No. 19-1010

In The Supreme Court of the United States

ACTAVIS HOLDCO US, INC., et al.,

Petitioners,

v.

STATE OF CONNECTICUT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PLAINTIFFS-RESPONDENTS

State Respondents

State of Connecticut
State of Alabama
State of Alaska
Territory of American Samoa
State of Arizona
State of Arkansas
State of California
State of Colorado
State of Delaware
District of Columbia
State of Florida
State of Georgia
Territory of Guam
State of Hawaii
State of Idaho
State of Illinois
State of Indiana
State of Iowa
State of Kansas
Commonwealth of Kentucky
State of Louisiana
State of Maine
State of Maryland
Commonwealth of Massachusetts
State of Michigan
State of Minnesota
State of Mississippi
State of Missouri
State of Montana
State of Nebraska
State of Nevada
State of New Hampshire

State of New Jersey
State of New Mexico
State of New York
State of North Carolina
State of North Dakota
Commonwealth of the Northern Mariana Islands
State of Ohio
State of Oklahoma
State of Oregon
Commonwealth of Pennsylvania
Commonwealth of Puerto Rico
State of Rhode Island
State of South Carolina
State of South Dakota
State of Tennessee
State of Utah
State of Vermont
Commonwealth of Virginia
State of Washington
State of West Virginia
State of Wisconsin
State of Wyoming

Direct Purchaser Respondents (Named Plaintiffs)

KPH Healthcare Services, Inc., a/k/a Kinney Drugs, Inc.
FWK Holdings, LLC
Rochester Drug Co-Operative, Inc.
César Castillo, Inc.
Ahold USA, Inc.

End-Payor Respondents (Named Plaintiffs):

1199SEIU Greater New York Benefit Fund

1199SEIU Licensed Practical Nurses Welfare Fund
1199SEIU National Benefit Fund
1199SEIU National Benefit Fund for Home Care Workers
American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan
American Federation of State, County and Municipal Employees District Council 47 Health & Welfare Fund
City of Providence, Rhode Island
Detectives Endowment Association of the City of New York
Nina Diamond
Hennepin County International Union of Operating Engineers Local 30 Benefits Fund
Robby Johnson
Louisiana Health Service & Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana
Ottis McCrary
Philadelphia Federation of Teachers Health and Welfare Fund
Self-Insured Schools of California
Sergeants Benevolent Association of the Police Department of the City of New York Health and Welfare Fund
David Sherman
UFCW Local 1500 Welfare Fund
Uniformed Fire Officers Association Family Production Plan Local 854
Unite Here Health
United Food & Commercial Workers and Employers Arizona Health & Welfare Trust
Valerie Velardi

Indirect-Reseller Respondents (Named Plaintiffs):

Mr. Russell's Discount Drugs, Inc.
Falconer Pharmacy, Inc.
Reliable Pharmacy, Inc.
Chet Johnson Drug, Inc.
Halliday's and Koivisto's Pharmacy

Direct Action Respondents:

The Kroger Co.
Albertsons Companies, LLC
H.E. Butt Grocery Company L.P.
Humana, Inc.
United Healthcare Services, Inc.

In re Generic Pharmaceuticals Pricing Antitrust Litigation
2:16-md-2724-CMR (MDL 2724)

List of Drugs at Issue

1. Acetazolamide
2. Acyclovir
3. Adapalene
4. Albuterol
5. Alclometasone Dipropionate
6. Allopurinol
7. Amantadine HCL
8. Amiloride HCL/HCTZ
9. Amitriptyline
10 Amoxicillin/Clavulanate
11. Amphetamine/Dextroamphetamine
12. Atenolol Chlorthalidone
13. Atropine Sulfate
14. Azithromycin
15. Baclofen
16. Balsalazide Disodium
17. Benazepril HCTZ
18. Betamethasone Dipropionate
19. Betamethasone Dipropionate Augmented
20. Betamethasone Dipropionate Clotrimazole
21. Betamethasone Valerate
22. Bethanechol Chloride
23. Bromocriptine Mesylate
24. Budesonide
25. Bumetanide
26. Buprenorphine
27. Buprenorphine Naloxone
28. Buspirone Hydrochloride
29. Butorphanol Tartrate
30. Cabergoline
31. Capecitabine
32. Captopril
33. Carbamazepine
34. Carisoprodol
35. Cefdinir
36. Cefprozil
37. Cefuroxime Axetil
38. Celecoxib
39. Cephalexin (Cefalexin)

