IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

STATE OF FLORIDA, OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LEGAL AFFAIRS,

Plaintiff,

v.

PURDUE PHARMA L.P., et al.,

Defendants.

Case No. 2018-CA-001438

CVS PHARMACY, INC. AND WALGREEN CO.,

Defendants and Third-Party Plaintiffs,

v.

JOHN AND JANE DOES 1-500,

Third-Party Defendants.

PLAINTIFF STATE OF FLORIDA'S MOTION TO STRIKE OR SEVER THIRD-PARTY COMPLAINT OF CVS PHARMACY, INC. AND WALGREEN CO.

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Plaintiff State of Florida, Office of the Attorney General, Department of Legal Affairs (the "State") files this motion to strike or sever the third-party complaint filed by CVS Pharmacy, Inc. ("CVS") and Walgreen Co. ("Walgreens") (collectively, "the Pharmacies").

INTRODUCTION

After distributing and dispensing billions of opioids in Florida and engaging in egregious misconduct, CVS and Walgreens have launched a publicity stunt attempting to deflect attention from their role in causing the opioid epidemic plaguing Florida. The Pharmacies have filed a third-party complaint against unnamed doctors who wrote improper opioid prescriptions in Florida – prescriptions that *the Pharmacies* filled without adequate investigation, in breach of their own duties under Florida law. CVS and Walgreens' gambit is factually unsupported because both Pharmacies have records concerning the prescriptions that the Pharmacies dispensed, including the names of the doctors who wrote the prescriptions. Yet, CVS and Walgreens have not named a single prescriber and, instead, have filed this pleading against 500 John and Jane Doe defendants. The Pharmacies' tactic is also legally groundless because Florida law treats such John and Jane Doe filings as a nullity. Such a filing does not commence a legal action against any party.

The Pharmacies are two of the largest distributors and dispensers of opioids in Florida. *See* Am. Compl. ¶¶ 385, 395. Collectively, they distributed billions of pills into Florida, and each failed to implement reasonable steps to stop diversion of those pills to the black market. The Pharmacies also collectively operate more than 1,600 retail pharmacy stores across the State. *Id.* ¶ 145. Retail pharmacies are the last line of defense between dangerous opioids and the public. Before dispensing any controlled substance, the Pharmacies are required by Florida law to review each controlled substance prescription and determine whether the prescription is

effective, valid, and issued by a practitioner for a legitimate medical purpose. *See id.* ¶ 158; Ch. 465, Fla. Stat.; Fla. Admin. Code R. 64B16-27.810, -27.831.

The Pharmacies failed to fulfill those obligations. Each was the target of enforcement actions specifically aimed at its diversion-related failures in the State of Florida. CVS paid millions of dollars to resolve allegations of malfeasance at one of its stores in Sanford, Florida, while Walgreens paid millions of dollars in connection with diversion and record-keeping problems in its Jupiter, Florida distribution center and six retail Walgreens pharmacies in the State, including one in Port Richey. *See* Am. Compl. ¶ 386. A Walgreens in Pasco County sold 2.2 million tablets in Hudson alone in one year. *Id.* ¶ 387.

The Pharmacies' third-party complaint should be stricken or severed, because John Doe pleadings do not properly commence an action and any attempt to litigate the Pharmacies' purported third-party claims together with the State's claims against the existing defendants would be unduly cumbersome for the parties and the Court.

ARGUMENT

I. The Court Should Strike The Pharmacies' Third-Party Complaint Because A Complaint Naming Only John Doe Defendants Does Not Commence An Action Under Florida Law

The Pharmacies' John Doe complaint does not commence an action under Florida law, and this Court should strike it.

A third-party complaint listing only John Doe defendants "does not commence an action against a real party" under Florida law. *Grantham v. Blount*, *Inc.*, 683 So. 2d 538, 539 (Fla. 2d DCA 1996). Some states permit plaintiffs "to file a fictitious or 'John Doe' pleading if the true name of the defendant is not known," and then later to file an amended pleading that names the true defendant and relates back to the date the original John Doe complaint was filed. *Id.* at 540.

But "Florida is not one of these states." *Id.* Florida courts reject John Doe complaints because, in jurisdictions that permit them, such a pleading "does not actually give the true defendant notice of the lawsuit," but "merely serves as a legal justification to extend the time in which to find and serve the actual defendant" – a procedural ploy that "conflict[s] with the public policy" and "the established law in Florida." *Id.* at 541.

