May 4, 2018

By Hand Delivery and ECF

Hon. Eileen Bransten
Supreme Court, New York County
60 Centre Street, Room 521
New York, NY 10007

Re: *Eros International Plc v. Mangrove Partners, et al. (Index No. 653096/2017)*

Dear Justice Bransten:

Counsel for Plaintiff Eros International Plc ("Eros" or "Plaintiff"), together with counsel for the Mangrove Defendants, the GeoInvesting Defendants, and the ClaritySpring Defendants[1] (collectively, the "Moving Defendants"), hereby submit this joint letter to respectfully request a preliminary conference at Your Honor's convenience to address whether discovery may proceed while the Moving Defendants' motions to dismiss are *sub judice*.

Set forth below is a brief overview of the procedural developments to date, as well as Plaintiff's and the Moving Defendants' respective positions regarding this discovery dispute.

Procedural Posture

Eros commenced this action on June 6, 2017 by filing an initial Summons with Notice. [Dkt. No. 1.] Eros thereafter filed a Supplemental Summons and Complaint on September 29, 2017 that named the Moving Defendants, as well as other named and John Doe defendants, as parties. [Dkt. Nos. 2 & 3.]

On November 30, 2017, each of the Moving Defendants moved to dismiss the Complaint in its entirety. [Dkt. Nos. 47-95.] The motions to dismiss were fully briefed as of February 7, 2018, and the Court heard oral argument on February 14, 2018.[2]

On March 28, 2018, Eros served document requests, interrogatories and requests to admit on each of the Moving Defendants. On April 10, 2018, the Mangrove Defendants sent a letter to

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[1] All capitalized terms not defined herein have the same meaning ascribed to them in the Complaint.

[2] During the February 14 hearing, the Court separately granted Plaintiff's motion to extend its time to serve the remaining John Doe Defendants by an additional 120 days, and granted Plaintiff's motion to default defendants Asensio & Company and Mill Rock Advisors, Inc.

Plaintiff objecting to the timing and scope of Plaintiff's discovery requests. The April 10 letter also attached the Mangrove Defendants' first set of interrogatories and first request for the production of documents to Plaintiff.

On April 16, 2018, Plaintiff and the Moving Defendants met and conferred regarding their respective positions on conducting discovery at this stage of the litigation. Unable to reach a resolution, the parties agreed to jointly submit their dispute to the Court and request a preliminary conference.

Plaintiff's Position

The discovery Eros served on the Moving Defendants is proper and timely under the CPLR, the Commercial Division's Rules, and this Court's precedent.

Specifically, the CPLR authorizes parties to issue document requests, interrogatories, and requests to admit after the commencement of an action, or shortly thereafter. *See* CPLR 3120 (document requests may be served "after the commencement of an action"); CPLR 3130 (interrogatories may be served "after the commencement of an action); CPLR 3123 (requests to admit may be served "[a]t any time after service of the answer or after the expiration of twenty days from service of the summons, whichever is sooner").

Likewise, the Commercial Division Rules embrace discovery during the early stages of an action, even while a motion to dismiss is pending. *See* 22 NYCRR 202.70(g)(11)(d) ("The court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion.").[3]

Indeed, this Court has stated that "[t]he strong general practice of the Commercial Division is to allow discovery to proceed, notwithstanding the filing of a motion to dismiss, in order to ensure that cases proceed as expeditiously as possible." *Harrop & Co. v. Apollo Inv. Fund VII, L.P.*, No. 651949/2014, 2015 WL 3989030, at *5 (Sup. Ct., N.Y. Cty. June 25, 2015) (Bransten, J.). Consistent with this general practice, this Court has denied a party's request to stay discovery pending a motion to dismiss, even where the party believed it had "presented

[3] In accordance with these dispositive CPLR and Commercial Division rules, Eros served discovery after it filed a highly detailed Complaint, which set forth specific evidence that the Moving Defendants made numerous false and defamatory statements, including that certain Moving Defendants had "irrefutable proof" that Eros was booking "fraudulent revenue," was a "complete fraud," and was embroiled in a liquidity crisis. Contrary to the Moving Defendants' reliance on *Culligan*, this plainly is not an instance where Eros is attempting to procure pre-action discovery to "ascertain," as a "prospective plaintiff," whether it "has a cause of action worth pursuing" or "explore alternative theories of liability." *Culligan Soft Water Co. v. Clayton Dubilier & Rice, LLC*, 55 Misc. 3d 1115, 1120 (Sup. Ct., N.Y. Cty. Jan. 11, 2017) (denying motion to compel "pre-action" discovery where action had already been commenced and dismissed on numerous occasions).