40. Chlorpromazine HCL
41. Cholestyramine
42. Ciclopirox
43. Cimetidine
44. Ciprofloxacin HCL Tablet
45. Clarithromycin
46. Clemastine Fumarate
47. Clindamycin Phosphate
48. Clobetasol
49. Clomipramine HCL
50. Clonidine TTS
51. Clotrimazole
52. Cyproheptadine HCL
53. Desmopressin Acetate
54. Desonide
55. Desogestrel and Ethinyl Estradiol [Kariva]
56. Dexmethylphenidate HCL [Focalin]
57. Dextroamphetamine Sulfate ("Dex Sulfate")
58. Diclofenac Potassium
59. Dicloxacillin Sodium
60. Diflunisal
61. Digoxin
62. Diltiazem HCL
63. Diphenoxylate Atropine HCL
64. Disopyramide Phosphate
65. Disulfiram
66. Divalproex
67. Doxazosin Mesylate
68. Doxycycline
69. Doxycycline Hyclate
70. Doxycycline Monohydrate
71. Drospirenone and Ethinyl Estradiol
72. Econazole
73. Enalapril Maleate
74. Entecavir
75. Eplerenone
76. Epitol
77. Estazolam
78. Estradiol
79. Estradiol and Norethindrone Acetate [Mimvey]
80. Ethinyl Estradiol and Levonorgestrel [Portia and Jolessa]
81. Ethosuximide
82. Etodolac
83. Exemestane

84. Fenofibrate
85. Fluconazole
86. Fluocinonide
87. Fluocinolone Acetonide
88. Fluoxetine HCL
89. Flurbiprofen
90. Flutamide
91. Fluticasone Propionate
92. Fluvastatin Sodium
93. Fosinopril HCTZ
94. Gabapentin
95. Glimepiride
96. Glipizide-Metformin
97. Glyburide
98. Glyburide-Metformin
99. Griseofulvin
100. Halobetasol Propionate
101. Haloperidol
102. Hydralazine
103. Hydrocodone Acetaminophen
104. Hydrocortisone Valerate
105. Hydroxyurea
106. Hydroxyzine Pamoate
107. Imiquimod
108. Irbesartan
109. Isoniazid
110. Isosorbide Dinitrate
111. Isotretinoin
112. Ketoconazole
113. Ketoprofen
114. Ketorolac Tromethamine
115. Labetalol HCL
116. Lamivudine/Zidovudine
117. Lamotrigine
118. Latanoprost
119. Leflunomide
120. Levothyroxine
121. Lidocaine HCL
122. Lidocaine-Prilocaine
123. Loperamide HCL
124. Medroxyprogesterone
125. Meprobamate
126. Metformin (F) ER
127. Methadone HCL

128. Methimazole
129. Methotrexate Sodium
130. Methylphenidate
131. Methylprednisolone
132. Metoprolol Succinate
133. Metronidazole
134. Modafinil
135. Moexipril HCL
136. Moexipril HCL HCTZ
137. Montelukast
138. Nabumetone
139. Nadolol
140. Naproxen Sodium
141. Neomycin Polymyxin Hydrocortisone
142. Niacin
143. Nimodipine
144. Nitrofurantoin
145. Norethindrone Acetate
146. Norethindrone and Ethinyl Estradiol [Balziva]
147. Nortriptyline Hydrochloride
148. Nystatin
149. Nystatin/Triamcinolone
150. Omega-3-Acid Ethyl Esters
151. Omeprazole-Sodium bicarbonate
152. Ondansetron
153. Oxaprozin
154. Oxybutynin Chloride
155. Oxycodone Acetaminophen
156. Oxycodone HCL
157. Paricalcitol
158. Paromomycin
159. Penicillin VK
160. Pentoxifylline
161. Permethrin
162. Perphenazine
163. Phenytoin Sodium
164. Pilocarpine HCL
165. Pioglitazone-Metformin
166. Piroxicam
167. Potassium Chloride ER
168. Pravastatin
169. Prazosin HCL
170. Prednisolone Acetate
171. Prednisone

