

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION**

In re:

NEW ENGLAND COMPOUNDING
PHARMACY, INC.,

Debtor.

Chapter 11

Case No. 12-19882-HJB

**JOINT MOTION OF THE CHAPTER 11 TRUSTEE AND THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS FOR ORDER LIMITING SERVICE
AND LIMITING FORM AND MANNER OF SERVICE OF NOTICE OF THE
DISCLOSURE STATEMENT MOTION¹**

Paul D. Moore, the Chapter 11 Trustee (the “Trustee”) for the bankruptcy estate of New England Compounding Pharmacy, Inc. (“NECC” or the “Debtor”), and the Official Committee of Unsecured Creditors of NECC (the “Official Committee”, and together with the Trustee, the “Plan Proponents”), by and through their undersigned counsel, hereby jointly move (this “Motion”) this Court for entry of an order (i) designating the parties on whom the Plan Proponents must serve copies of the Disclosure Statement Motion, and (ii) designating the form, manner and scope of service of the notice of the hearing on the Disclosure Statement Motion in the above-captioned proceeding (the “Chapter 11 Case”).

In support of this Motion, the Plan Proponents respectfully state as follows:

¹ The “Disclosure Statement Motion” is the *Joint Motion of the Chapter 11 Trustee and the Official Committee of Unsecured Creditors for Order (I) Approving the Plan Proponents’ Disclosure Statement, (II) Approving Solicitation and Notice Procedures With Respect to Confirmation of The Plan Proponents’ Joint Plan of Reorganization, (III) Approving the Form of Various Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates With Respect Thereto, and (V) Granting Related Relief.*

PRELIMINARY STATEMENT

1. Contemporaneously with the filing of this Motion, the Plan Proponents have filed the Disclosure Statement Motion, seeking, among other things, approval of the *Disclosure Statement* (the “Disclosure Statement”) for the *Joint Chapter 11 Plan of New England Compounding Center, Inc.* (the “Plan”). The Plan seeks to provide meaningful compensation to personal injury claimants with allowed claims who have suffered death, grievous injuries and illnesses from the administration of allegedly contaminated medications compounded by NECC.

2. As this Court is aware, the deadline to file claims (the “Bar Date”), although extended in certain circumstances, passed on January 15, 2014. The Trustee provided direct mail notice of the Bar Date to over 20,000 persons and entities, and also published notice in over sixty publications. The Trustee estimates that the estate incurred costs and expenses of more than \$240,000 in connection with service and publication of notice of the Bar Date, \$127,028 of which was the cost of newspaper publication.

3. As of the filing of this Motion, the Plan Proponents have been informed that Donlin, Recano & Co. (“DRC”), the Trustee’s noticing agent, timely received approximately 3770 proofs of claim and accompanying PITWD Addenda from individuals alleging personal injury or death due to exposure to products compounded by NECC. Additionally, DRC received PITWD Addenda from approximately 320 additional individuals who did not file formal claims. Many, but not all, individuals filing proofs of claim also are parties in the multi-district litigation proceeding pending in the United States District Court for the District of Massachusetts (the “MDL Proceeding”), where to date, 555 cases have been consolidated.

4. As this Court is also aware, the NECC estate has limited cash; only approximately \$930,000 was available to the Chapter 11 Trustee as of November 12, 2014. To preserve the

cash on hand and to avoid further depleting the estate's limited funds, the Plan Proponents seek entry of an order, in the form attached hereto as Exhibit A, (i) limiting the persons upon whom the Plan Proponents must serve copies of the Disclosure Statement Motion, and (ii) approving the form and manner of notice of the hearing on the Disclosure Statement Motion attached hereto as Exhibit B (the "Hearing Notice").

JURISDICTION AND VENUE

5. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b). The statutory predicates for the relief requested herein are Bankruptcy Code Sections 105, Federal Rules of Bankruptcy Procedure 1001, 2002, 3017(a), and 900 and Massachusetts Local Bankruptcy Rules 1001-1, 9013-3(a) and (b) and 9029-1(a).

BACKGROUND

6. On December 21, 2012 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

7. On January 18, 2013, the Office of the United States Trustee (the "UST"), pursuant to Bankruptcy Code Section 1102(a)(1), appointed a nine (9) member Official Committee, eight (8) of whom are tort claimants of the Debtor holding personal injury tort and/or wrongful death cases against the Debtor and others [Dkt. No. 67].

8. On January 25, 2013, this Court granted the UST's *Certificate of Appointment* appointing Paul D. Moore as Chapter 11 trustee of the Debtor (the "Trustee").

