



SO ORDERED,

**Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: April 4, 2017**

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**OPUS MANAGEMENT GROUP
JACKSON LLC, ET AL.,**

**CASE NO. 16-00297-NPO
JOINTLY ADMINISTERED**

DEBTORS.

CHAPTER 11

**ORDER DENYING MOTION OF RX PRO OF MISSISSIPPI INC., D/B/A MCDANIEL
PHARMACY TO REMOVE FROM ABEYANCE STATUS AND SET FOR HEARING
DEBTOR'S OBJECTION TO PROOF OF CLAIM OF JOHN F. KENDLE - NO. 3**

This matter came before the Court for hearing on March 8, 2017 (the "Hearing"), on the Motion of Rx Pro of Mississippi, Inc., d/b/a McDaniel Pharmacy to Remove from Abeyance Status and Set for Hearing Debtor's Objection to Proof of Claim of John F. Kendle – No. 3 (the "Motion") (Dkt. 653) filed by Rx Pro of Mississippi, Inc., d/b/a McDaniel Pharmacy ("McDaniel Pharmacy") and the Response of John F. Kendle in Opposition to Motion of Rx Pro of Mississippi, Inc., d/b/a McDaniel Pharmacy to Remove from Abeyance Status and Set for Hearing Debtor's Objection to Proof of Claim of John Kendle – No. 3 [Doc. No. 653] (the "Response") (Dkt. 677) filed by John F. Kendle ("Kendle") in the above-styled jointly administered chapter 11 bankruptcy case (the "Bankruptcy Case").¹ At the Hearing, Stephen W.

¹ The chapter 11 bankruptcy cases of the following affiliate debtors have been administratively consolidated pursuant to the Order Granting Motion of Opus Management Group

Rosenblatt (“Rosenblatt”) represented McDaniel Pharmacy and Douglas C. Noble (“Noble”) represented Kendle. After fully considering the matter and being fully advised in the premises, the Court denied the Motion from the bench. This Order memorializes and supplements the Court’s bench ruling.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). Notice of the Motion was proper under the circumstances.

Facts

The facts of the Bankruptcy Case and the McDaniel Pharmacy Bankruptcy Case are complex. The Court will only discuss the facts that are relevant to the Motion and the Response, most of which are not in dispute. McDaniel Pharmacy and Kendle are involved in litigation regarding claims related to the Bankruptcy Case and the McDaniel Pharmacy Bankruptcy Case in the U.S. District Court for the Southern District of Ohio (the “Ohio District Court”) commenced prior to the Bankruptcy Case and the McDaniel Pharmacy Bankruptcy Case. After McDaniel Pharmacy initiated the McDaniel Pharmacy Bankruptcy Case, the parties agreed that the Ohio District Court remained the best forum in which to litigate these claims and, therefore, McDaniel Pharmacy agreed to the termination of the automatic stay so that the Ohio District Court could

Jackson, LLC for Order Directing Joint Administration of Affiliated Cases Pursuant to Bankruptcy Rule 1015(b) [Dkt. #52], dated March 4, 2016 (Dkt. 114): Rx Pro of Mississippi, Inc., d/b/a McDaniel Pharmacy (the “McDaniel Pharmacy Bankruptcy Case”) (Case No. 16-00288-NPO); OpusRx, LLC (Case No. 16-00291-NPO); Estonna Management LLC, d/b/a The Brooks Pharmacy and d/b/a The Pharmacy at BCHC and d/b/a Vitality Compounding Pharmacy and d/b/a Vitality Pharmacy (Case No. 16-00292-NPO); Rx Pro Pharmacy & Compounding Inc., d/b/a OpusRx, a Florida Corporation (Case No. 16-00294-NPO); Care Rx Pharmacy Group L.L.C. (Case No. 16-00295-NPO); World Health Jets LLC (Case No. 16-00296-NPO); and Opus Management Group Jackson LLC (Case No. 16-00297-NPO).

proceed with the litigation. Apparently, McDaniel Pharmacy is now concerned about a possible delay in the Ohio District Court and the resulting impact such a delay might have on the administration of the Bankruptcy Case and the McDaniel Pharmacy Bankruptcy Case. McDaniel Pharmacy has requested that this Court reimpose the automatic stay with respect to the litigation in the Ohio District Court and hear the related issues in the Bankruptcy Case and the McDaniel Pharmacy Bankruptcy Case.

