

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY	
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In re: NOSTRUM LABORATORIES INC. Debtor.	Case No. 24-19611 (JKS) Chapter 11 Honorable John K. Sherwood

**McKESSON CORPORATION'S SUMMATION
FOLLOWING EVIDENTIARY HEARING**

McKesson Corporation (“McKesson”), on behalf of itself and two corporate affiliates, ClarusONE Sourcing Services LLP (“ClarusONE”) and RxCrossroads 3PL LLC (“RxCrossroads,” and collectively with McKesson and ClarusONE, the “McKesson Entities”) submits this Summation following the February 5, 2025 evidentiary hearing (the “Hearing”) on the motion filed by Debtor Nostrum Laboratories, Inc. (“Nostrum”). [Docket No. 206].

MOTION SUMMARY

1. In the Motion, Nostrum alleged claims for (1) violations of the stay under §§ 362(a)(3), (6) & (7) and 362(k);¹ (2) damages under § 362(k) for alleged willful violation of the stay; (3) turnover of funds under § 542(a)-(b); (4) specific performance of contracts; and (5) damages for alleged improper triangular setoff. Nostrum, which bears the burden of proof, failed to prove any of these claims or its entitlement to injunctive relief against McKesson.

The Undisputed Evidence Proves McKesson Did Not Violate the Stay.

2. The bulk of the Motion is devoted to allegations that the McKesson Entities improperly withheld funds in order to pay pre-petition amounts owed to RxCrossroads and ClarusONE. Based on the undisputed evidence regarding the still-outstanding amounts owed to each entity (as detailed in McKesson’s Proof of Claim), the claims for violation of the stay, implementation of unapproved setoffs, and triangular setoff were “not an issue anymore.” February 5, 2025 Hearing Transcript (“Hearing Tr.”) 49:113-23.

Nostrum Is Not Entitled to Injunctive Relief on the Two Remaining Claims.

3. Due to the elimination of the stay violation claims, the only remaining claims before the Court are injunctive relief-type demands for: (1) “compelling” turnover (Motion, ¶¶ 41-47); and (2) “compelling contract performance,” (Motion, ¶ 48-53). Under Bankruptcy Rule 7001,

¹ Each reference to a “Section” is to a section of title 11 of the United States Code (the “Bankruptcy Code”).

these claims cannot be brought as a contested matter and instead must be brought in an adversary proceeding, with the procedural protections allocable to such proceedings.

4. A preliminary injunction, particularly in a breach of contract lawsuit, is extraordinary relief. It may be awarded only after the Court considers whether the moving party is (1) likely to succeed on the merits of its claim, (2) is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities between the parties, and (4) the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As the moving party, Nostrum must demonstrate both a likelihood of success on the merits of its breach of contract/turnover claims and that it will likely suffer irreparable harm (of a type that would be prevented by an immediate grant of relief it could be awarded after prevailing on the merits of its claims at trial). *See Bennington Foods LLC v. St. Croix Renaissance, Grp., LLP*, 528 F.3d 176, 180 (3d Cir. 2008). When the claim is based on a breach of contract, irreparable injury may be found in two situations: (1) where the subject matter of the contract is of such a special nature or peculiar value that damages would be inadequate; or (2) where because of some special and practical features of the contract, it is impossible to ascertain the legal measure of loss so that money damages are impracticable.” *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987). A party failing to meet its burden on either of these first two prongs is not entitled to preliminary relief. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 179-80 (3d Cir. 2017). Here, Nostrum has not met its burden to obtain a preliminary injunction.

McKesson’s Accounting Is, In Every Material Respect, Strictly in Accordance with the Terms of the Operative Agreements.

5. Much of the testimony, and the Court’s questions, focused on McKesson’s accounting. The Court expressed concern that no company could make money in the industry if McKesson’s accounting was this strict across the board. However, as established at the Hearing,

this difficulty arises not from McKesson's accounting but entirely from Nostrum's own actions. Nostrum sets both (i) the wholesale acquisition cost ("WAC") for its products and (ii) the cost that ultimate customers pay for Nostrum's products sold by McKesson. *See* MPSA, Ex. 1 ¶ 101 ("WAC" means Supplier's then current and published wholesale acquisition cost . . .), Hearing Tr. (Wilson Testimony) at 129: 22-24 ("A: [The chargebacks apply because] McKesson [is] short paid by the customer due to the customer having a previous agreement with Nostrum . . . "). The difference between these two items is the "WAC Spread."

6. As the trial testimony established, the "WAC Spread" at the hearing is a direct result of Nostrum's negotiated contracts with its customers (primarily pharmacies). In order to induce customers to select its generic pharmaceuticals over alternatives,² Nostrum offered low purchase prices with many of its major customers. This "WAC Spread" results in McKesson holding "Chargebacks" which are deducted against any payables owed to Nostrum. *See* Hearing Tr. (Wilson Testimony) at 124:6-9 ("[T]he 43 percent [WAC Spread] is . . . based on the average chargeback percentile that McKesson has experienced through prior sales [of Nostrum product.]"). As Nostrum acknowledges, McKesson is entitled to deduct Chargebacks and other items (termed "Deduction Credits") from any payables to Nostrum. *See* Hearing Tr. (Sabale Testimony) 22:4-8.