9. On February 12, 2013, the Judicial Panel on Multidistrict Litigation entered an order transferring certain litigation actions against NECC and other third parties to the District

Court for the District of Massachusetts (the “MDL Court”), thereby establishing the “MDL Proceeding”.

RELIEF REQUESTED

A. Request to Approve Form of the Hearing Notice

10. The Plan Proponents request that this Court approve the form of the Hearing Notice.

11. MLBR 9013-3(b), entitled “Notice of Hearing”, provides in pertinent part as follows:

Upon receipt of a notice of hearing from the Court, counsel (or a pro se party) shall immediately serve the notice upon all interested parties and parties who have filed their appearances and requested service of all notices in the case.

12. The Hearing Notice closely tracks the customary form of notice issued by this Court in recognition of the command in MLBR 9013-3(b) that movants use and serve the form of the notice of hearing provided by the Court. The Hearing Notice is customized with the following alterations from the standard form, but otherwise is identical to the standard form:

- a. The Hearing Notice provides the link on the DRC website where copies of the Disclosure Statement Motion can be downloaded; and
- b. The Hearing Notice provides contact information for requests to DRC or counsel for the Plan Proponents for paper copies of the Disclosure Statement Motion.

The Hearing Notice also instructs entities to consult their own counsel with questions and not to call the Court or the Plan Proponents for legal advice.

B. Request to Limit Service of the Disclosure Statement Motion and the Hearing Notice

13. For notice and service purposes, the Plan Proponents submit there are two different categories of parties in this case – those who receive notice and service electronically, through this Court’s Electronic Case Filing (“ECF”) system, and those who do not receive notice electronically. The Plan Proponents estimate that approximately 75 attorneys, representing approximately 165 parties, receive ECF notice electronically (“ECF Parties”).² The ECF Parties include those most active in this case and the parties the Plan Proponents expect will be interested in reviewing and potentially being heard with respect to the adequacy of the Disclosure Statement prior to its approval by this Court. The ECF Parties will be served with the Hearing Notice and the Disclosure Statement electronically. The Plan Proponents are not requesting that electronic notice through the ECF system be limited in any way. Indeed, in addition to electronic service, the Plan Proponents will file copies of the Disclosure Statement Motion and the Hearing Notice on the electronic docket maintained with respect to the MDL Proceeding, thereby affording notice to the numerous counsel for all plaintiffs and defendants currently involved in litigation against NECC and its various affiliates

14. With respect to service of the Hearing Notice, Disclosure Statement Motion and the Disclosure Statement to parties other than electronically to the ECF Parties, the Plan Proponents request that this Court enter an order (i) limiting their obligation to serve copies of the Disclosure Statement Motion and Disclosure Statement, by first class mail, postage prepaid, only on:

- a. the Securities and Exchange Commission

² See, e.g., *BNC Certificate of Mailing - Date 10/04/2014* [Docket No. 1042].

b. any party in interest who requests in writing a copy of the Disclosure Statement or Plan; and

c. Mr. Darrel Cummings,³

and (ii) limiting their obligation to serve copies by first class mail, postage prepaid, of the Hearing Notice only to these entities, and, in addition, to any other parties who have

a. filed their appearances and requested service of all pleadings filed in this Chapter 11 Case; and

b. who have filed a proof of claim in this Chapter 11 Case.

15. In addition, the Plan Proponents will make the Disclosure Statement Motion and the Hearing Notice available on the DRC website, as well as that maintained by the Official Committee.

16. The Plan Proponents respectfully submit that this Court has authority, pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”) and Massachusetts Local Bankruptcy Rules (“MLBR”) 1001-1 and 9013-3(a), to limit their obligation to serve the Disclosure Statement Motion as requested above.

17. Bankruptcy Rule 9013(b) provides that the Disclosure Statement Motion must be served on “the entities the court directs if [the Bankruptcy Rules] do not require service or specify the entities to be served.” None of the Bankruptcy Rules require service or specifies the entities to be served with the Disclosure Statement Motion. Thus, by the plain language of Rule 9013(b), this Court has the power to direct the entities to be served with the Disclosure Statement

³ Pursuant to paragraphs 2 c. and 7 of this Court’s June 2, 2014 “*Order Designating Manner Of Service Of 9019 Motions And Approving Form And Manner Of Service Of Notice Of Hearings On 9019 Motions*” [Docket No. 777], service upon Mr. Cummings is required to be made at an address specified in that order. On December 2, 2014, Mr. Cummings filed a Notice of Change of Address [Docket No. 1051]. The Plan Proponents will send all required service to Mr. Cummings henceforth at the address specified by Mr. Cummings in the Notice of Change of Address, or at such other address as Mr. Cummings may provide in any further written notice of change of address filed in this case.

