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December 15, 2017

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

Re: *In Re Opioid Litigation, Index No. 400000/2017*

Dear Justice Garguilo:

We write on behalf of McKesson Corporation, Cardinal Health, Inc., AmerisourceBergen Drug Corporation, and their affiliate defendants ("Distributor Defendants") in response to Plaintiffs' request that this Court lift the automatic stay of discovery in place pending resolution of defendants' motions to dismiss. Plaintiffs' request should be denied because, as explained below, they have not demonstrated—and cannot demonstrate—a need for discovery before resolution of the dispositive motions and lifting the stay would impose unreasonable and unwarranted burdens on Distributor Defendants.

I. Plaintiffs' overbroad document requests are subject to the discovery stay.

On November 6, 2017, the plaintiff counties served each of the Distributor Defendants with a request for production of documents seeking "[a]ll reports, data, records, purchase requests, invoices, itemized lists, documents and/or communications from January 1, 2011 until the present concerning opioids sold, promoted, marketed, manufactured, received, disposed, and/or distributed by [defendants] in Plaintiffs' counties." Plaintiffs' request contains 15 subparts, which demand production of all "data, documents and communications concerning" virtually every aspect of the manufacture, distribution, and sale of "any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into [such] a drug"—regardless of the relevance to Plaintiffs' claims against Distributor Defendants.

On November 10, 2017, Distributor Defendants (along with the pharmaceutical manufacturer defendants) moved to dismiss the Master Long Form Complaint, triggering the automatic stay of disclosure under CPLR 3214(b). CPLR 3214(b) provides: "Service of a notice of motion under rule 3211 . . . stays disclosure until determination of the motion unless the court orders otherwise," and this Court confirmed at the November 29, 2017 case management conference that discovery is in fact stayed.

Plaintiffs now seek to lift that stay.

II. Plaintiffs have not demonstrated a legitimate need for immediate discovery.

As an initial matter, Plaintiffs have not explained what "relevant information" they believe they need to remedy what they implicitly acknowledge is a deficient pleading, nor why Distributor Defendants are the sole source for such information.

More fundamentally, Plaintiffs' position proceeds from a misconception as to the standard against which their Complaint is measured. When evaluating motions to dismiss, this Court considers only the sufficiency of the facts *as alleged in the Complaint*.

Indeed, two of the three decisions Plaintiffs cite in their December 1, 2017 letter—*John Eric* and *Martinez*—are inapposite because each concerned a request for discovery pending resolution of a motion for summary judgment, as to which the standard, obviously, is different. *See John Eric Jacoby, M.D., P.C. v. Loper Assocs.*, 249 A.D.2d 277, 278 (2d Dep't 1998); *Martinez v. Anita-Nidhi Cab Corp.*, 2007 WL 2176737 (Sup. Ct. July 5, 2007). Moreover, the facts of those cases further undermine Plaintiffs' position: In *John Eric*, neither the trial court nor the Second Department lifted the automatic stay of discovery, and in *Martinez*, the defendant had repeatedly failed to comply with discovery orders and used the summary judgment motion to continue to evade discovery, "a dilatory tactic" that the court refused to endorse. *John Eric*, 249 A.D.2d at 279; *Martinez*, 2007 WL 2176737.

The only other case cited by Plaintiffs, *Arthur Glick*, is no more favorable to their position. In that case, a court permitted "limited discovery" in advance of a hearing on a preliminary injunction motion where the court determined that there was "no question that the plaintiff [would] suffer irreparable injury" if the injunction were not granted. *Arthur Glick Truck Sales, Inc. v. H.O. Penn Machinery Co.*, 5 Misc.3d 1010(A), at *2, *3 (Sup. Ct. Nov. 3, 2004). Here, by contrast, Plaintiffs will not suffer irreparable harm and are not seeking "limited discovery"—as already noted, Plaintiffs have issued a discovery request with 15 subparts, touching on virtually all aspects of Distributor Defendants' businesses as related to controlled substances.

Nor does Plaintiffs' position fare better with their vague, unsupported, and demonstrably false suggestion that their discovery is necessary to "help save lives." At the outset, it bears emphasis that Plaintiffs do not—and cannot—explain how they will use information gathered through the civil discovery process to "control the chain of distribution of opioids" when authority to enforce regulations concerning distribution of controlled substances (along with the information needed to effect enforcement) lies with the New York Department of Health and the U.S. Drug Enforcement Administration. Moreover, even if Plaintiffs had authority to control the distribution of opioids, it would be an improper use of civil discovery to obtain information for purposes unrelated to these lawsuits; discovery is permitted under CPLR 3101(a) solely as to "matter material and necessary in the *prosecution or defense of an action*." (Emphasis added.)

III. Lifting the stay of discovery would impose unreasonable and unwarranted burdens on Distributor Defendants.

Whereas Plaintiffs have demonstrated no legitimate need for lifting the automatic discovery stay, Distributor Defendants would suffer unjustified burdens if the stay were lifted.

Plaintiffs' discovery requests seek what is likely to be hundreds of thousands, if not millions, of documents from Distributor Defendants before this Court determines which—if any—of the claims against Distributor Defendants survive and may be pursued. This Court's determination of the motions to dismiss may obviate entirely or at least limit the scope of discovery. Indeed, the very purpose of the automatic stay is to avoid saddling defendants with onerous discovery obligations where the complaint may not state a valid cause of action. *See Rappaport v. Blank*, 99 Misc.2d 1020, 1021 (Sup. Ct. 1979) ("The purpose of 3214(b) . . . is to prevent the unwarranted resort to disclosure. If the motion to dismiss were granted in this case, disclosure becomes unnecessary.") *aff'g in relevant part and rev'g on other grounds*, 72 A.D.2d 717, 718 (1st Dep't 1979).

Moreover, Plaintiffs' assertion that information responsive to its sweeping discovery demands "is readily available" is simply incorrect. Distributor Defendants have not produced documents or information in any of these pending civil lawsuits; in fact, discovery has not begun in any of the more than 100 opioid-related lawsuits against Distributor Defendants across the country.[1] Nor is the information pre-packaged as Plaintiffs have suggested, but rather would have to be painstakingly searched for, collected and reviewed, a time consuming and burdensome—and potentially unnecessary—process.

For the foregoing reasons, Plaintiffs' request to lift the stay of discovery should be denied.

Respectfully submitted,

Neil K. Roman

cc: Counsel of Record (via NYSCEF)

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[1] Indeed, in the only court wherein motions to dismiss filed by Distributor Defendants have advanced through briefing and oral argument, the court specifically stayed discovery until it decided the threshold issues presented by those motions. *See, e.g.*, Order, *Boone Cnty. Comm'n v. AmerisourceBergen Drug Corp.*, No. 2:17-02028, Dkt No. 63 (S.D. W.Va.) (staying discovery pending resolution of Distributor Defendants' motions to dismiss).