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December 1, 2017

VIA NYSCEF
The Honorable Jerry Garguilo
Supreme Court of the State of New York
Suffolk County
John P. Cohalan, Jr. Courthouse
Part 48, Courtroom S-33
400 Carleton Avenue
Central Islip, New York 11722

Re: *In Re Opioid Litigation*, Index Nos. 400000/2017

Dear Justice Garguilo:

We write on behalf of the Plaintiff Counties in response to Defendants' correspondence regarding a stay of discovery during the pendency of Defendants' motions to dismiss. (*See* Dkt. Nos. 168, 173, 174.) There is a legitimate need for the discovery requested by Plaintiffs, and therefore, Plaintiffs respectfully request that the Court lift the stay regarding discovery.

I. Standard

CPLR § 3214(b) makes clear that the Court has unfettered discretion to determine whether a stay of discovery is appropriate pending its decision on Defendants' upcoming motions to dismiss. *See* CPLR 3214(b) ("Service of a notice of motion under rule 3211 . . . stays disclosure until determination of the motion *unless the court orders otherwise*."); *id.* Cmt. ("The stay of disclosure is automatic. *The court may of course direct otherwise*, and allow disclosure to continue, but matters of this kind are generally worked out between the parties.") (emphasis added). *See also John Eric Jacoby, M.D., P.C. v. Loper Assocs., Inc.*, 249 A.D.2d 277, 279 (2d Dep't 1998) ("Although the stay is automatic, a court can direct otherwise."); *Martinez, v. Anita-Nidhi Cab Corp.*, 2007 WL 2176737, at *4 (Sup. Ct. N.Y. Co. July 5, 2007) ("CPLR 3214(b) provides for an automatic stay of discovery but only if the court does not order otherwise. In its March 2, 2007 order, the court ordered otherwise."); *Arthur Glick Truck Sales, Inc. v. H.O. Penn Mach. Co.*, 5 Misc. 3d 1010(A), at *3 (Sup. Ct. N.Y. Co. Nov. 3, 2004) (The stay in CPLR § 3214(b) is automatic but statutorily the court may, of course, direct otherwise."). In other words, "[t]he scant precedents and CPLR § 3214(b) itself authorize[] the court to order discovery not withstanding the automatic stay of CPLR § 3214(b)." *Arthur Glick Truck Sales*, 5 Misc. 3d 1010(A), at *3.

II. The Court should exercise its discretion and lift the stay.

Courts routinely exercise their discretion to not stay discovery in cases, like this, where there is a "legitimate need for discovery." *John Eric Jacoby, M.D., P.C.*, 249 A.D.2d at 279 ("Thus, if there were any legitimate need for discovery, the defendant could and should have requested it in its opposing papers responding to the plaintiff's motion for partial summary judgment."); *Martinez*, 2007 WL 2176737, at *4 ("[A] court can direct discovery to continue during the pendency of a summary judgment motion if there is any legitimate need for the discovery."); *Arthur Glick Truck Sales*, 5 Misc. 3d 1010(A), at *3 (holding on motion to compel, filed after defendant moved to dismiss, that

"despite the automatic stay provision of CPLR § 3214(b) the trial court may direct otherwise if there is a legitimate need for discovery").

III. There is a legitimate need for discovery.

There is a legitimate need for discovery here because the relevant information is exclusively within Defendants' possession. Even if Defendants are successful on their initial motions to dismiss, it is likely that Plaintiffs will have a chance (if not multiple chances) to amend. Accordingly, Plaintiffs will at least be able to use the information uncovered in discovery to defend against Defendants' future motions. *See, e.g.*, *Arthur Glick Truck Sales*, 5 Misc. 3d 1010(A), at *3 ("This Court is of the opinion that the discovery of eight (8) sets of documents requested by the plaintiff (prior to the defendant's motions to dismiss) is necessary for the preliminary injunction hearing *and to defend the subsequently filed motions to dismiss*. Some of the documents go directly to the issue of Caterpillar and Penn meeting the criteria of the New York Franchised Motor Vehicle Dealers' Act.") (emphasis added). On the other hand, if the Court flat-out denies Defendants' initial motions to dismiss, the parties will have a jump-start on discovery for purposes of summary judgment and trial.