Motion.

18. Although it does not address those parties to be served with the Disclosure Statement Motion itself, Bankruptcy Rule 3017(a) does identify the parties that shall be served by mail with copies of the plan and disclosure statement; in particular, “the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in writing a copy of the statement or plan.” Fed. R. Bankr. P. 3017(a). The Plan Proponents respectfully submit that only these parties (excepting the Plan Proponents) need be served by mail with the voluminous Disclosure Statement Motion.

19. MLBR 9013-3(a) requires that the Plan Proponents serve the Disclosure Statement Motion “upon all interested parties and upon all parties who have filed their appearances and requested service of all pleadings filed in the case.” However, this Rule cannot be applied to eliminate the power conferred on this Court pursuant to Rule 9013(b) to order to whom notice should be sent and the form, manner, and scope of service of that notice for at least two reasons: First, MLBR 9029-1(b) provides that the Bankruptcy Rules govern “[t]o the extent that a conflict appears or arises between” the Local Rules and the Bankruptcy Rules. Thus, MLBR 9013-3(a) should not operate to override the Court’s power to authorize non-standard notice and service. Second, MLBR 1001-1 provides that the Local Rules “govern all proceedings in bankruptcy cases insofar as is just and practicable.”

20. Requiring the Plan Proponents to serve the Disclosure Statement Motion by methods other than those requested in this Motion is inconsistent with Bankruptcy Rule 3017(a) and is neither just nor practicable. The Plan Proponents are cognizant that each dollar spent on mail service will reduce the recovery for NECC’s creditors (including personal injury claimants who suffered death or serious injuries on account of NECC products). Given the length of the

Disclosure Statement Motion (together with exhibits, some 120 pages), wider service than that requested in this Motion of the Disclosure Statement Motion would be prohibitively expensive; DRC estimates that mailing paper copies of the Disclosure Statement Motion even only to those persons or entities that filed a proof of claim would cost approximately \$67,000; that expense would be multiplied to serve, to the extent they can be deemed “interested parties”, each of the approximately 18,000 additional individuals who were served with notice of the Bar Date but did not file a proof of claim or otherwise appear (the “Other Parties”). The Plan Proponents respectfully submit, moreover, that such broad service would be of limited utility, given that the only parties who will not receive paper copies of the Disclosure Statement Motion are *pro se* creditors, who likely have little desire to read the lengthy Disclosure Statement Motion or to submit a response or objection to the proposed Disclosure Statement.

21. For similar reasons, the Plan Proponents respectfully request that the Court limit their obligation to serve the Hearing Notice as requested above. Bankruptcy Rules 3017(a) and 2002(b), in accordance with 3017-1(a) of the Local Rules, require that the Plan Proponents to provide not less than twenty-eight (28) days’ notice of the hearing to consider approval of the Disclosure Statement (*i.e.*, the Hearing Notice) to creditors and other parties in interest. Fed. R. Bankr. P. 3017(a), 2002(b); Local Rule 3017-1(a). In addition, Bankruptcy Rule 2002(b), in accordance with 3017-1(a) of the Local Rules, requires that creditors receive at least 28 days’ notice of the time fixed for filing objections to the adequacy of a disclosure statement.

22. The Plan Proponents respectfully submit, however, that if and to the extent the Other Parties can be deemed “parties in interest”, strict compliance with the Bankruptcy Rules and the Local Rules with respect to service of the Hearing Notice (*i.e.*, service on all Other Parties) would be unduly costly and in the best interest of neither the Debtor’s estate nor its

creditors. As indicated above, the Trustee estimates that the estate incurred costs of more than \$126,000 in connection with service of the initial Bar Date notice (exclusive of costs incurred in providing publication notice). Moreover, as described in the Disclosure Statement Motion, the Plan Proponents propose to serve all Other Parties, including each person who might have received an injection of tainted MPA and each NECC customer who received a shipment of the same, with notice of the hearing on and deadline to object to confirmation of the Plan, and links to the DRC website where copies of the Plan and Disclosure Statement can be obtained. See Disclosure Statement Motion ¶¶ 49, 52. The Plan Proponents respectfully submit that estate resources should be reserved, where possible, for that critical mailing.