For those reasons, Florida courts hold that filing a John Doe pleading, without more, has no legal effect. *See Gilliam v. Smart*, 809 So. 2d 905, 908 (Fla. 1st DCA 2002) (reversing denial of motion to dismiss and holding that amendment of John Doe complaint to name defendant did not relate back to filing of John Doe complaint); *Click v. Pardoll*, 359 So. 2d 537, 538 (Fla. 3d DCA 1978) (per curiam) (holding that belated amendment of "Dr. John Doe" complaint alleging medical malpractice, by substituting name of actual doctor, constituted new action filed as to doctor, so that amended complaint did not "relate back" to date original complaint was filed, and dismissal of complaint as to actual named doctor was proper); *Liebman v. Miami-Dade Cty. Code Compliance Office*, 54 So. 3d 1043, 1044 (Fla. 3d DCA 2011) (affirming grant of motion to quash service of later-named Doe defendant and holding that, "[i]n the absence of a statute authorizing such a procedure, the filing of a 'John Doe' complaint is not sufficient to commence an action against a real party in interest"); *Fowler v. Coad*, No. 3:14-cv-309-RS-EMT, 2015 WL 1843243, *3-4 (N.D. Fla. Apr. 22, 2015) (granting motion to dismiss amended complaint where original complaint had only named John Doe defendants and relying on *Grantham*, *Gilliam*, and *Liebman*); *D.B. v. Orange Cty., Fla.*, No. 6:13-cv-434-Orl-31DAB, 2013 WL 12149317 (M.D. Fla. July 29, 2013) (holding that "Florida law is clear" that "[s]ubstituting a named defendant for a John Doe defendant is the legal equivalent of filing a new claim").

Multiple Florida rules authorize striking a third-party complaint that fails to commence an action against any party. Florida Rule of Civil Procedure 1.180(a), which governs the filing of third-party claims, expressly permits any party to move to strike the third-party claim. Florida Rule of Civil Procedure 1.140(f) also authorizes the Court to strike a pleading that is "redundant, immaterial, impertinent, or scandalous . . . at any time." Because the Pharmacies' John Doe pleading does not commence an action against any party, it is immaterial and impertinent, and should be stricken.

It is no answer for the Pharmacies to assert that they intend later to file an amended third-party complaint naming actual prescribers. Any subsequent amendment to name real defendants would be treated as a new action against new parties. *See Gilliam*, 809 So. 2d at 909. The amended pleading would not "relate back" to the John Doe complaint for purposes of complying with Rule 1.180 or any other deadline or limitations period. *See id.*; *Grantham*, 683 So. 2d at 541-42.

In short, the Pharmacies' John Doe complaint is a placeholder that does not hold a place. It should be stricken.

II. The Court Should Strike Or Sever The Pharmacies' Third-Party Complaint Because It Would Unduly Complicate The Litigation And Prejudice The State

The Pharmacies' third-party complaint should be stricken or severed for the additional reason that any attempt to litigate claims by the Pharmacies against hundreds of prescribers together with the State's claims against the existing defendants would unduly complicate this important lawsuit and prejudice the State.

Rule 1.180(a) allows any party to move to strike or sever a third-party claim. In addition, Florida courts "have discretion to sever a third party claim pursuant to Florida Rule of Civil Procedure 1.270(b) or to dismiss an inappropriate third party complaint." *Gortz v. Lytal, Reiter,*

Clark, Sharpe, Roca, Fountain & Williams, 769 So. 2d 484, 488 (Fla. 4th DCA 2000) (quoting *Attorneys' Title Ins. Fund, Inc. v. Punta Gorda Isles, Inc.*, 547 So. 2d 1250, 1253 (Fla. 2d DCA 1989)). Rule 1.270(b) permits the Court to sever third-party claims "in furtherance of convenience or to avoid prejudice." Fla. R. Civ. P. 1.270(b). Courts exercise that discretion to "avoid the[ ] problems" that third-party complaints such as this one present: that "defendants could overly complicate the litigation by excessive third party practice" and that "joinder of third party defendants could unfairly prejudice plaintiffs in the orderly presentation of their claims." *Gortz*, 769 So. 2d at 488 (quoting *Attorneys' Title Ins. Fund*, 547 So. 2d at 1253); *see also*, *e.g.*, *Van Voorhis v. Hillsborough Bd. of Cty. Comm'rs*, No. 8:06-cv-1171-T-TBM, 2008 WL 11440528, at *1 (M.D. Fla. Mar. 25, 2008) (denying leave to file third-party complaint because, *inter alia*, "doing so would unduly delay or complicate the trial and prejudice [plaintiff]").

