

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

<i>In re</i> MELINTA THERAPEUTICS, INC., et al., Debtors. ¹	Chapter 11 Case No. 19-12748 (LSS) BAP No. 20-09
LIN LUO, Appellant, v. MELINTA THERAPEUTICS, INC. Appellee.	C.A. No. 20-600 (MN) Related Docket No. 13

**APPELLEE’S OBJECTION TO APPELLANT’S MOTION
FOR AN ORDER PURSUANT TO BANKRUPTCY RULE
2004**

Appellee Melinta Therapeutics, Inc. (“**Melinta**” and, together with certain of its affiliates, the reorganized debtors in the above-captioned chapter 11 cases, the “**Reorganized Debtors**”) hereby objects (this “**Objection**”) to the *Motion for an Order Pursuant to Bankruptcy Rule 2004 Authorizing Discovery and Production of Documents Requests of Vatera, Medco, Melinta, Deerfield, Peter Milligan, Thomas Koestler, and David Zaccardelli, and Granting the Shareholder/s’ Authority to Issue Subpoenas for the Production of Documents* [Docket No. 13]²

¹ The Reorganized Debtors and the last four digits of their respective taxpayer identification numbers are: Melinta Therapeutics, Inc. (0364); Cempra Pharmaceuticals, Inc. (5814); CEM-102 Pharmaceuticals, Inc. (4262); Melinta Subsidiary Corp. (9437); Rempex Pharmaceuticals, Inc. (6000); and Targanta Therapeutics Corporation (1077). The address of the Reorganized Debtors’ corporate headquarters is 44 Whippany Road, Suite 280, Morristown, New Jersey 07960.

² Documents filed in this appeal are cited as “Docket No.”; documents filed in the bankruptcy court are cited as “Bankr. Docket No.”.



(the “**Motion**”) filed by Appellant Lin Luo. In support of its Objection, Melinta respectfully states as follows:³

PRELIMINARY STATEMENT

1. The Court should deny the Motion for two reasons. First, the Court should not expand the factual record while sitting as an appellate court under 28 U.S.C. § 158(a). Instead, Rule 8009 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) establishes the record for this appeal, which cannot be supplemented by discovery conducted pursuant to Bankruptcy Rule 2004. Second, even if discovery under Bankruptcy Rule 2004 were available during an appeal, the Motion lacks good cause because (a) it requests far-reaching and burdensome discovery with no meaningful connection to the issues in this appeal and (b) Ms. Luo never requested discovery in the bankruptcy court when she had an opportunity to do so.

OBJECTION

I. The Court, as an Appellate Tribunal, Should Not Expand the Factual Record.

2. The evidentiary record is closed, and Appellant’s request to expand it on appeal is improper. This Court presides over this case as an appellate court pursuant to 28 U.S.C. § 158(a), and, as such, should not admit new evidence or adjudicate new factual disputes. *See In re Salas*, 18-CV-2318 (KBJ), 2020 WL 32567, at *3 (D.D.C. Jan. 2, 2020). The Third Circuit has held that “the taking of evidence, including testimony and fact-finding by the court, is inappropriate for an appellate tribunal.” *Shareholders v. Sound Radio, Inc.*, 109 F.3d 873, 882 (3d Cir. 1997) (discussing role of district court presiding over bankruptcy appeal); *see also In re Cohn*, 54 F.3d 1108, 1118 (3d Cir. 1995) (holding that a district court reviewing a bankruptcy court decision

³ As discussed in greater detail in paragraph 8 below, Melinta objects to the Motion in its entirety, irrespective of the specific party to whom any particular discovery request is directed. Without limiting the generality of the foregoing, Melinta objects to the Motion as it relates to its current and former directors and officers.

“act[s] beyond its authority in making its own factual findings”); *accord In re Foust*, 52 F.3d 766, 768 (8th Cir. 1995) (“Because the district court was sitting as an appellate court reviewing the bankruptcy court’s decision to deny discharge, the district court should not have taken additional testimony.”).