7. Again, the magnitude of McKesson's Deduction Credits is a problem of Nostrum's own making. As Mr. Wilson testified, he handles more than 300 supplier accounts for McKesson, the overwhelming majority of which are operating in the normal course of business. Hearing Tr. (Wilson Testimony) 142:22-143:3 ("Q: [Mr. Wilson, you handle] [u]pwards of 300 other suppliers, right? A: That is correct, yes. Q: And most of them are still in business? A: Yes sir.").

² As Nostrum's sole witness Parashram Sabale explained, many of Nostrum's products are multi-sourced and customers have the option of purchasing those products from Nostrum or alternative suppliers. Hearing Tr. (Sabale Testimony) at 13:18-14:11. Obviously, for large purchasers of generic pharmaceutical products (such as national pharmacy chains), the acquisition price of those products will be the major decision point.

8. Regarding the information available on the RxCrossroads portal, the undisputed testimony established two critical facts: (1) The numbers in the RxCrossroads portal come from Nostrum and are inflated because Nostrum has not approved credit memos to properly account for all of the Deduction Credits which McKesson is entitled to apply. *See* Declaration of Bryan Thompson (“Thompson Decl.”) ¶ 18. (2) Nostrum falsely alleged that RxCrossroads provides bookkeeping services for Nostrum. It does not. *Compare* Hearing Tr. (Sabale Testimony) 59:15-19 (“Q: Does your read of [section 3.0.5 of the MPSA] mean that RxCrossroads will act as Nostrum’s accounting department for its sales? A: For account receivable, yes.”) *with* Thompson Decl. ¶ 10 (“RxCrossroads does not make accounting decisions with respect to Nostrum’s day-to-day financial relationships”). Nostrum’s own testimony established that the RxCrossroads portal only offers “an estimate of the timing and amounts of future payments.” *See* Sabale Decl. ¶ 35. Nostrum’s reliance on the portal to perform its own accounting flies in the face of generally accepted accounting principles. Plus the portal is a mere estimate of future payments. It is not the controlling method of determining the amounts actually owed to Nostrum.

9. McKesson is not bound by the “estimate . . . of future payments” included on the portal for calculating payments. It is bound by the parties’ contracts. And the evidence proves the operative agreements grants McKesson with the right to setoff, recoup, charge back, process returns, and perform related deductions with respect to the services provided and for amounts due to McKesson, *i.e.*, the “Deduction Credits.” *See* Wilson Decl. ¶¶ 5-7; Thompson Decl. ¶¶ 5-6.

Nostrum Failed to Meet Its Burden of Proof on Any Issue.

10. As aptly asked by the Court to Nostrum’s counsel: “What have you proven today?” Hearing Tr. 155:2-3. The answer is Nostrum has not proven its claims for turnover or breach of contract, or injunctive-type relief against McKesson on either of those two claims. Tellingly,

Nostrum's declarant, Mr. Sabale, attached Nostrum's return policy, when that policy does not apply to the Nostrum/McKesson relationship.³ Mr. Sabale testified as to projected payments from McKesson rather than identifying actual unpaid invoices. *See* Sabale Decl., ¶¶ 16, 17. In sum, Nostrum makes a general plea that McKesson be required to provide funding even though, as the testimony of Mr. Wilson conclusively establishes, see *Wilson* Decl. ¶¶ 9-12, Exh. A; Hearing Tr. (Wilson Testimony) at 136:18-19 ("[I]t is unlikely that [McKesson] would move out of [the] debit position [it is currently in.]"), it does not owe Nostrum any amounts. Under controlling law, Nostrum's request for injunctive relief on the two remaining claims must be denied.

11. While McKesson recognizes the Court's concern about Nostrum limping forward in this case, the current troubles are direct result of its own actions. Put plainly, Nostrum is asking the Court to place McKesson in a position of effectively underwriting this bankruptcy case. McKesson should not be forced into a *de facto* DIP lender role where it has not been proven that McKesson did anything outside the scope of what it is allowed to do under both the parties' contracts and the now-final order on the customer motion.

CONCLUSION

For all of the reasons set forth in McKesson's Opposition (Docket No. 222) and the trial testimony, Nostrum has failed to prove any of the two remaining claims (turnover and breach of contract) alleged in the Motion and its entitlement to injunctive relief on those claims, the McKesson Entities respectfully request that the Court deny the Motion.

³ With respect to returns and Nostrum's turnover action, the application of McKesson's return policy is critical for another reason: "It is settled law that the debtor cannot use the turnover provisions [of section 542] to liquidate contract disputes or otherwise demand assets whose title is in dispute." *U.S. v. Inslaw*, 932 F.2d 1467, 1472 (D.C. Cir. 1991); *see also In re Denby-Peterson*, 576 B.R. 66, 82 (Bankr. D.N.J. 2017), *aff'd sub nom. Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184 (D.N.J. 2018), *aff'd sub nom. In re Denby-Peterson*, 941 F.3d 115 (3d Cir. 2019) (citing *Inslaw* for the quoted language). At best, Nostrum has a dispute as to the whether certain inventory can be returned under McKesson's return policy. This is a contract dispute, not a turnover claim under section 542.

Dated: February 13, 2025

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