the policy before she took FMLA leave. Having failed to do so, it violated the notice requirements of §§ 825.300(c)(1)(vi) and 825.604.
>
> As a result, after drawing all permissible factual inferences in favor of plaintiff, we conclude that there is a genuine issue of material fact as to whether the notice violation "constitute[d] an interference with, restraint, or denial of the exercise of [plaintiff's] FMLA rights," 29 C.F.R. § 825.300(e) – for instance, whether the plaintiff would have taken unpaid FMLA leave had she been properly notified about the policy regarding restoration of tenure, see, e.g., App. 848. If the failure to provide notice is found to have constituted an interference, under § 825.300(e), the "employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered." 29 C.F.R. § 825.300(e). We therefore vacate the District Court's judgment insofar as it granted defendants summary judgment on this claim, and we remand the cause to the District Court for further proceedings.

Id., 634 F.App'x at 322.

Upon remand, plaintiff moved (Dkt. No. 108) for summary judgment, and the District defendants moved for summary judgment and other relief (Dkt. No. 109). This Court denied the summary judgment motions without prejudice; directed plaintiff to appear for a deposition solely with respect to the failure-to-provide-notice interference issue remanded by the Second Circuit; and gave the parties leave to renew their summary judgment motions solely with respect to the

remanded issue after the deposition. *See De Oliveira v. Cairo-Durham Cent. Sch. Dist.*, 2016 WL 6605053, at *3 (N.D.N.Y. June 9, 2016). Thereafter, the District defendants deposed plaintiff on June 30, 2016.

As explained below, the Court rules on the pending motions as follows. Plaintiff's motion (Dkt. No. 116) for partial summary judgment on the issue of liability against the District defendants is granted; the District defendants' motion (Dkt. No. 117) for summary judgment is denied; and plaintiff's motion (Dkt. No. 119) for sanctions against the District defendants and their counsel is denied. The Court further finds that the September 30, 2014 Judgment (Dkt. No. 99) granting summary judgment dismissing the action remains in effect as to the Association defendants and directs the Clerk of the Court to terminate them as defendants.

DISCUSSION

SUMMARY JUDGMENT MOTIONS

A party moving for summary judgment must show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met this burden, the burden shifts to the non-movant to adduce evidence establishing the existence of an issue of material fact. *See Linares v. McLaughlin*, 423 Fed.Appx. 84, 86 (2d Cir. 2011). If the non-movant fails to make such a showing, the movant is entitled to summary judgment. Summary judgment is appropriate "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party[.]" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When deciding a summary judgment motion, a court must "resolve all ambiguities and draw all factual inferences in favor of the party opposing the

motion." *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (citation omitted). When it reviewed this Court's award of summary judgment against plaintiff, the Second Circuit drew all permissible factual inferences in favor of plaintiff. On plaintiff's present motion for summary judgment, the Court must draw all factual inferences in favor of the District defendants, whereas on the District defendants' summary judgment motion, the Court must draw all such inferences in favor of plaintiff.

Plaintiff moves (Dkt. No. 116) for partial summary judgment on the issue of liability. She contends that, on this record, no rational trier of fact could find in favor of the District defendants on the question of whether they interfered with her FMLA rights by failing to notify her that she would not accrue service credit while she was on unpaid FMLA leave. As seen above, the Second Circuit held that the District defendants had a duty under the FMLA to notify plaintiff in writing before she took FMLA leave that she would not accrue service credit while she was on such leave, and that they failed to perform that duty, thus violating the FMLA notice requirement as a matter of law. On the question of whether this notice violation amounted to an interference with plaintiff's FMLA rights, the Second Circuit wrote:

> [T]here is a genuine issue of material fact as to whether the notice violation "constitute[d] an interference with, restraint, or denial of the exercise of [plaintiff's] FMLA rights," 29 C.F.R. § 825.300(e) – for instance, whether the plaintiff would have taken unpaid FMLA leave had she been properly notified about the policy regarding restoration of tenure, see, e.g., App. 848.

De Oliveira, 634 F.App'x at 322.

In support of her argument that the notice violation constituted an interference with her FMLA rights, plaintiff submits the August 19, 2009 notice she received from the District defendants informing her that she would be "reinstated to the same or an equivalent job with the