3. Indeed, under Bankruptcy Rule 8009—which establishes the evidentiary record in a bankruptcy appeal—the appellate court “cannot consider material on appeal that is outside of the [trial] court record.” *In re Capital Cities/ABC, Inc.’s Application for Access to Sealed Transcripts*, 913 F.2d 89, 96 (3d Cir. 1990) (interpreting Federal Rule of Appellate Procedure 10); *see Salas*, 2020 WL 32567 at *3 (noting that Bankruptcy Rule 8009 mirrors Federal Rule of Appellate Procedure 10). Instead, a party in a bankruptcy appeal may only supplement the record to the extent necessary to consider items that were “omitted from or misstated in the record by error or accident.” Fed. R. Bankr. Pro. 8009(e); *see also* Committee Notes on Rules—2014 Amendments (“[Rule 8009(e)], modeled on F. R. App. P. 10(e), provides a procedure for correcting the record on appeal if an item is improperly designated, omitted, or misstated.”). The Motion does not describe any material that was inadvertently omitted from the record, and thus does not request supplementation permissible under Bankruptcy Rule 8009(e).⁴ *See* Motion, Ex. B. Rather, the Motion apparently seeks to adduce entirely new evidence, which is wholly improper on appeal.⁵

⁴ Should Ms. Luo later seek the information at issue under Bankruptcy Rule 8009(e), the Court should consider that Ms. Luo was a prolific litigant in the bankruptcy court, where she filed dozens of duplicative filings requesting relief the bankruptcy court had previously denied. *See* Sept. 17, 2020 Hr’g Tr. [Bankr. Docket No. 839] at 19:2–11.

⁵ Moreover, Ms. Luo has already filed her opening brief, and cannot raise any new issues in her reply. *See* 10 COLLIER ON BANKRUPTCY ¶ 8014.04 (Richard Levin & Henry J. Sommer eds., 16th ed.) (citing 20A MOORE’S FEDERAL PRACTICE § 328.22 (Matthew Bender 3d ed.)). Thus, while discovery in connection with an appeal is procedurally improper generally, it is especially improper here.

II. Even if Bankruptcy Rule 2004 Were Available on Appeal, the Motion Should be Denied for Lack of Good Cause.

4. Even if considered on the merits under Bankruptcy Rule 2004, the Motion should be denied. A party seeking discovery under Bankruptcy Rule 2004 must establish good cause, which “is shown if the Rule 2004 examination is necessary to establish the claim of the party seeking the examination, or if denial of such request would cause the examiner undue hardship or injustice.” *In re Millennium Lab Holdings II, LLC*, 562 B.R. 614, 627 (Bankr. D. Del. 2016) (citations omitted). Such an inquiry “requires a balancing of ‘the competing interests of the parties, weighing the relevance of and necessity of the information sought by examination.’” *Id.* at 626 (quoting *In re Drexel Burnham Lambert Grp., Inc.*, 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991)). Requests that “seek far-reaching information . . . are inherently more intrusive and present a greater potential for abuse.” *In re Countrywide Home Loans, Inc.*, 384 B.R. 373, 393 (Bankr. W.D. Pa. 2008).

5. The Motion lacks good cause because the information sought bears no relevance to this appeal and because denial of the Motion would result in no undue hardship or injustice. Ms. Luo does not explain how the requested discovery is relevant to her assertions that the confirmation order was procured by fraud and that votes on the plan were tabulated incorrectly. *See* Motion; *see also* Notice of Appeal [Docket No. 1]. Instead, Ms. Luo’s Motion principally discusses alleged disclosure deficiencies, Motion at ¶¶ 1–3, 14, 15, 17, 21, and unrelated transactions. *Id.* at ¶¶ 11–13, 16, 18. But the propriety of Melinta’s disclosures⁶ or the conduct of third parties in unrelated transactions is of no relevance to the questions raised by Ms. Luo’s

⁶ Importantly, Ms. Luo did not object to Melinta’s Disclosure Statement and did not appeal the order approving the Disclosure Statement and has therefore waived any arguments concerning the proper disclosure and solicitation of Melinta’s plan of reorganization.