172. Prochlorperazine
173. Progesterone
174. Propranolol
175. Raloxifene HCL
176. Ranitidine HCL
177. Silver Sulfadiazine
178. Spironolactone HCTZ
179. Sumatriptan
180. Tamoxifen Citrate
181. Temozolomide
182. Timolol Maleate
183. Tizanidine HCL
184. Theophylline
185. Tobramycin
186. Tobramycin Dexamethasone
187. Tolmetin Sodium
188. Tolterodine Tartate
189. Topiramate
190. Trazodone
191. Triamcinolone Acetonide
192. Triamterene HCTZ
193. Trifluoperazine HCL
194. Ursodiol
195. Valganciclovir
196. Valsartan HCTZ
197. Vancomycin
198. Verapamil
199. Warfarin Sodium
200. Zoledronic Acid

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

THE STATE OF CONNECTICUT; THE STATE OF ALABAMA; THE STATE OF ALASKA; THE TERRITORY OF AMERICAN SAMOA; THE STATE OF ARIZONA; THE STATE OF ARKANSAS; THE STATE OF COLORADO; THE STATE OF DELAWARE; THE DISTRICT OF COLUMBIA; THE STATE OF FLORIDA; THE STATE OF GEORGIA; THE TERRITORY OF GUAM; THE STATE OF HAWAII; THE STATE OF IDAHO; THE STATE OF ILLINOIS; THE STATE OF INDIANA; THE STATE OF IOWA; THE STATE OF KANSAS; THE COMMONWEALTH OF KENTUCKY; THE STATE OF LOUISIANA; THE STATE OF MAINE; THE STATE OF MARYLAND; THE COMMONWEALTH OF MASSACHUSETTS; THE STATE OF MICHIGAN; THE STATE OF MINNESOTA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF NEVADA; THE STATE OF NEW HAMPSHIRE; THE STATE OF NEW JERSEY; THE STATE OF NEW MEXICO; THE STATE OF NEW YORK; THE STATE OF NORTH CAROLINA; THE STATE OF NORTH DAKOTA; THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS; THE STATE OF OHIO; THE STATE OF OKLAHOMA; THE STATE OF OREGON; THE COMMONWEALTH OF PENNSYLVANIA; THE COMMONWEALTH OF PUERTO RICO; THE STATE OF RHODE ISLAND; THE STATE OF SOUTH CAROLINA; THE STATE OF SOUTH DAKOTA;	**MDL 2724** **16-MD-2724** **HON. CYNTHIA M. RUFE** **Civil Action No. 19-CV-2407-CMR** **October 31, 2019** **AMENDED COMPLAINT**

THE STATE OF TENNESSEE;
THE STATE OF UTAH;
THE STATE OF VERMONT;
THE COMMONWEALTH OF VIRGINIA;
THE STATE OF WASHINGTON;
THE STATE OF WEST VIRGINIA;
THE STATE OF WISCONSIN;
THE STATE OF WYOMING;

v.