I. Pre-Petition and Bankruptcy Case

The following facts are undisputed and presented in chronological order:

a. In April of 2015, Kendle filed a Complaint (the “Original Ohio Complaint”) (Case No. 2:15-cv-1295, Dkt. 1) in the Ohio District Court styled *John F. Kendle v. WHIG Enterprises, LLC* (the “Ohio Litigation”), in which McDaniel Pharmacy is a defendant. (Mot. at 2). Kendle filed an amended complaint on June 10, 2015 (the “First Amended Ohio Complaint”) (Ohio Litigation, Dkt. 10), asserting claims against McDaniel Pharmacy and certain other defendants in the Ohio Litigation for breach of contract, unjust enrichment, and tortious interference with contractual relationships. (*Id.*; Resp. at 3).

b. McDaniel Pharmacy filed a voluntary petition for relief pursuant to chapter 11 of the Bankruptcy Code on February 2, 2016 (the “Petition”) (McDaniel Pharmacy Bankruptcy Case, Dkt. 1).

c. In the McDaniel Pharmacy Bankruptcy Case,² Kendle filed a Proof of Claim (the “POC”) (McDaniel Pharmacy Bankruptcy Case, Cl. No. 3-1) on May 31, 2016, for an

² In the Order Granting Motion of Rx Pro of Mississippi, Inc. d/b/a McDaniel Pharmacy for Order Directing Joint Administration of Affiliated Cases Pursuant to Bankruptcy Rule 1015(b) [Dkt. #45] (Dkt. 121), the Court required that “any creditor of the Debtor must file any proof of claim in the McDaniel Pharmacy Case, which proof of claim shall be maintained in the claims

“Unknown/Unliquidated” amount. (POC at 2). McDaniel Pharmacy filed the Objection of Rx Pro of Mississippi, Inc., d/b/a McDaniel Pharmacy to Proof of Claim of John F. Kendle – Claim No. 3 (the “POC Objection”) (Dkt. 468) on July 28, 2016. Kendle filed the Response of John F. Kendle to Objection of Rx Pro of Mississippi, Inc., d/b/a McDaniel Pharmacy to Proof of Claim of John F. Kendle Claim No. 3 [Doc. No. 468] (the “Response to POC Objection”) (Dkt. 524) on September 16, 2016.

d. Kendle filed the Unopposed Motion to Modify Automatic Stay (Dkt. 541) on October 13, 2016, in which he explained that “so the Debtor can have representation in the Ohio Litigation, Kendle and the Debtors have agreed to entry of the proposed Agreed Order Modifying Automatic Stay . . . to permit liquidation of Kendle’s claims and, ultimately therefore resolve the Objection.” (Stay Mot. at 1). On October 14, 2016, the Court entered the Agreed Order Modifying Automatic Stay (the “Agreed Stay Order”) (Dkt. 542) to allow the Ohio Litigation to proceed against McDaniel Pharmacy in the Ohio District Court. (Agreed Stay Order at 1). At the parties’ request, the Court held that the automatic stay of § 362 “is hereby modified solely to the extent necessary to permit and enable the Ohio Litigation to proceed to final resolution.” (*Id.* at 2).

e. On August 19, 2016, the Ohio District Court entered the Order (the “Ohio Discovery Order”) (Ohio Litigation, Dkt. 66) extending the discovery deadline in the Ohio Litigation to December 30, 2016, with a deadline for dispositive motions to be filed of January 31, 2017, and held that “[n]o further extensions will be granted.”

register of the McDaniel Pharmacy Case.” (McDaniel Pharmacy Bankruptcy Case, Dkt. 121 at 3).

f. On November 3, 2016, McDaniel Pharmacy and Kendle filed the Joint Motion to Hold Claim Objection in Abeyance (the “Joint Abeyance Motion”) (Dkt. 557) in the Bankruptcy Case, in which they requested that the Court hold the POC Objection in abeyance “until proceedings have concluded in the Ohio Litigation,” because “the interest of efficiency favors holding all proceedings relating to the [POC], the [POC] Objection and Response [to POC Objection] in abeyance pending liquidation of the [POC] and resolution of the Ohio Litigation.” (Joint Abeyance Mot. at 2). The Court entered the Agreed Order Granting Joint Motion to Hold Claim Objection in Abeyance and Scheduling Status Conference (the “Agreed Abeyance Order”) (Dkt. 559) on November 3, 2016. In the Agreed Abeyance Order, the Court held the POC Objection in abeyance “pending further order of the Court.” (Abeyance Order at 2).

