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July 22, 2019

VIA ECF
Honorable Madeline Cox Arleo, U.S.D.J.
Honorable Joseph A. Dickson, U.S.M.J.
United States District Court
Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07101

Re: *Kenworthy v. Lyndhurst Police Department, et al.*
Civil Action No. 2:18-cv-12822 (MCA)(JAD)

Dear Judge Arleo and Judge Dickson:

This firm represents Defendant Adapt Pharma, Inc. ("Adapt") in the above matter. Please accept this letter brief in opposition to Plaintiff Lee Kenworthy's "Letter/Motion for Discovery" (ECF No. 42), the Motion for Discovery/Interrogatories to Adapt (ECF No. 48), and the Motion for a Continuance (ECF No. 49), which are returnable before Your Honors on August 5, 2019.

Procedural History of the Filings at Issue

By way of background, on June 7, 2019, the Court ordered defendants to file motions to dismiss Plaintiff's Amended Complaint by July 5, 2019 (ECF No. 39). Adapt was preparing its motion when, on June 28, 2019, we received a Notice of Electronic Filing that Plaintiff had filed the "Letter/Motion for Discovery" on June 25, 2019. On July 3, 2019, Adapt filed its motion (ECF No. 46). On July 7, 2019, we received two Notices of Electronic Filing that related to filings directed at Adapt. The first Notice was for a Motion for Discovery that consisted only of a set of interrogatories directed at Adapt and other defendants, which Plaintiff filed on June 27, 2019. The second Notice was for a Motion for a Continuance, which Plaintiff filed on June 27,

2019. The Motion for a Continuance appears to reproduce verbatim a substantial portion of the "Letter/Motion for Discovery."

To the extent Adapt can construe Plaintiff's arguments in these filings, he appears to seek a continuance of "2 month[s] to [an] undetermined time" for two reasons: (1) to allow an attorney he has purportedly retained to appear in the case; and (2) to conduct discovery. Both of these requests are inappropriate, procedurally improper, and without any basis in law. Plaintiff's "motions" should be denied.

<u>Continuance for Counsel to Appear</u>

Adapt respectfully requests that the Court deny Plaintiff's Motion for a Continuance because the filing is a bad faith effort the delay proceedings. Further, the appearance of counsel on his behalf would have no bearing on Adapt's pending motion to dismiss.

1. Plaintiff Seeks to Delay the Proceedings in Bad Faith

Plaintiff claims he has retained an attorney and argues the Court should not decide any "motions or timetables" before his attorney appears (*Id.*) Plaintiff seeks a continuance of at least two months, both to allow his attorney to appear and to conduct discovery (ECF No. 42 at 1).

When a request for a continuance is "motivated by procrastination, bad planning or bad faith," it must be denied. *CBG Occupational Therapy v. RHA Health Servs.*, 357 F.3d 375, 390 (3d Cir. 2004) (quoting *Gaspar v. Kassm*, 493 F.2d 964, 969 (3d Cir. 1974)). Here, the timing of Plaintiff's Motion for a Continuance, which he filed days before the Court's deadline for defendants to file motions to dismiss the Amended Complaint, evinces a bad faith effort to delay the proceedings.

Plaintiff filed the initial Complaint on **<u>August 14, 2018</u>**, electing to proceed *pro se* (ECF No. 1). To the extent Plaintiff has misgivings about that decision, he has had nearly a year to retain counsel. Yet, in all that time, Plaintiff has raised the issue of counsel appearing on his behalf only twice. On **<u>January 7, 2019</u>**, the day before Plaintiff's opposition to Adapt's pending motion to dismiss the initial Complaint was due, Plaintiff sought a continuance to allow an attorney he had purportedly retained to appear in the case (ECF No. 22). On January 14, 2019, the Court granted Plaintiff a continuance until February 15, 2019 (ECF No. 27). No attorney appeared on Plaintiff's behalf, and Plaintiff never again raised the possibility of an attorney appearing until his June 25, 2019 "Letter/Motion for Discovery." This time, Plaintiff filed a request for a continuance a week before the Court's deadline for defendants to file motions to

dismiss the Amended Complaint. The fact that Plaintiff made both of these requests for a continuance when faced with motions to dismiss is evidence of his bad faith and his desire to delay the Court's review of the merits.

2. Plaintiff's Retention of Counsel is Irrelevant to Adapt's Pending Motion to Dismiss the Amended Complaint

As Adapt demonstrates in its motion to dismiss the Amended Complaint, Plaintiff's claims against Adapt are subsumed by New Jersey's Product Liability Act ("PLA") (*See* ECF No. 46-3). The interpretation of a statute is an issue of law for the Court to decide. *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1551 (3d Cir. 1996); *Brennan v. William Paterson College*, 34 F. Supp. 3d 416, 423 (D.N.J. 2014). Rule 12(b)(6) "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Twp. of W. Orange v. Whitman*, 8 F. Supp. 2d 408, 413 (1998) (citing *Neitzke v. Williams*, 490 U.S. 319, 326 (1989)). Plaintiff's retention of counsel is immaterial to Adapt's motion to dismiss and the Court's interpretation of the PLA as applied to Plaintiff's claims. Neither Plaintiff nor an attorney can affect the issue of whether the Amended Complaint adequately states a claim against Adapt upon which relief can be granted, because a party cannot amend a pleading by the brief in opposition to a motion to dismiss. *Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988).

Accordingly, Adapt respectfully requests that the Court deny Plaintiff's Motion for a Continuance to allow an attorney to appear on his behalf.

<u>Continuance for Discovery</u>

Likewise, Plaintiff's Motion for a Continuance in order to take discovery, and his Motion for Discovery are improper. Plaintiff argues that "discovery . . . must commence before [the Court] entertain[s] any motions of dismissal" (ECF No. 42 at 1). Plaintiff is incorrect. "Indeed, the purpose of Rule 12(b)(6) is to 'streamline litigation by dispensing with needless discovery and factfinding.'" *Ghaffari v. Wells Fargo Bank NA*, 621 Fed. App'x 121, 124 (3d Cir. 2015) (quoting *Neitzke*, 490 U.S. 326-27). The Third Circuit has found that motions to dismiss pursuant to Rule 12(b)(6) should usually "be resolved before discovery begins." *Id.* (quoting *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997)). Therefore, Plaintiff's desire to take discovery provides no basis for a continuance, and his Motion for a Continuance should therefore be denied.

Plaintiff's service of interrogatories and his Motion for Discovery are also procedurally improper. Pursuant to Rule 26(d), no party may "seek discovery from any source before the

parties have conferred as required by Rule 26(f)." Here, the Court has not scheduled a Rule 16 conference, and thus, the parties have not conferred. Plaintiff's service of interrogatories is improper, and his Motion for Discovery should be denied. The Court has shown Plaintiff great leniency throughout this case, which we understand is customary for *pro se* plaintiffs. However, no plaintiff, *pro se* or otherwise, is entitled to flout the Federal Rules of Civil Procedure.

Plaintiff has filed a litany of documents with the Court, almost none of which address the merits of his case or the inadequacy of his claims. Adapt continues to incur great expense to not only oppose Plaintiff's baseless claims, but to respond to his erratic, extraneous filings with the Court. Adapt respectfully requests that the Court deny Plaintiff's latest attempt to waste Adapt's—and the Court's—time.

Respectfully submitted,

s/ Beth S. Rose

BETH S. ROSE

cc: All counsel of record (via ECF)