TEVA PHARMACEUTICALS USA, INC.;
ACTAVIS HOLDCO US, INC.;
ACTAVIS PHARMA, INC.;
AMNEAL PHARMACEUTICALS, INC.;
AMNEAL PHARMACEUTICALS LLC;
APOTEX CORP.;
ARA APRAHAMIAN;
AUROBINDO PHARMA U.S.A., INC.;
DAVID BERTHOLD;
BRECKENRIDGE PHARMACEUTICAL, INC.;
JAMES (JIM) BROWN;
MAUREEN CAVANAUGH;
TRACY SULLIVAN DIVALERIO;
DR. REDDY'S LABORATORIES, INC.;
MARC FALKIN;
GLENMARK PHARMACEUTICALS, INC., USA;
JAMES (JIM) GRAUSO;
KEVIN GREEN;
GREENSTONE LLC;
ROBIN HATOSY;
ARMANDO KELLUM;
LANNETT COMPANY, INC.;
LUPIN PHARMACEUTICALS, INC.;
MYLAN PHARMACEUTICALS INC.;
JILL NAILOR;
JAMES (JIM) NESTA;
PAR PHARMACEUTICAL COMPANIES, INC.;
NISHA PATEL;
PFIZER, INC.;
KONSTANTIN OSTAFICIUK;
DAVID REKENTHALER;
RICHARD (RICK) ROGERSON;
SANDOZ, INC.;
TARO PHARMACEUTICALS USA, INC.
UPSHER-SMITH LABORATORIES, LLC;
WOCKHARDT USA LLC;
ZYDUS PHARMACEUTICALS (USA), INC.

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People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.

- Adam Smith, *The Wealth of Nations*, 1776

Teva said in a statement it would continue to defend itself and that while it does "review prices in the context of market conditions, availability and cost of production," it does not "discuss individual pricing rationale/strategies." It denied that it engaged in anything that would lead to criminal or civil liability.

"Overall, we establish prices to enable patient access, maintain our commitment to innovative and generic medicines and fulfill obligations to our shareholders," Teva said. "Teva delivers high-quality medicines to patients around the world, and is committed to complying with all applicable competition laws and regulations in doing so. Teva fosters a culture of compliance with these laws and regulations, and is dedicated to conducting business with integrity and fairness. Litigation surrounding U.S. generic pricing of several companies, including Teva, continues to be the subject of innacurate media stories."

- *Statements by Teva reported in Law360, January 18, 2019*

AMENDED COMPLAINT[1]

The States of Connecticut, Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming, the Commonwealths of Kentucky, Massachusetts, the Northern Mariana Islands, Pennsylvania, Puerto Rico, and Virginia, the Territories of American Samoa and Guam, and the District of Columbia (the "Plaintiff States"), by and through their Attorneys General, bring this civil law enforcement action against Teva Pharmaceuticals USA, Inc. ("Teva"), Actavis Holdco US, Inc., Actavis Pharma, Inc., Amneal Pharmaceuticals, Inc., Amneal Pharmaceuticals LLC, Apotex Corp., Ara Aprahamian, Aurobindo Pharma U.S.A., Inc., David

[1] The Plaintiff States are filing this Amended Complaint as of right under Fed. R. Civ. P. 15(a)(1).

Berthold, Breckenridge Pharmaceutical, Inc., James (Jim) Brown, Maureen Cavanaugh, Tracy Sullivan DiValerio, Dr. Reddy's Laboratories, Inc., Marc Falkin, Glenmark Pharmaceuticals, Inc., USA, James (Jim) Grauso, Kevin Green, Greenstone LLC, Robin Hatosy, Armando Kellum, Lannett Company, Inc., Lupin Pharmaceuticals, Inc., Mylan Pharmaceuticals Inc., Jill Nailor, James (Jim) Nesta, Konstantin Ostaficiuk, Par Pharmaceutical Companies, Inc., Nisha Patel, Pfizer, Inc., David Rekenthaler, Richard (Rick) Rogerson, Sandoz, Inc., Taro Pharmaceuticals USA, Inc., Upsher-Smith Laboratories, LLC, Wockhardt USA LLC, and Zydus Pharmaceuticals (USA), Inc. (collectively, the "Defendants") and allege as follows:

I. SUMMARY OF THE CASE

1. For many years, the generic pharmaceutical industry has operated pursuant to an understanding among generic manufacturers not to compete with each other and to instead settle for what these competitors refer to as "fair share." This understanding has permeated every segment of the industry, and the purpose of the agreement was to avoid competition among generic manufacturers that would normally result in significant price erosion and great savings to the ultimate consumer. Rather than enter a particular generic drug market by competing on price in order to gain market share, competitors in the generic drug industry would systematically and routinely communicate with one another directly, divvy up customers to create an artificial equilibrium in the market, and then maintain anticompetitively high prices. This "fair share" understanding was not the result of independent decision making by individual companies to avoid competing with one another. Rather, it was a direct result of specific discussion, negotiation and collusion among industry participants over the course of many years.