g. On December 28, 2016, Kendle filed the Plaintiff’s Motion for Leave to Amend Complaint (the “Ohio Motion to Amend”) (Ohio Litigation Dkt. 81), in which it requested the Ohio District Court’s permission to file a second amended complaint. Subsequently, on January 4, 2017, the Ohio District Court entered an order vacating the Ohio Discovery Order and extending the deadline to complete all remaining depositions to February 6, 2017. (Ohio Litigation, Dkt. 85). McDaniel Pharmacy and the other defendants in the Ohio Litigation filed the Defendants WHIG Enterprises, LLC, Mitchell Chad Barrett, and Rx Pro of Mississippi, Inc.’s Response to Plaintiff’s Motion [for] Leave to Amend Complaint (Ohio Litigation, Dkt. 88) on January 18, 2017, arguing that the Ohio Motion to Amend should be denied because allowing Kendle to file a second amended complaint would unduly extend discovery.

h. On January 26, 2017, Organ Cole LLP, the attorney for all defendants in the Ohio Litigation, filed the Motion to Withdraw (Ohio Litigation, Dkt. 93), seeking to withdraw as the attorney in the Ohio Litigation, which the Ohio District Court granted on January 27, 2017 (Ohio

Litigation, Dkt. 94). McDaniel Pharmacy and the other defendants were given thirty (30) days, until March 8, 2017, in which to obtain new counsel in the Ohio Litigation. (Ohio Litigation, Dkt. 96).

II. Motion and Response

McDaniel Pharmacy filed the Motion on February 3, 2017, requesting that the Court remove the POC Objection from abeyance, set it for hearing “at the earlier possible time,” and reinstate the automatic stay as to the Ohio Litigation. (Mot. at 1, 7). According to McDaniel Pharmacy, the Court should vacate the Agreed Abeyance Order pursuant to Rules 7016 and 9024 of the Federal Rules of Bankruptcy Procedure. Rule 9024 incorporates Rule 60(b) of the Federal Rules of Civil Procedure (“Rule 60(b)”) with limited exceptions. McDaniel Pharmacy and Kendle agreed in the Joint Abeyance Motion “to consensual lifting of the automatic stay to permit the Ohio Litigation to proceed in order to liquidate Kendle’s underlying claims” (*Id.* at 7). Apparently, the Ohio Litigation is not proceeding in the way McDaniel Pharmacy expected, and it now seeks to adjudicate the POC Objection in this Court. “[A]s a result of developments in the Ohio Litigation that were beyond its control, McDaniel Pharmacy no longer has representative counsel in the Kendle Litigation. It also appears that if the Motion for Leave to Amend the Complaint is granted, discovery in the Kendle Litigation will be ongoing and there will not be a prompt resolution of [the POC Objection].” (*Id.*). According to McDaniel Pharmacy, reinstating the automatic stay is necessary as to the Ohio Litigation to the extent it involves the prosecution of any claim against it. (*Id.*).

In the Response, Kendle argued that McDaniel Pharmacy “made a conscious choice” to stipulate to termination of the automatic stay to allow the Ohio Litigation to proceed and to the abeyance of POC Objection. (Resp. at 1). Kendle maintained that Rule 60(b) is not supposed to

be “used as a procedure through which a party to a case may revisit its own deliberate litigation choices.” (*Id.*). Although McDaniel Pharmacy agreed in the Agreed Abeyance Order and in the Agreed Stay Order that the Ohio District Court was the best forum in which to litigate, it has now changed its position and has requested that the POC Objection be removed from abeyance. (*Id.*). According to Kendle, the Agreed Abeyance Order and Agreed Stay Order were “not conditioned upon any specific case schedule in the [Ohio Litigation], and [Kendle] has relied upon that Agreement in continuing his case against [McDaniel Pharmacy] in Ohio.” (*Id.*). Kendle argued that the Ohio District Court “remains the best venue for the determination of the [POC Objection] given the amassing of involved parties before that Court, the familiarity of the Court with the claim, and the discovery that has been conducted to date and which continues there.” (*Id.* at 2). In short, Kendle contended in the Response that Rule 60(b) does not provide a proper basis for the relief sought by McDaniel Pharmacy (Resp. at 7-13); that McDaniel Pharmacy has not sought an injunction under § 105(a),³ which provides the only basis for the relief sought (*Id.* at 13-16); that the Ohio District Court is still the appropriate venue for determination of the POC Objection (*Id.* at 16-18); and that the POC Objection should remain in abeyance (*Id.* at 18).