appeal, namely whether the confirmation order was procured by fraud and whether it was approved by a class entitled to vote, as required by the Bankruptcy Code for confirmation.⁷

6. Ms. Luo's request for document production is similarly untethered from the issues of this appeal. By way of example, the proposed requests seek:

- (a) a January 14, 2019 amendment to Melinta's secured prepetition credit facility, Motion, Ex. B ¶ 1, which was publicly filed with the Securities and Exchange Commission on Melinta's 2019 Form 10-K filing;
- (b) information concerning Melinta's prepetition debt, *id.* ¶ 18, which was amply described in the Disclosure Statement (to which, again, Ms. Luo did not object);
- (c) Melinta's prepetition employee retention and incentive plans, *id.* ¶¶ 7–8, 19–20, in respect of which Melinta sought no relief from the bankruptcy court, whether as part of its plan of reorganization or otherwise;⁸ and
- (d) information and responses to questions concerning the terms and legal effect of Melinta's plan, *id.* ¶¶ 9–17, which are unnecessary because the plan speaks for itself.

Moreover, even if Ms. Luo's discovery requests were somehow relevant to her legal objections to Melinta's plan, she inexcusably failed to propound such discovery in the bankruptcy court when such requests would have been timely (albeit still substantively objectionable).

Memorandum on Relief Sought by Shareholders Seeking to "Cancel Sale" [Bankr. Docket No. 744] at 16 ("I also note that Shareholders did not propound discovery prior to confirmation.").

⁷ Under the Bankruptcy Code, a plan must be accepted by at least one impaired class of claims (determined without regard to the vote of any insider). *See* 11 U.S.C. § 1129(a)(10). Among Ms. Luo's principal objections to the plan is the claim that the plan was not, in fact, properly accepted by an impaired class of creditors. But the bankruptcy court's approved procedures for soliciting and tabulating votes, and Melinta's tabulation of votes in accordance with such procedures, is already part of the record in this appeal.

⁸ *See Declaration of Peter Milligan in Support of Chapter 11 Petitions and First-Day Papers* [Bankr. Docket No. 17] ¶ 101. Moreover, information concerning Melinta's prepetition equity incentive plan is especially irrelevant because the equity interests granted to employees pursuant to that program were cancelled pursuant to the chapter 11 plan. *See Modified Amended Joint Chapter 11 Plan of Reorganization of Melinta Therapeutics, Inc. and its Debtor Affiliates* [Bankr. Docket No. 481] § 3.02(h). Indeed, all of Melinta's prepetition equity interests were cancelled pursuant to the chapter 11 plan, because (as Melinta will explain in greater detail in its responsive brief in this appeal, its restructuring efforts (including its robust, court-approved marketing process) unfortunately failed to realize sufficient value to provide a recovery for equity interest holders).

As such, any “hardship” Ms. Luo may suffer as a result of her inability to obtain discovery at this late stage is entirely of her making.

7. Additionally, the requested discovery would be unduly burdensome on Melinta and the third parties named in the Motion. The Motion is a far-reaching request for documents in 20 different categories to be produced by seven different parties within 14 days. *See* Motion, Ex. B. Ms. Luo also requests that all third-party witnesses submit to oral examination and such further depositions as Ms. Luo deems necessary. *Id.*, Ex. A. This expansive discovery is especially intrusive as Melinta emerged from bankruptcy six months ago. *See Notice of (I) Entry of Findings of Fact, Conclusions of Law and Order Confirming Modified Amended Joint Plan of Reorganization of Melinta Therapeutics, Inc. and Its Debtor Affiliates and (II) Occurrence of Effective Date* [Bankr. Docket No. 542]. Melinta has already litigated Ms. Luo’s theories thoroughly in the bankruptcy court, and further extending Ms. Luo’s proceedings will be wasteful, as Judge Silverstein explained: “There have probably been close to 50 filings with respect to various issues, and that just simply has to stop.” Sept. 17, 2020 Hr’g Tr. [Bankr. Docket No. 839] at 19:9–11. Because the discovery sought is of little relevance to Ms. Luo’s appeal and would unduly burden Melinta and third parties, the Motion lacks good cause and should be denied.