2. By 2012, Teva and other co-conspirators decided to take this understanding to the next level. Apparently unsatisfied with the status quo of "fair share" and the mere avoidance of price erosion, Teva and its co-conspirators embarked on one of the most egregious and damaging

price-fixing conspiracies in the history of the United States. Teva and its competitors sought to leverage the collusive nature of the industry to not only maintain their "fair share" of each generic drug market, but also to significantly raise prices on as many drugs as possible. In order to accomplish that objective, Teva selected a core group of competitors with which it already had very profitable collusive relationships – Teva referred to them as "High Quality" competitors – and targeted drugs where they overlapped. Teva had understandings with its highest quality competitors to lead and follow each other's price increases, and did so with great frequency and success, resulting in many billions of dollars of harm to the national economy over a period of several years.

3. At the zenith of this collusive activity involving Teva, during a 19-month period beginning in July 2013 and continuing through January 2015, Teva significantly raised prices on approximately 112 different generic drugs. Of those 112 different drugs, Teva colluded with its "High Quality" competitors on at least 86 of them (the others were largely in markets where Teva was exclusive). The size of the price increases varied, but a number of them were well over 1,000%.

4. In July 2014, the State of Connecticut initiated a non-public investigation into suspicious price increases for certain generic pharmaceuticals. Over time, the investigation expanded and Connecticut was joined in its efforts by forty-eight (48) additional states and U.S. territories. The allegations in this Amended Complaint are based on, and supported by, information and evidence gleaned directly from the investigation, including: (1) the review of many thousands of documents produced by dozens of companies and individuals throughout the generic pharmaceutical industry, (2) an industry-wide phone call database consisting of more than 11 million phone call records from hundreds of individuals at various levels of the

Defendant companies and other generic manufacturers, and (3) information provided by several as-of-yet unidentified cooperating witnesses who were directly involved in the conduct alleged herein.

5. As a result of the information and evidence developed through that investigation, which is still ongoing, the Plaintiff States allege that Defendant Teva consistently and systematically, over a period of several years, along with the other Defendants named herein and other unnamed co-conspirators, engaged in contracts, combinations and conspiracies that had the effect of unreasonably restraining trade, artificially inflating and maintaining prices and reducing competition in the generic pharmaceutical industry throughout the United States, including but not limited to, the markets for well more than one-hundred (100) different generic drugs, many of which are identified herein. This conduct has resulted in many billions of dollars of overcharges to the Plaintiff States and others, and has had a significant negative impact on our national health and economy.

6. Plaintiff States also allege that Defendants participated in an overarching conspiracy, the effect of which was to minimize if not thwart competition across the generic drug industry. The overarching conspiracy was effectuated by a series of conspiracies that affected and continue to affect the market for a number of generic drugs identified in this Amended Complaint.

7. The Plaintiff States focus here on the role of these named Defendants and their participation in and agreement with this overarching conspiracy. The Amended Complaint describes conspiracies regarding the sale of specific drugs, and how these specific conspiracies are also part of the larger overarching conspiracy. The Plaintiff States continue to investigate additional conspiracies, involving these and other generic drug manufacturers, regarding the sale

of other drugs not identified in this Complaint, and will likely bring additional actions based on those conspiracies at the appropriate time in the future.

8. Defendants' illegal agreements have raised prices, maintained artificially inflated prices, thwarted Congress's goal to lower the prices of drugs, and thus frustrated the potential of the industry to deliver great value to Plaintiff States and those they represent. Generic drugs are pharmaceutically equivalent to the referenced brand name drug in dosage, form, route of administration, strength or concentration, and amount of active ingredient. Generic drugs can save (and have saved) consumers, other purchasers of drugs, and taxpayers tens of billions of dollars annually because generic drugs are a lower-priced alternative to brand name drugs. When the manufacturer of a branded drug loses the market exclusivity that comes with patent rights, generic drugs offer lower prices and greater access to healthcare for all consumers in the United States through genuine competition. A consumer with a prescription can fill that prescription not only with the brand name drug, but also with a generic version of that drug, if one is available. State laws often require pharmacists to fill prescriptions with generic versions of the drug.