On March 8, 2017, the same day as the Hearing, attorney David A. Beck, of the law firm of Carpenter Lipps & Leland LLP, filed an entry of appearance on behalf of McDaniel Pharmacy in the Ohio Litigation (Ohio Litigation, Dkt. 106). This Court entered the Order Granting Application of Rx Pro of Mississippi, Inc. d/b/a McDaniel Pharmacy, to Employ and Retain Carpenter Lipps & Leland LLP as Special Counsel [Dkt. #684] on April 3, 2017. (Dkt. 762).

³ Hereinafter, all code sections refer to the Bankruptcy Code found in title 11 of the United States Code unless indicated otherwise.

III. Hearing

At the Hearing, Rosenblatt argued on behalf of McDaniel Pharmacy and Noble argued on behalf of Kendle. Jack West (“West”), the operations manager of McDaniel Pharmacy, testified on behalf of McDaniel Pharmacy. The parties entered Composite Exhibit A-C into evidence, which consisted of the WHIG, LLC and Affiliates Distributor Consultant Agreement (the “Distributor Consultant Agreement”), the Memorandum of Understanding (the “Memo of Understanding”), and patient records that reflect various prescriptions for which Kendle claimed he was entitled to a commission (the “Patient Records”).⁴

A. McDaniel Pharmacy

1. Rosenblatt Argument

At the Hearing, Rosenblatt argued that the POC Objection should be removed from abeyance and placed on the Court’s active docket, and that the automatic stay should be reimposed. Rosenblatt explained that at the time McDaniel Pharmacy agreed to the entry of the Agreed Abeyance Order and the Agreed Stay Order, a scheduling order in the Ohio Litigation had been entered, setting a discovery deadline. According to Rosenblatt, the Ohio Litigation was delayed after Kendle filed the First Amended Ohio Complaint. He contended that it would be more efficient to bring the POC Objection back into this Court because if it remains in the Ohio District Court, litigation will continue “for years.”

Rosenblatt argued that because the Ohio Litigation⁴ is unrelated to McDaniel Pharmacy, it would be a waste of time and resources to require McDaniel Pharmacy to litigate in the Ohio District Court, which is evidenced by the fact that the Distributor Consultant Agreement and the Memo of Understanding relate to parties other than McDaniel Pharmacy, and the Patient Records

⁴ The Patient Records do not disclose the names of patients.

do not list McDaniel Pharmacy. Additionally, Rosenblatt stated that the discovery that has been conducted in the Ohio Litigation can be incorporated into litigation of the POC Objection in this Court. If the Court removes the POC Objection from abeyance and places it back on the active docket, Rosenblatt estimated that the POC Objection can be resolved in less than three (3) months.

2. West Testimony

West testified at the Hearing that he has been the point of contact for McDaniel Pharmacy's attorneys in the Ohio Litigation since the Original Ohio Complaint was filed. He was notified of the issues related to McDaniel Pharmacy's attorneys in the Ohio Litigation less than thirty (30) days prior to the Hearing, and was given a deadline by which to obtain new representation, which has now been accomplished. West stated that neither the Distributor Consultant Agreement nor the Memo of Understanding related to McDaniel Pharmacy, and neither makes mention of McDaniel Pharmacy. Additionally, the Patient Records show that McDaniel Pharmacy was not involved in the actions that gave rise to the Ohio Litigation. He explained that the Patient Records are generated as a commission report that evidences the amount Kendle would receive pursuant to the Distributor Consultant Agreement. Because the Patient Records do not mention McDaniel Pharmacy, West stated that the claims involved in the Ohio Litigation are not related to it. Nonetheless, before filing a summary judgment motion in the Ohio Litigation, McDaniel Pharmacy wanted to complete discovery, according to West.

If the POC Objection remains before the Ohio District Court, West stated that it would negatively impact McDaniel Pharmacy because it would hinder its ability to file a confirmable plan. West testified that when McDaniel Pharmacy agreed to the Agreed Stay Order and the Agreed Abeyance Order, it believed that discovery in the Ohio Litigation would be completed by

December 31, 2016, and then it would move for summary judgment. The discovery deadlines, however, were extended by the Ohio District Court. McDaniel Pharmacy has not propounded any discovery, and it has not been served with any discovery requests. West stated that the only matter delaying the filing of a plan in the Bankruptcy Case is the litigation of the POC Objection. McDaniel Pharmacy, therefore, desires to have the POC Objection removed from abeyance so that it can be quickly resolved and seeks to vacate the Agreed Stay Order.