The pertinent factors all favor striking or severing the Pharmacies' third-party complaint. Injecting third-party claims against up to 500 as-yet-unidentified prescribers into this case would unduly complicate and delay the litigation. *See Stuart v. Hertz Corp.*, 351 So. 2d 703, 706 (Fla. 1977) (discussing courts' power to strike or sever third-party claims under Rule 1.180 and rejecting an "expan[sion of] the applicability of the third-party rule [to] make it a tool whereby the tortfeasor is allowed to complicate the issues to be resolved . . . and prolong the litigation through the filing of a third-party" claim). The Pharmacies' third-party complaint purports to add hundreds of new defendants without identifying any of them. It introduces six new claims, including five new causes of action, to the State's existing seven claims. Attempting to litigate the Pharmacies' purported claims together with the State's claims would risk significant delay and unduly complicate the discovery schedule being contemplated by the State and in negotiation with defendants. Litigating the Pharmacies' asserted claims could entail significant

collateral discovery and accompanying delay, including depositions of up to 500 currently unidentified prescribers, along with additional expert reports and other evidence unrelated to the State's claims against the existing defendants.

The third-party complaint, if permitted to proceed as part of this case, would also substantially interfere with the State's orderly presentation of its claims at trial against the existing defendants. If the Pharmacies were eventually to succeed in adding to the case third-party claims against hundreds of actual prescribers, they would undoubtedly demand trial time to present those claims. Attempting to try the State's case together with the Pharmacies' purported claims against prescribers would significantly extend the length of the trial and risk confusing jurors about the relationship between the asserted third-party liability of prescribers to the Pharmacies and the State's claims against the existing defendants.

The unjustified complications and resulting delay and prejudice to the State that would result from litigating the Pharmacies' purported third-party claims as part of this case independently warrant striking or severing the Pharmacies' John Doe complaint. *See Merchs. & Businessmen's Mut. Ins. Co. v. Bennis*, 636 So. 2d 593, 595 (Fla. 4th DCA 1994) (per curiam) (reversing trial court's denial of severance where third-party claims "are essentially unrelated and constitute separate and distinct legal actions"); *Estate of Amergi ex rel. Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1367 (11th Cir. 2010) (affirming severance of third-party complaint because of "sound administrative reasons" to prevent the case from "becoming increasingly unmanageable")[*]; *Gwynn v. Rabco Leasing, Inc.*, No. 8:09-cv-2093-T-23TGW, 2010 WL

[*] Florida courts have recognized that Rule 1.180 "was adopted verbatim" from Federal Rule of Civil Procedure 14, and that "[f]ederal case law which construes a federal rule after which a Florida rule is patterned may be considered in interpreting the Florida rule." *Sheradsky v. Basadre*, 452 So. 2d 599, 602-03 (Fla. 3d DCA 1984); *see Attorneys' Title Ins. Fund*, 547 So. 2d at 1252 (similar).

11507685, at *2 (M.D. Fla. July 28, 2010) (denying leave to file third-party complaint where "the late addition of third-party defendants would likely require additional discovery and preclude the parties' compliance with the discovery and other deadlines established in the case management report"); *U.S. Distribs., Inc. v. Block*, No. 09-21635-CIV, 2010 WL 337669, at *2 (S.D. Fla. Jan. 22, 2010) (observing that a court may strike a third-party complaint where "the third-party complaint could result in, among other things, unnecessary confusion or delay in the proceedings"); *Medsker v. Feingold*, No. 04-81025-CIV-ZLOCH, 2007 WL 9751897, at *2 (S.D. Fla. Aug. 8, 2007) ("Sufficient prejudice to warrant denial of impleader may be present when bringing in a third party will introduce unrelated issues and unduly complicate the original suit."); *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 237 F.R.D. 679, 684 (N.D. Okla. 2006) (severing third-party claims where "[t]he addition of numerous Third-Party Defendants unduly complicates this action-transforming it from an action with sixteen parties to one with over one hundred and fifty parties, with additional claims and theories of relief").

CONCLUSION

For the foregoing reasons, the Court should strike or sever the third-party complaint.

Dated: February 5, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 5, 2020, a true and correct copy of the foregoing was filed with the Clerk of Court using the Florida Courts e-Filing Portal, which will send a notice of electronic filing to all registered to receive such notifications. Counsel not receiving service by Florida Courts e-Filing Portal are denoted on the attached service list with an asterisk and have been served via email.

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