same pay, benefits, and terms and conditions of employment on your return from leave." She contends that the record establishes without contradiction that, if the District defendants had notified her that she would not accrue seniority while on unpaid FMLA leave, she would not have taken such leave. She points to her December 13, 2013 affidavit submitted to this Court on her prior summary judgment motion (Dkt. No. 86) and cited by the Second Circuit (2d Cir. Case No. 14-3710, Dkt. No. 42, App. p. 848), in which she stated: "I was never told that the time I spen[t] [on] unpaid leave would be used against me to reduce my seniority status. If I had been told that my seniority status would be reduced while I was on unpaid FMLA leave I would never had taken unpaid FMLA leave." When testifying before the Public Employment Relations Board, she stated: "Had I understood [that seniority did not accrue during unpaid FMLA leave], I would have come back in September [without taking FMLA leave]. I wouldn't have waited." At her June 30, 2016 deposition, under extensive questioning on the issue, plaintiff testified that, when she took FMLA leave, she believed FMLA protected all her terms and conditions of employment, including seniority, and that her goal in taking FMLA leave was to prevent any change in her terms and conditions of employment. In the June 30, 2016 deposition, she also stated: "I was always keeping in mind FMLA [when calculating maternity leave], because I knew that when I came back to work, I wanted to make sure everything was as if I didn't leave"; "I would have returned to work had I known in advance that my FMLA could have been affected by all of this"; and "[T]here's common knowledge in the teaching profession that you can have a person who's been working longer than you and you can lose your job." At the deposition she further testified: "If the district had said I wasn't going to accrue seniority and the district had told me a date to come back by which I would continue, you know, where I left off, I would have come back on

that day." In her sworn testimony and an affidavit dated July 19, 2016, the following additional facts emerged: she had child care available whenever she decided to return to teaching; she and the baby were both healthy; she wanted to work; she came back to work after using only about half of her FMLA leave; she knew that she and a few other teachers had the least seniority; she was aware that layoffs could occur any year due to budgetary reasons, a decline in enrollment, or voter rejection of the school budget; and when she decided to take unpaid FMLA leave, she believed that all her terms and conditions of employment – including seniority – would not be adversely affected. Plaintiff's evidence showed that she relied on the August 19, 2009 notice from the District defendants; that she believed that her FMLA leave would not affect her seniority; that, if she had been given proper notice of the effect of her FMLA leave on her seniority, she was in a position to adjust her FMLA leave to preserve her seniority; and that she would have done so.

The Court has thoroughly reviewed this voluminous record and, resolving all ambiguities and drawing all inferences against plaintiff, finds no material question of fact that would bar an award of summary judgment to plaintiff on liability on the ground that the notice violation amounted to interference with her rights under FMLA.[1] Plaintiff's testimony and affidavits

[1] In their response to plaintiff's Statement of Material Facts, the District defendants refer to portions of the record, in particular the affidavits and testimony of plaintiff and defendant Sally Sharkey, Superintendent of Schools, indicating that plaintiff's unpaid FMLA leave was "deducted" from her seniority, whereas, in fact, she simply did not accrue seniority during that leave. This misstatement, as it affected plaintiff's seniority, is a distinction without a difference. Superintendent Sharkey corrected the misstatement in her deposition. It does not create a material question of fact.

In their response to plaintiff's Statement of Material Facts, the District defendants also challenge plaintiff's assertion that while teaching in Maryland (prior to her employment with the District) she "acquired first-hand knowledge of the dramatic impact that seniority could have on [her] job retention rights as a teacher." The Court need not determine whether the alleged incidents in Maryland actually involved seniority; rather, for purposes of this motion, the Court assumes that they did not. Resolving this issue in District defendants' favor does not raise a material question of fact.

clearly and consistently show that she would not have taken unpaid FMLA leave if the District defendants had properly notified her that she would not accrue seniority while on such leave. This showing is supported by her evidence that she was in a position to return to work earlier if she had chosen to do so. There is no evidence to the contrary. Despite the fact that, after the Second Circuit's remand, the District defendants deposed plaintiff regarding this very issue, they elicited no testimony that creates a material question of fact warranting a jury trial on the question of liability.

In opposition to plaintiff's motion for partial summary judgment, the District defendants do not assert that the record contains material questions of fact requiring a trial. Nor do they argue that, despite the absence of a material question of fact, the credibility of plaintiff's testimony about her state of mind should nevertheless be evaluated by a jury. Rather, their primary argument in opposition to plaintiff's motion is that "[a]ny opinion testimony offered by plaintiff about what she would have done if she had received the notice identified by the Second Circuit in its summary order is inadmissible under Federal Rules of Evidence 701 and 403." Similarly, in support of their motion for summary judgment dismissing the case, the District defendants argue:

> Since the only evidence that Plaintiff can offer to support her failure-to-provide-notice interference claim under the FMLA is her own self-serving, speculative opinion testimony, which is inadmissible under Federal Rules of Evidence 701 and 403, there is no genuine dispute of material fact germane to Plaintiff's FMLA interference claim and, therefore, that claim must be dismissed.