B. Kendle

At the Hearing, Noble contended that McDaniel Pharmacy has the burden of proof under Rule 60(b), and it cannot meet that burden. He argued that McDaniel Pharmacy failed to assert grounds under Rule 60(b) for removing the POC Objection from abeyance. According to Noble, the parties intended to resolve the POC Objection in the Ohio District Court, which is why they agreed to entry of both the Agreed Stay Order and the Agreed Abeyance Order. Noble contended that Kendle filed the First Amended Ohio Complaint in the Ohio Litigation to add World Health Industries, Inc. as a defendant, add a claim to pierce the corporate veil, and add a spoliation claim, all of which are related to the prior claims and evidence.

The Court also should decline to issue a new injunction under § 105(a), according to Noble, because deference should be given to the Ohio District Court. The Ohio District Court has maintained jurisdiction over the Ohio Litigation, and the parties agreed to allow the POC Objection to remain within the Ohio District Court's discretion. McDaniel Pharmacy did not offer proof that moving the Ohio Litigation to this Court would solve the issues McDaniel Pharmacy has claimed exist in the Ohio District Court, and Noble argued that drastic relief is not warranted. Noble contended that McDaniel Pharmacy agreed to allow the POC Objection to be resolved in the Ohio District Court.

Discussion

The Ohio Litigation has been pending in the Ohio District Court since April 2015, almost one (1) year prior to the filing of the Bankruptcy Case and the McDaniel Pharmacy Bankruptcy Case and nearly two (2) years before the Hearing. The Ohio District Court is familiar with the Ohio Litigation and has managed discovery, has overseen the withdrawal and appointment of counsel for McDaniel Pharmacy, and has imposed and extended deadlines. Recognizing that the Ohio District Court was the most efficient forum in which to litigate the POC Objection, McDaniel Pharmacy approved the Agreed Stay Order, the Joint Abeyance Motion, and the Agreed Abeyance Order. In the Agreed Stay Order, McDaniel Pharmacy agreed to the termination of the automatic stay “to permit and enable the Ohio Litigation to proceed to final resolution.” (Agreed Stay Order at 2). Similarly, in the Joint Abeyance Motion, McDaniel Pharmacy agreed that the “Ohio Litigation will serve as the forum to liquidate the claims asserted by Kendle which form the basis of [the POC], to which the Debtor has objected,” and until the Ohio Litigation is concluded, “*the interest of efficiency favors* holding all proceedings relating to the [POC], the [POC] Objection and Response [to POC Objection] in abeyance pending liquidation of the [POC] and resolution of the Ohio Litigation.” (Joint Abeyance Mot. at 2) (emphasis added).

Pursuant to the Joint Abeyance Motion, the Court entered the Agreed Abeyance Order on November 3, 2016, and set a status conference for May 23, 2017. (Agreed Abeyance Order at 2). Despite its assertion in at least three (3) pleadings that the Ohio District Court is the proper forum for liquidation of the POC and that “the interest of efficiency” favored holding the POC, the POC Objection, and the Response to POC Objection in abeyance pending resolution of the Ohio

Litigation, McDaniel Pharmacy now wishes to renege on its agreement. As the Court will outline below, there is no basis for the relief sought by McDaniel Pharmacy in the Motion.

Under Rule 60(b), “[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding” for any of six (6) enumerated reasons. FED. R. CIV. P. 60(b)(1)-(6). In the Motion, McDaniel Pharmacy argued that relief should be granted under Rule 60(b)(6), for “any other reason that justifies relief.” FED. R. CIV. P. 60(b)(6). According to McDaniel Pharmacy, it agreed to the consensual termination of the automatic stay in the Agreed Stay Order and the Agreed Abeyance Order, but, “as a result of developments in the Ohio Litigation that were beyond its control,” it no longer has counsel in the Ohio Litigation⁵ and discovery has been extended. (Mot. at 7). “Rule 60(b)(6) ‘is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses.’” *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 642 (5th Cir. 2005) (quotation omitted). The equitable power granted to a bankruptcy court by Rule 60(b)(6) gives it “ample power to vacate judgments whenever such action is appropriate to accomplish justice.” *Id.* (quotation omitted). Nonetheless, “relief under this section is granted only if extraordinary circumstances are present.” *Id.* (quotation omitted).