strong arguments in favor of dismissal." *See, e.g.*, *Hartman v. Snellen*, No. 6538692013, 2014 WL 7876752, at *1-2 (Sup. Ct., N.Y. Cty. Sept. 17, 2014) (Bransten, J.) (denying motion to stay pending resolution of motion to dismiss and before preliminary conference was held); *Harrop*, 2015 WL 3989030, at *5 (denying motion to stay).[4]

The Moving Defendants claim, without basis, that discovery should be stayed because Eros is purportedly seeking discovery only to bolster a defective pleading. As Eros has made clear, however, consistent with the Commercial Division Rules and the practices of this Court, Eros served its discovery in order to advance its meritorious case – not to resuscitate failed causes of action. Moreover, even the cases the Moving Defendants rely on are strikingly inapposite and lend no support for their claims. *See, e.g.*, *Culligan*, 55 Misc. 3d at 1120 (concerning discovery sought by plaintiff after court dismissed complaint for the ***fourth*** time); *Chan v. Zoullas*, 34 Misc. 3d 1210(A), at *4 (Sup. Ct., N.Y. Cty. Jan. 10, 2012) (stay in discovery warranted because of parallel federal court action, which posed a risk of inconsistent rulings and the potential dismissal of the state court action).[5]

Moreover, given that this Court extended Plaintiff's time to serve the John Doe Defendants until June 1, 2018, the Moving Defendants have no basis for their position that all discovery should be stayed. A number of Plaintiff's discovery requests pertain to information that will help it ascertain the identities of the unnamed John Doe Defendants. Thus, the Moving Defendants' refusal to respond to any of Plaintiff's discovery requests has hindered its ability to

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[4] *See also Benzies v. Take-Two Interactive Software, Inc.*, No. 651920/16, 2016 WL 7407084, at *1 (Sup. Ct., N.Y. Cty. Dec. 19, 2016) (motion to stay pending determination of motion to dismiss denied "consistent with the general rules of the Commercial Division"); *Ndiaye v. NEP W. 119th St. L.P.*, No. 154600/13, 2013 WL 6638018, at *1 (Sup. Ct., N.Y. Cty. Dec. 13, 2013) ("The only time requirement contained in CPLR 3120 regarding the use of the discovery device is after commencement of an action.") (internal citation omitted); *Kokolakis v. The City of New York*, No. 1158792008, 2013 WL 6921325, at *1 (Sup. Ct., N.Y. Cty. Apr. 12, 2013) (allowing discovery to proceed before ruling on any motion to dismiss); *Priya Hospitality LLC v. Patel*, No. 23475-2010, 2011 WL 11071763, at *9 (Sup. Ct., Qns. Cty. May 24, 2011) ("This case is assigned to the Commercial Division and pursuant to its rules, there is no automatic stay of discovery pending the determination of a dispositive motion. . . . As such, there was no basis for the parties to not adhere to their respective discovery obligations.").

[5] The Moving Defendants cite to *Kenney v. Immelt*, 41 Misc. 3d 1225(A), at *19 (Sup. Ct., N.Y. Cty., 2013) (Bransten, J.), for the proposition that the Court should deny Eros' purported attempt to "fish for facts" to salvage a defective pleading. *Kenney*, however, dealt with a shareholder derivative action under BCL 626(c), which requires plaintiffs to plead demand futility with particularity. This Court held, therefore, that permitting discovery would enable plaintiffs to circumvent these heightened requirements. *Id.*; *see also id.* (noting defendants' argument that, "under Delaware law, plaintiffs in a derivative suit are not entitled to discovery to assist their compliance with the particularized pleading requirement in a case of demand refusal").

comply with the Court's extension order, discover the identities of the remaining John Doe Defendants, and prosecute its case to the fullest extent.

Even if the Moving Defendants were to object to certain of Plaintiff's requests on the grounds that they are improper or overbroad, they should still be required to formally respond on a request-by-request basis, meet and confer over any such disputes, and then raise them with the Court if necessary. In fact, this Court has expressly recognized that disputes regarding the scope of a party's discovery requests do not provide grounds to resist discovery during the pendency of a motion to dismiss. *See Hartman*, 2014 WL 7876752, at *1 (concluding that alleged overbreadth of discovery requests does not provide a basis for a stay of discovery).

Accordingly, Eros respectfully requests that the Court order the Moving Defendants to promptly respond to Eros' discovery requests.[6]

Moving Defendants' Position

Defendants respectfully request that the Court stay—or at least limit the amount of—discovery until the Court rules on the pending motions to dismiss.[7] Almost eleven months ago, Plaintiff began this litigation by filing a Notice of Summons, and more than seven months ago, filed the Complaint. Last November, Defendants filed their respective motions to dismiss the Complaint. These motions analyzed each alleged defamatory statement and demonstrated that the Plaintiff's claims failed as a matter of law. In part, the motions argued that Plaintiff failed to allege facts sufficient to support its claims.