23. The Plan Proponents intend to make the Disclosure Statement Motion and the Hearing Notice available through the DRC website, the website maintained by the Official Committee, or upon request to DRC or the Plan Proponents' counsel. Accordingly, any parties not receiving copies directly will be able to receive copies promptly upon request. The limited service of the Disclosure Statement Motion and the Hearing Notice requested above ensures that those parties who are most active in this case or in the MDL Proceeding will receive either paper copies or cost-effective electronic service of the Disclosure Statement Motion. In addition, every person or entity with a potentially allowable claim against NECC (as established by their proof of claim) will receive direct mail or electronic service of the Hearing Notice. Finally, as described above, all parties in interest will be afforded the opportunity to object to confirmation of the Plan and/or to appear at the hearing on confirmation. The Plan Proponents respectfully submit, therefore, that the requested limitations will not result in any prejudice.

WHEREFORE, the Plan Proponents respectfully request that this Court approve this Motion by entering an order substantially in the form attached hereto as Exhibit A, and grant the Plan Proponents such other and further relief as this Court deems just and proper.

Dated: December 3, 2014
Boston, Massachusetts

Respectfully submitted,

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-and-

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EXHIBIT A

PROPOSED ORDER

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION**

)	
In re:)	
)	Chapter 11
NEW ENGLAND COMPOUNDING)	
PHARMACY, INC.,)	Case No. 12-19882-HJB
)	
Debtor.)	
)	

**ORDER LIMITING SERVICE AND LIMITING FORM
AND DESIGNATING MANNER OF SERVICE OF NOTICE OF THE
DISCLOSURE STATEMENT MOTION¹**

Upon the joint motion (the “Motion”) of Paul D. Moore, the Chapter 11 Trustee (the “Trustee”) for the bankruptcy estate of New England Compounding Pharmacy, Inc. d/b/a New England Compounding Center (“NECC” or the “Debtor”), and the Official Committee of Unsecured Creditors of NECC (the “Official Committee”, and together with the Trustee, the “Plan Proponents”), for entry of an order (i) designating the parties on whom the Plan Proponents must serve copies of the Disclosure Statement Motion, and (ii) designating the form, manner and scope of service of the notice of the hearing on the Disclosure Statement Motion in the above-captioned proceeding (the “Chapter 11 Case”); it is hereby ORDERED as follows:

1. The Motion is GRANTED.
2. The form of the Hearing Notice, attached as Exhibit B to the Motion, is approved.
3. In addition to those parties who will receive service electronically through this

Court’s Case Management/Electronic Case Filing System, the Plan Proponents shall serve the

¹ The “Disclosure Statement Motion” is the *Joint Motion of the Chapter 11 Plan Proponents and the Official Committee of Unsecured Creditors for Order (I) Approving the Plan Proponents’ Disclosure Statement, (II) Approving Solicitation and Notice Procedures With Respect to Confirmation of the Plan Proponents’ Joint Plan of Reorganization, (III) Approving the Form of Various Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates With Respect Thereto, and (V) Granting Related Relief*. Capitalized terms used but not defined herein have the meaning ascribed to them in the Disclosure Statement Motion.

following entities with the items and in the manner specified, which service shall constitute due, sufficient and proper notice, and no further notice of such items to such entities shall be required:

- a. full copies of the Disclosure Statement Motion, served by first class mail, postage prepaid, upon:
 - i. the Securities and Exchange Commission
 - ii. any party in interest who requests in writing a copy of the Disclosure Statement or Plan; and
 - iii. Mr. Darrel Cummings.
- b. the Hearing Notice, served by first class mail, postage prepaid, on the parties identified in paragraph 3 a. above, and, in addition, upon:
 - a. those parties who have filed their appearances and requested service of all pleadings filed in this Chapter 11 Case; and
 - b. those parties who have filed a proof of claim in this Chapter 11 Case.

4. In addition, the Plan Proponents shall file the Disclosure Statement Motion and Hearing Notice on the electronic docket maintained with respect to the MDL Proceeding, thereby affording notice to the numerous counsel for all plaintiffs and defendants currently involved in litigation against NECC and its various affiliates.

5. In addition, the Plan Proponents shall make the Disclosure Statement Motion and the Hearing Notice available on the website maintained by Donlin, Recano & Company, Inc. (“DRC”), as well as that maintained by the Official Committee.