The requested discovery is also needed because this type of information will help save lives. This information will provide Plaintiffs with the much-needed lifeline to control the chain of distribution of opioids within the Plaintiff Counties. In 2014, there were 1,153 opioid deaths within New York State (excluding New York City). (*See* New York State Opioid Report, attached as Ex. 1.) In 2015, that number increased to 1,238 opioid related deaths. (*See* New York State Opioid Report, July 2017, attached as Ex. 2.) The opioid crisis is getting worse and this type of information can assist Plaintiffs in controlling this epidemic.

IV. Defendants have the requested information readily available and have been fined or suspended for actions specifically related to the information being requested.

The information being requested is readily available to Defendants. Defendants must maintain such information for the Department of Health of the State of New York. (*See* 10 NYCRR § 80.23.)

Defendants such as Rochester Drug Cooperative, Inc. ("RDC"), AmerisourceBergen Drug Corp. ("ABDC"), Bellco Drug Corp. ("Bellco"), and Purdue Pharma ("Purdue") are opposed to disclosing this vital information because they are more concerned about profits rather than saving lives. These Defendants are no strangers to paying fines and being suspended for actions specifically related to the information being requested by Plaintiffs.

On July 9, 2015, the United States settled a civil lawsuit with RDC. (*See* Department of Justice Press Release, attached as Ex. 3.) In the settlement agreement, RDC admitted that between July 2013 and July 2014, it failed to report any electronic distribution transactions in its DEA ARCOS reports, and admitted that between July 2012 and July 2014, it failed to provide the required theft or significant loss reporting in ARCOS to the DEA. (*Id.*) Under the Consent Order, RDC paid $360,000 in civil penalties to the United States and reconstruct complete and correct historical ARCOS data for the last five years for submission to the DEA. (*Id.*)

In 2007, Bellco agreed to pay an $800,000 fine for its failure to report to the DEA "suspicious orders" equaling 2,288 shipments of hydrocodone between January 2005 and April 2007. (*See* article

discussing Bellco, attached as Ex. 4.) On April 24, 2007, the DEA issued an Order to Show Cause and Immediate Suspension Order against the ABDC Orlando, Florida distribution center (Orlando Facility) alleging failure to maintain effective controls against diversion of controlled substances. (*See* DEA Press Release, attached as Ex. 5.) On June 22, 2007, ABDC entered into a settlement which resulted in the suspension of its DEA registration. (*Id.*)

In 2007, Purdue settled criminal and civil charges against it for misbranding OxyContin and agreed to pay the United States $635 million—at the time one of the largest settlements with a drug company for marketing misconduct. (*See* article discussing Purdue, attached as Ex. 6.) Pursuant to its settlement, Purdue operated under a Corporate Integrity Agreement with the Office of Inspector General of the U.S. Department of Health and Human Services, which required the company, *inter alia*, to ensure that its marketing was fair and accurate, and to monitor and report on its compliance with the Agreement.

In light of the legitimate need for the discovery requested by Plaintiffs, Plaintiffs respectfully request that the Court lift the stay regarding discovery.

V. This Court should not wait for a potential federal MDL to issue a discovery schedule.

Defendants wish to stay discovery to facilitate coordination with a potential federal multidistrict litigation. This request is a veiled attempt by the Defendants to have this Court acquiesce to the will of a federal judge located in some other state. In essence they suggest that this Court should take direction from another court. As Your Honor pointed out, this Court is the leader of the New York Coordinated Opioid Litigation, and as such, not restricted by the actions of a federal MDL which has not yet even been established yet.

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Therefore, Plaintiffs respectfully request that the Court lift the stay regarding discovery.

Sincerely,

/s/ Paul J. Napoli