9. Typically, when the first generic manufacturer enters a market for a given drug, the manufacturer prices its product slightly lower than the brand-name manufacturer. When a second generic manufacturer enters, that reduces the average generic price to nearly half the brand-name price. As additional generic manufacturers market the product, the prices continue to fall. For drugs that attract a large number of generic manufacturers, the average generic price falls to 20% or less of the price of the branded drug.

10. Generic drugs were one of the few "bargains" in the United States healthcare system. Health care experts believe cost savings from the growing number of generic drugs

helped keep the lid on increasing health care costs. With the Hatch-Waxman Act of 1984, Congress designed the generic drug market to keep costs low, and the market initially operated that way.

11. At some point, that price dynamic changed for many generic drugs. Prices for hundreds of generic drugs have risen – while some have skyrocketed, without explanation, sparking outrage from politicians, payers and consumers across the country whose costs have doubled, tripled, or even increased 1,000% or more. The growing outrage and public reports of unexplained and suspicious price increases caused the State of Connecticut to commence its investigation in July 2014. Shortly thereafter, Congress opened an inquiry and various companies acknowledged that a criminal grand jury investigation had been convened by the United States Department of Justice Antitrust Division.

12. Generic drug manufacturers argued publicly that the significant price increases were due to a myriad of benign factors, such as industry consolidation, FDA-mandated plant closures, or elimination of unprofitable generic drug product lines. What the Plaintiff States have found through their investigation, however, is that the reason underlying many of these price increases is much more straightforward – illegal collusion among generic drug manufacturers. Prices of many generic pharmaceuticals were and remain artificially inflated through collusive bid rigging and market allocation agreements designed to prevent price wars from occurring when key competitive opportunities arise in the marketplace.

13. Generic drug manufacturers, through their senior leadership and marketing, sales and pricing executives, have routine and direct interaction. The Defendants exploited their interactions at various and frequent industry trade shows, customer conferences and other similar events, to develop relationships and sow the seeds for their illegal agreements. These

anticompetitive agreements are further refined and coordinated at regular "industry dinners," "girls' nights out," lunches, parties, golf outings, frequent telephone calls, e-mails and text messages.

14. The anticompetitive conduct – schemes to fix and maintain prices, allocate markets and otherwise thwart competition – has caused, and continues to cause, significant harm to the United States healthcare system, which is ongoing. Moreover, executives and others at the highest levels in many of the Defendant companies, including but not limited to Defendants Ara Aprahamian, David Berthold, James (Jim) Brown, Maureen Cavanaugh, Tracy Sullivan DiValerio, Marc Falkin, James (Jim) Grauso, Kevin Green, Armando Kellum, Jill Nailor, James (Jim) Nesta, Konstantin (Kon) Ostaficiuk, Nisha Patel, David Rekenthaler, and Richard (Rick) Rogerson, among others, conceived, directed and ultimately benefited from these schemes.

15. Defendant Teva is a consistent participant in the conspiracies identified in this Amended Complaint, but the conduct is pervasive and industry-wide. The schemes identified herein are part of a larger, overarching understanding about how generic manufacturers fix prices and allocate markets to suppress competition. Through its senior-most executives and account managers, Teva participated in a wide-ranging series of restraints with more than a dozen generic drug manufacturers, all of whom knowingly and willingly participated. As a result of these conspiracies, Defendants reaped substantial monetary rewards.