"[O]nly admissible evidence need be considered by the trial court in ruling on a motion for summary judgment." *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 582 F.3d 244,

264 (2d Cir. 2009). Here, the Court finds that plaintiff's affidavits and testimony regarding her state of mind and intention at the time she took FMLA leave are admissible evidence and are properly considered on summary judgment. "[A] witness has personal knowledge of his or her own state of mind and intention when he or she acted and remains competent to testify about the same." *Wilkins v. Kmart Corp.*, 487 F. Supp. 2d 1216, 1220 (D. Kan. 2007); *accord Fenje v. Feld*, 301 F. Supp. 2d 781, 816 (N.D. Ill. 2003) ("A witness may testify as to his or her own state of mind."), *aff'd*, 398 F.3d 620 (7th Cir. 2005) (cited in *United States v. Subeh*, 2006 WL 1875407, *5 (W.D.N.Y., July 5, 2006)); 98 C.J.S. Witnesses § 94 ("A witness is properly testifying from 'personal knowledge' when the witness describes his or her own state of mind and explains the thoughts motivating his or her own behavior."). Plaintiff's state-of-mind evidence is properly considered on summary judgment and admissible at trial.

The Court notes that, in vacating summary judgment dismissing the failure-to-provide-notice interference claim, the Second Circuit plainly viewed plaintiff's affidavit as admissible evidence. The Second Circuit wrote that there was "a genuine issue of material fact as to whether the notice violation constituted an interference with, restraint, or denial of the exercise of plaintiff's FMLA rights, for instance, whether the plaintiff would have taken unpaid FMLA leave had she been properly notified about the policy regarding restoration of tenure, see, e.g., App. 848." 634 F.App'x 322 (citation, brackets, and quotation marks omitted). The citation to "App. 848" is a citation to plaintiff's December 13, 2013 affidavit in which she stated: "I was never told that the time I spen[t] [on] unpaid leave would be used against me to reduce my seniority status. If I had been told that my seniority status would be reduced while I was on unpaid FMLA leave I would never had taken unpaid FMLA leave." Thus, the Second Circuit treated plaintiff's

affidavit as admissible evidence for purposes of summary judgment.

In opposing plaintiff's summary judgment motion and in support of their motion for summary judgment, the District defendants cite to Federal Rules of Evidence 701, "Opinion Testimony by Lay Witnesses." Rule 701 provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge[.]

The District defendants argue that plaintiff's testimony that she would not have taken unpaid FMLA leave had she been properly notified that she would not accrue seniority while on such leave "cannot be based on her own perception as required by Fed. R. Evid. 701(a) since it is undisputed that at the time she decided to take leave, she had not been told by the District, and did not know, that she would not accrue seniority while on unpaid FMLA leave." Rather, the District defendants contend, plaintiff would "simply [be] hypothesizing about what she believes she would have done under different circumstances based upon information she admittedly only learned after the fact." The Tenth Circuit has observed: "The perception requirement stems from [Rule 602 of the Federal Rules of Evidence] which requires a lay witness to have first-hand knowledge of the events he is testifying about so as to present only the most accurate information to the finder of fact." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 667 n. 12 (10th Cir. 2006); *accord United States v. Garcia*, 413 F.3d 201, 211 (2d Cir. 2005) ("Rule 701 represents no departure from Fed. R. Evid. 602: 'A witness may not testify to a matter until evidence is introduced sufficient to support a finding that the witness had personal knowledge of the matter.'" (quoting Fed. R. Evid. 602)). Noting the absence of cases applying Rule 701 to

FMLA failure-to-provide-notice interference claims, the District defendants cite to products liability and other cases that, in their view, "highlight[] why Plaintiff's speculative opinion testimony in this case should be excluded." These cases are inapposite. Most concern the exclusion of a plaintiff's testimony regarding what he or she would have done if a product had not had the alleged defect, such as a lack of a rear-view mirror, *see Kennedy v. Adamo*, 2006 WL 3704784, *3 (E.D.N.Y. Sept. 1, 2006), *aff'd* 323 F. Appx. 34, 35 (2d Cir. 2009), or inadequate warnings, *see Kloepfer v. Honda Motor Co., Ltd.*, 898 F.2d 1452, 1459 (6th Cir. 1990). These and other cases cited by the District defendants hold that a plaintiff's "speculation as to what he [or she] would have done" if circumstances had been different is inadmissible because it involves opinion testimony "that is not based on [the plaintiff's] first-hand perception of actual events." *Magoffe v. JLG Indus., Inc.*, 375 F.App'x 848, 859 (10th Cir. 2010). In other words, the plaintiffs in those cases had no ability to perceive the hypothetical circumstances – such as whether the plaintiff would have seen the other vehicle in the hypothetical rear-view mirror in time to avoid the accident, or whether the plaintiff would have seen, read, and been influenced by a warning with hypothetical appearance and wording placed in a hypothetical location on the product. In contrast, in the case at bar, plaintiff's evidence on the remanded issue concerns her state of mind and intention at the time in question, based wholly on factors as to which she had first-hand knowledge, such as her own circumstances, the wording of the District defendants' August 19, 2009 FMLA notification, and her awareness of the significance of seniority accrual. Rule 701 does not preclude its admission.