The facts of the Bankruptcy Case, the McDaniel Pharmacy Bankruptcy Case, and the Motion do not constitute “extraordinary circumstances” that justify the relief requested by McDaniel Pharmacy. McDaniel Pharmacy essentially argued that because the Ohio Litigation is not proceeding as originally contemplated, it desires to renege on its agreement to terminate the automatic stay and hold the issues surrounding the POC in abeyance pending resolution of the

⁵ Although McDaniel Pharmacy did not have counsel in the Ohio Litigation at the time it filed the Motion, as the Court discussed in Section II above, McDaniel Pharmacy has now retained counsel in the Ohio Litigation.

Ohio Litigation. The fact that the Ohio Litigation is not proceeding as McDaniel Pharmacy had hoped is not “any other reason that justifies relief” under Rule 60(b)(6). McDaniel Pharmacy, while represented by counsel in the Ohio Litigation, asked the Court to terminate the automatic stay and enter the Agreed Abeyance Order so that the parties could liquidate the POC in the Ohio District Court. It presented no evidence in the Motion or at the Hearing that demonstrate “extraordinary circumstances” that justify relief. Justice would not be served by reinstating the automatic stay or setting aside the Agreed Abeyance Order. Additionally, the Ohio Litigation has been pending in the Ohio District Court since nearly one (1) year prior to the initiation of the Bankruptcy Case and the McDaniel Pharmacy Bankruptcy Case. It is, therefore, familiar with the facts and circumstances surrounding the Ohio Litigation—which is why McDaniel Pharmacy agreed to proceed in the Ohio District Court in the first place. Accordingly, Rule 60(b) does not provide a basis for relief from the Agreed Stay Order or the Agreed Abeyance Order.

Similarly, § 105(a) does not provide a basis for the relief requested in the Motion. Section 105(a) allows the Court to “issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Although McDaniel Pharmacy did not expressly request relief pursuant to the Court’s inherent power under § 105(a), it requested that the Court reimpose the automatic stay, which would prevent Kendle from pursuing his claims against it in the Ohio Litigation. This would have the procedural effect of the Court issuing a new injunction against Kendle. *Timmons v. Rose Acceptance, Inc. (In re Timmons)*, 479 B.R. 597, 609 (Bankr N.D. Ala. 2012); 2 COLLIER ON BANKRUPTCY ¶ 105.03 (16th ed. 2016). “[A] request for relief under section 105 must meet the traditional requirements for an injunction, and must be presented and prosecuted in traditional formats.” 2 COLLIER ON BANKRUPTCY ¶ 105.03. The elements McDaniel Pharmacy was required to meet in order for the automatic stay to be

reimposed, therefore, are: (1) the likelihood of success on the merits; (2) the likelihood that irreparable harm will be suffered in the absence of preliminary relief; (3) that the balance of equities weigh in its favor; and (4) that an injunction is in the public interest. 2 COLLIER ON BANKRUPTCY ¶ 105.03[1].

Not only did McDaniel Pharmacy fail to offer proof that any of these elements are satisfied, but it is also clear to the Court that *at least* the second element cannot be satisfied. As the Court previously discussed, McDaniel Pharmacy agreed to entry of the Agreed Stay Order and the Agreed Abeyance Order, accepting the risks associated with agreeing to litigate the POC Objection in the Ohio District Court. Now that the Ohio Litigation is not proceeding the way it had hoped, it has sought to remove the POC Objection from abeyance and reimpose the automatic stay. Enforcing the parties' agreement does not present a likelihood of irreparable harm attributable to the risks undertaken by McDaniel Pharmacy in agreeing to the Agreed Stay Order and the Agreed Abeyance Order. In fact, a number of options are available to expedite litigation and to present a confirmable plan. Accordingly, the Court declines to reimpose the automatic stay pursuant to § 105(a).

Conclusion

In the Agreed Stay Order and the Agreed Abeyance Order, to which McDaniel Pharmacy agreed, the parties explained that the Ohio District Court is the most efficient forum in which to litigate the POC Objection. The Court agrees. The Ohio District Court maintained jurisdiction over the Ohio Litigation prior to the filing of the Petition and during the pendency of the Bankruptcy Case and the McDaniel Pharmacy Bankruptcy Case, and it will continue to maintain jurisdiction over the Ohio Litigation. There has been no showing of cause to vacate either the Agreed Stay Order or the Agreed Abeyance Order under Rule 60(b), and injunctive relief is not

warranted under § 105(a). McDaniel Pharmacy will not be prejudiced by the enforcement of its agreement with Kendle to litigate in the Ohio District Court, which is memorialized by the Agreed Stay Order and the Agreed Abeyance Order. Accordingly, the Motion should be denied.

IT IS, THEREFORE, ORDERED that the Motion is hereby denied.

##END OF ORDER##