More than a month after the February 14, 2018, oral argument on the motions to dismiss, Plaintiff served broad discovery (the "Discovery Requests"[8]) on each of the Defendants. The Discovery Requests seek, among other things, all documents related in any way to each of the statements the Defendants made about Eros, documents relating to the purpose of taking short positions in Plaintiff, communications between Defendants and any prospective business relationship of Plaintiff, and communications among any of the Defendants. This is of course exactly the type of information Eros would not have been permitted to obtain through pre-suit

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[6] The Court should not entertain the Moving Defendants' transparent attempt to reargue its so-called First Amendment concerns, which have already been fully briefed and argued. As detailed herein, this dispute turns on the straightforward application of the CPLR, the Commercial Division's Rules, and this Court's precedent.

[7] This Court has discretion to grant the requested relief. *Chan v. Zoullas*, 34 Misc. 3d 1210(A), at *4 (Sup. Ct., N.Y. County, 2012) (Kornreich, J.) ("[D]iscovery during the pendency of a dispositive motion, in the commercial part, is not a rule written in stone. The court has discretion to stay such discovery. . ."); *see also Levy Group, Inc. v. L.C. Licensing, Inc.*, No. 650034/2010, 2010 N.Y. Slip Op. 33800(U), at *1, n.1 (Sup. Ct., N.Y. County, Oct. 12, 2010) (Kapnick, J.) (granting motion to stay discovery pending determination of motion to dismiss).

[8] Eros served Requests for Documents, Requests for Admission, and Interrogatories on each of the Defendants in this matter (collectively, the "Discovery Requests").

discovery, and it should not be allowed to seek this information now based on a Complaint that fails to state a claim and is subject to a pending motion to dismiss. *See Culligan Soft Water Co. v. Clayton Dubilier & Rice, LLC*, 55 Misc.3d 1115, 1120 (Sup. Ct., N.Y. County, 2017) (Oing, J.) (denying request for discovery as "nothing more than an effort to overcome [Plaintiff's] pleading shortcomings.")

It is improper for Plaintiff to use discovery while motions are pending to fish for facts to supplement a deficient Complaint, whether through a motion for leave to amend or in the event this Court grants the motions to dismiss without prejudice. *See Kenney v. Immelt*, 41 Misc. 3d 1225(A), at *19 (Sup. Ct., N.Y. County, 2013) (Bransten, J.) (holding that Plaintiff with a "patently defective cause of action" was not entitled to discovery prior to deciding a motion to dismiss). Eros must be able to plead and support its claims independently, without the aid of discovery. *Cf. Stewart v. Socony Vacuum Oil Co.*, 3 A.D.2d 582, 583 (3d Dept. 1957) ("The rule is that to entitle a party to examination of some other party in order to frame a complaint against that other party something actionable must be shown.")

Further, the requested relief will not prejudice Plaintiff. Plaintiff filed the Complaint last September but waited nearly six months to serve discovery. There is plainly no urgency, either on Plaintiff's part or because of the circumstances in the case. Defendants have issued litigation holds, obviating concerns about spoliation, and are prepared to conduct discovery should the Court deny the motions to dismiss in whole or in part. On the other hand, allowing Eros to begin discovery could materially prejudice the Defendants by causing them to expend significant resources to gather materials to improperly assist Eros in supplementing its deficient Complaint. This is an especially important consideration in the current case, which implicates important First Amendment protections that are designed to prevent a plaintiff like Eros from utilizing the threat of costly litigation to silence its critics and deprive investors from hearing a counterpoint to the one-sided narrative that Eros has been touting regarding its future business prospects. *See 600 West 115th St. Corp v. Von Gutfeld*, 80 N.Y.2d 130, 137 (1992) (courts are "vigilant about the potential 'chilling effect' the threat of defamation actions can have on public debate").

To be clear, Defendants are not seeking to unnecessarily delay the discovery process. Rather, Defendants will continue to meet and confer with Plaintiff's counsel to reach agreement on an overall discovery schedule for the case, as well as search terms, custodians, and other issues relating to the specifics of electronic discovery and responding to the Discovery Requests. This work will allow the parties to begin discovery promptly, if necessary, following the rulings on the motions to dismiss.[9] The requested relief is designed to prevent Plaintiff from using the discovery process to do what it would not otherwise be able to do to support the claims in its Complaint.

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Notwithstanding the parties' disagreement over whether discovery is appropriate at this juncture, the parties are continuing to meet and confer regarding the scope and length of an

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[9] The relief will also have the added benefit of minimizing the potentially significant costs associated with a large document review and production that may not ultimately be required.

appropriate discovery schedule, along with a discovery protocol, and will be prepared to discuss these issues with the Court at the preliminary conference.

We appreciate the Court's consideration of the request and matters set forth in this letter.

Respectfully submitted,

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