6. Service of the Disclosure Statement Motion and the Hearing Notice in accordance with this Order constitutes due and proper service and notice, and satisfies any and all applicable service and notice requirements, including, but not limited to, those prescribed in Rules 1001, 2002 and 3017(a) of the Federal Rules of Bankruptcy Procedure and Massachusetts Local Bankruptcy Rules 1001-1, 9013-3(a) and (b) and 9029-1(a). No further or other service of the

Disclosure Statement Motion or notice of any hearing to consider the Disclosure Statement Motion is necessary or required.

7. Paragraph 7 of this Court's June 2, 2014 "*Order Designating Manner Of Service Of 9019 Motions And Approving Form And Manner Of Service Of Notice Of Hearings On 9019 Motions*" [Docket No. 777] shall be and hereby is stricken. Service upon Mr. Darrel Cummings in this case pursuant to this Order and hereafter may be made upon Mr. Cummings by depositing the item(s) to be served with the United States Postal Service as first class mail, postage prepaid, for delivery to the address contained in the Notice of Change of Address [Docket No. 1051] filed by Mr. Cummings on December 2, 2014, or at such other address as Mr. Cummings specifies in any other Notice of Change of Address he files hereafter in this case.

Dated: _____, 2014

BY THE COURT,

Hon. Henry J. Boroff
United States Bankruptcy Judge

EXHIBIT B

PROPOSED NOTICE OF NONEVIDENTIARY HEARING

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION**

)	
In re:)	
)	Chapter 11
NEW ENGLAND COMPOUNDING)	
PHARMACY, INC.,)	Case No. 12-19882-HJB
)	
Debtor.)	
)	

**NOTICE OF NONEVIDENTIARY HEARING
ON MOTION TO APPROVE DISCLOSURE STATEMENT**

PLEASE TAKE NOTICE that a **HEARING** will be held on _____, 2014 at _____ before the Honorable Judge Henry J. Boroff United States Courthouse, 300 State Street, Berkshire Courtroom, Third Floor, Springfield, MA 01105-2924 to consider the following:

Joint Motion of the Chapter 11 Plan Proponents and the Official Committee of Unsecured Creditors for Order (I) Approving the Plan Proponents' Disclosure Statement, (II) Approving Solicitation and Notice Procedures With Respect to Confirmation of the Plan Proponents' Joint Plan of Reorganization, (III) Approving the Form of Various Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates With Respect Thereto, and (V) Granting Related Relief.

OBJECTION/RESPONSE DEADLINE:

[Any and all objections/responses must be filed by _____, 2014.]

[If no deadline is set, the objection/response deadline shall be governed by the Federal Rules of Bankruptcy Procedure (FRBP) and the Massachusetts Local Bankruptcy Rules (MLBR).] If no objection/response is timely filed, the Court, in its discretion, may cancel the hearing and rule on the motion without a hearing or further notice. See MLBR 9013-l(f).

THE MOVING PARTY IS RESPONSIBLE FOR:

1. Serving a copy of this notice upon all parties entitled to notice forthwith; and
2. Filing a certificate of service with respect to this notice seven (7) days after the date of issuance set forth below. If the hearing date is less than seven (7) days from the date of issuance, the certificate of service must be filed no later than the time of the hearing. **If the movant fails to timely file a certificate of service, the court may deny the motion without a hearing.**

NOTICE TO ALL PARTIES SERVED:

1. **Your rights may be affected.** You should read this notice, the above referenced pleadings and any related documents carefully and discuss them with your attorney, if you have one. If you do not have an attorney, you may wish to consult with one. **COPIES OF THE ABOVE-REFERENCED MOTION ARE AVAILABLE WITHOUT CHARGE FOR DOWNLOAD AT <http://www.donrecano.com/necp> OR UPON WRITTEN REQUEST TO THE FOLLOWING:**

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Donlin, Recano & Company, Inc.
Re: New England Compounding Pharmacy, Inc.
Attn: Rommel Mapa
P.O. Box 2034
Murray Hill Station
New York, NY 10156
Phone: 212-771-1128
Fax: 212-481-1416
Email: rmapa@donlinrecano.com

PLEASE DO NOT CALL THE COURT OR THE TRUSTEE WITH QUESTIONS ABOUT THIS NOTICE OR FOR LEGAL ADVICE.

2. Any request for a continuance **MUST** be made by **WRITTEN MOTION** filed and served at least one (1) business day prior to the hearing date. See MLBR 5071 -1.

3. The above hearing shall be **nonevidentiary**. If, in the course of the nonevidentiary hearing, the court determines the existence of a disputed and material issue of fact, the court will schedule an evidentiary hearing

DATE: _____, 2014