III. The Motion Should be Denied as to all Parties from Whom Discovery is Sought.

8. Melinta files this Objection on behalf of itself and its current and former directors and officers named in the Motion. *See In re Transmar Commodity Grp. Ltd.*, 16-13625-JLG, 2018 WL 4006324 (Bankr. S.D.N.Y. Aug. 17, 2018) (limiting Bankruptcy Rule 2004 examination of debtors’ managing director upon debtors’ objection); *see also In re AOG Ent., Inc.*, 558 B.R. 98, 111 (Bankr. S.D.N.Y. 2016) (denying Bankruptcy Rule 2004 request as to non-debtor corporate affiliates upon debtors’ objection). Melinta requests that this Court deny the

Motion in its entirety, as to the Reorganized Debtors themselves as well as the other persons and entities from whom discovery is sought. Even discovery requests directed to third parties would likely impede the efficient and timely resolution of this appeal, imposing on Melinta and such third parties substantial and unwarranted costs. Melinta expects that certain of the third parties identified in the Motion will separately oppose the Motion (or affirmatively join in this Objection), but, for the avoidance of doubt, Melinta has an independent interest in the denial of Ms. Luo's improper, burdensome, and dilatory discovery requests and therefore submits that that the Motion should be denied in its entirety and as to all parties, irrespective of whether a particular third party does or does not independently object to the motion.

[Remainder of Page Intentionally Left Blank]

WHEREFORE, Melinta respectfully requests that the Court deny the Motion, and grant such other and further relief as is just and proper.

Dated: Wilmington, Delaware
October 30, 2020

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

/s/ Jason M. Liberi

Joseph O. Larkin (I.D. No. 4883)

Jason M. Liberi (I.D. No. 4425)

920 North King Street

Wilmington, Delaware 19801

Telephone: (302) 651-3000

Fax: (302) 651-3001

– and –

Ron E. Meisler

Christopher M. Dressel

155 North Wacker Drive

Chicago, Illinois 60606-1720

Telephone: (312) 407-0700

Fax: (312) 407-0411

Counsel for the Appellee

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

In re: MELINTA THERAPEUTICS, INC., et al., Debtors. ¹	Chapter 11 Case No. 19-12748 (LSS) BAP No. 20-09
LIN LUO, Appellant, v. MELINTA THERAPEUTICS, INC., Appellee.	C.A. No. 20-600 (MN)

CERTIFICATE OF SERVICE

I, Jason M. Liberi, an attorney, do hereby certify as follows:

On October 30, 2020, I caused a copy of the following document to be filed and served electronically using the CM/ECF System on all counsel of record in the above referenced case:

- Appellee's Objection to Appellant's Motion for an Order Pursuant to Bankruptcy Rule 2004

¹ The Reorganized Debtors and the last four digits of their respective taxpayer identification numbers are: Melinta Therapeutics, Inc. (0364); Cempra Pharmaceuticals, Inc. (5814); CEM-102 Pharmaceuticals, Inc. (4262); Melinta Subsidiary Corp. (9437); Rempex Pharmaceuticals, Inc. (6000); and Targanta Therapeutics Corporation (1077). The address of the Reorganized Debtors' corporate headquarters is 44 Whippany Road, Suite 280, Morristown, New Jersey 07960.

In addition, on October 30, 2020, I also caused a copy of this document to be served on those listed below in the manner indicated:

Lin Luo
11510 Bucknell Drive
Apt. 204
Silver Spring, MD 20902
(By First-class mail and Electronic Mail)

Dated: Wilmington, Delaware
October 30, 2020

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

/s/ Jason M. Liberi

Joseph O. Larkin (I.D. No. 4883)
Jason M. Liberi (I.D. No. 4425)
920 North King Street
Wilmington, Delaware 19801
Telephone: (302) 651-3000
Fax: (302) 651-3001

– and –

Ron E. Meisler
Albert L. Hogan III
Christopher M. Dressel
155 North Wacker Drive
Chicago, Illinois 60606-1720
Telephone: (312) 407-0700
Fax: (312) 407-0411

Counsel for Appellee