The District defendants also cite to Federal Rules of Evidence 403, which provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by the

danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." The District defendants argue that "[t]estimony from Plaintiff about what she would have done in a hypothetical situation that she never actually encountered poses several of the risks contemplated by Rule 403 and should be excluded under this rule as well." The Court finds no significant danger of confusing the issues, undue delay, wasting time, or needlessly presenting cumulative evidence. In addition, for the same reasons as it rejects the District defendants' argument under Rule 701, the Court rejects the argument that such evidence would present a significant danger of unfair prejudice or misleading the jury. Rule 403 does not support exclusion of plaintiff's testimony regarding her failure-to-provide-notice interference claim.

The District defendants' remaining arguments do not warrant summary judgment dismissing plaintiff's claims. Questions regarding whether plaintiff sustained any injury caused by the failure-to-provide-notice interference claim and, if so, the appropriate award for such injury must be resolved upon further proceedings.

The uncontradicted record evidence, viewed most favorably to the District defendants, demonstrates as a matter of law that the notice violation identified by the Second Circuit constituted an interference with plaintiff's exercise of her FMLA rights. Resolving all ambiguities and drawing all factual inferences in favor of the District defendants, the Court finds that there is no genuine dispute as to any material fact on the issue. On the record taken as a whole, no rational trier of fact could find in favor of the District defendants and against plaintiff on her failure-to-provide-notice interference claim. Accordingly, plaintiff's motion (Dkt. No. 116) for partial summary judgment on the issue of liability is granted, and the District defendants'

motion (Dkt. No. 117) for summary judgment is denied with prejudice.

SANCTIONS MOTION

The Court denies plaintiff's motion (Dkt. No. 119) under Federal Rules of Civil Procedure Rule 11(c)(1) and (2) for sanctions against the District defendants and their attorney. Plaintiff argues that the District defendants' motion for summary judgment "is subject to sanctions because it is filed for an improper purpose and merely rehashes arguments rejected by Second Circuit." This Court finds no basis for granting plaintiff's motion for sanctions. The District defendants raised the non-frivolous argument that plaintiff's evidence in support of her failure-to-provide-notice interference claim constituted inadmissible opinion evidence. The Court finds no indication of improper purpose or bad faith, nor is there any other ground to award sanctions against the District defendants. Plaintiff's motion (Dkt. No. 119) for sanctions against the District defendants is denied.

ASSOCIATION DEFENDANTS

It appears from the Second Circuit decision that the vacatur and remand revived plaintiff's failure-to-provide-notice interference claim solely against the District defendants. Although plaintiff's notice of appeal (Dkt. No. 100) sought review of "each and every part of the Memorandum-Decision and Order in this action dated September 30, 2014," her appellate brief (2d Cir. Case No. 14-3710, Doc. 38) raises no claim that the Association defendants were obligated under the FMLA to provide notice to her that she would not accrue seniority while on FMLA leave. Nor did plaintiff assert any such claim in her amended complaint. The Second Circuit's decision, 634 F.App'x 320, did not refer to any such obligation on the part of the Association defendants, and there is nothing in that decision to suggest that the Second Circuit

intended to revive plaintiff's claims against the Association defendants. Plaintiff did not serve notice of the instant motion for partial summary judgment on the Association defendants, and there is no indication that she believes she still has viable claims against them. The Court concludes that its September 30, 2014 Judgment (Dkt. No. 99) granting summary judgment dismissing plaintiff's claims remains in effect with respect to the Association defendants. The Clerk of the Court is directed to designate Cairo-Durham Teachers Association and Justin Karker as terminated as of September 30, 2014.

CONCLUSION

It is therefore

ORDERED that plaintiff's motion (Dkt. No. 116) for partial summary judgment on liability is granted against defendants Cairo-Durham Central School District, Cairo-Durham Board of Education, Sally Sharkey, and Susan Kusminsky; and it is further

ORDERED that the motion (Dkt. No. 117) for summary judgment by defendants Cairo-Durham Central School District, Cairo-Durham Board of Education, Sally Sharkey, and Susan Kusminsky is denied with prejudice; and it is further

ORDERED that plaintiff's motion (Dkt. No. 119) for sanctions against defendants Cairo-Durham Central School District, Cairo-Durham Board of Education, Sally Sharkey, and Susan Kusminsky is denied; and it is further

ORDERED that Clerk of the Court is directed to designate defendants Cairo-Durham Teachers Association and Justin Karker as terminated as of September 30, 2014; and it is further

ORDERED that the case is deemed trial-ready, and the Court will notify the parties of a trial date and scheduling order.

IT IS SO ORDERED.

Date: March 30, 2017
Syracuse, New York

Norman A. Mordue
Senior U.S. District Judge