16. Defendants' anticompetitive conduct falls principally into two categories, the overarching goal being to avoid price erosion and maintain inflated pricing within and across their respective broad product portfolios and, at times, increase pricing for targeted products without triggering a “fight to the bottom” among existing competitors. First, to avoid competing with one another and thus eroding the prices for a myriad of generic drugs, Defendants – either

upon their entry into a given generic market or upon the entry of a new competitor into that market – communicated with each other to determine and agree on how much market share and which customers each competitor was entitled to. They then implemented the agreement by either refusing to bid for particular customers or by providing a cover bid that they knew would not be successful.

17. Second, and often in conjunction with the market allocation schemes, competitors in a particular market communicated -- either in person, by telephone, or by text message – and agreed to collectively raise and/or maintain prices for a particular generic drug.

18. Defendants here understood and acted upon an underlying code of conduct that is widespread in the generics industry: an expectation that any time a competitor is entering a particular generic drug market, it can contact its competitors and allocate the market according to a generally agreed-upon standard of "fair share" in order to avoid competing and keep prices high. While different drugs may involve different sets of companies, this background understanding remains constant and is an important component of the Defendants' ability to reach agreements for specific drugs.

19. The Defendants knew their conduct was unlawful. The conspirators usually chose to communicate in person or by cell phone, in an attempt to avoid creating a written record of their illegal conduct. The structure of the generic drug industry provided numerous opportunities for collusive communications at trade shows, customer events and smaller more intimate dinners and meetings. When communications were reduced to writing or text message, Defendants often took overt and calculated steps to destroy evidence of those communications.

20. As a result of the conspiracies identified in this Amended Complaint, consumers and payors nationwide, including the Plaintiff States, paid substantially inflated and

anticompetitive prices for numerous generic pharmaceutical drugs, and the Defendants illegally profited as a result.

21. The Plaintiff States seek a finding that the Defendants' actions violated federal and state antitrust and consumer protection laws; a permanent injunction preventing the Defendants from continuing their illegal conduct and remedying the anticompetitive effects caused by their illegal conduct; disgorgement of the Defendants' ill-gotten gains; damages on behalf of various state and governmental entities and consumers in various Plaintiff States; and civil penalties and other relief as a result of Defendants' violations of law.

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5. The Overarching Conspiracy Between Generic Drug Manufacturers – *Playing Nice in the Sandbox*

115. As a result of these communications, sales and marketing executives in the generic pharmaceutical industry are well aware of their competitors' current and future business plans. This reciprocal sharing of inside information greatly facilitates agreements among competitors to allocate markets to avoid price competition.

116. The overarching conspiracy among generic manufacturers, however – which ties together all of the agreements on individual drugs identified in this Complaint – is an agreed-upon code that each competitor is entitled to its "fair share" of the market, whether that market is a particular generic drug, or a number of generic drugs. Coined "fair share," the term is generally understood as an approximation of how much market share each competitor is entitled to, based on the number of competitors in the market, with a potential adjustment based on the timing of entry. Once a manufacturer has achieved its "fair share," it is generally understood that the competitor will no longer compete for additional business. The common goal or purpose of

this overarching agreement is to keep prices high, avoid price erosion and serve as the basis for further supra-competitive price increases.

117. This overarching agreement is widespread across the generic drug industry and is broader than the Defendant manufacturers named in this Complaint. The Plaintiff States focus here on the role of these named Defendants and their participation in, and agreement with, this overarching conspiracy. This Complaint describes conspiracies regarding the sale of specific drugs, and how these specific conspiracies are also part of the larger overarching conspiracy.

118. The exact contours of this "fair share" understanding, which has been in place for many years (and pre-dates any of the specific conduct detailed herein), has evolved over time during the numerous in-person meetings, telephonic communications, and other interactions between generic manufacturers about specific drugs. These business and social events occur with such great frequency that there is an almost constant ability for Defendants to meet in person and discuss their business plans. For example, between February 20, 2013 and December 20, 2013 (a 41-week period), there were at least forty-four (44) different tradeshows or customer conferences where the Defendants had the opportunity to meet in person. These in-person meetings gave the Defendants the opportunity and cover to have these conversations, and reach these agreements, without fear of detection.

119. As described in more detail below, when necessary, this larger understanding was reinforced through phone calls and text messages between the Defendants to discuss "fair share" and the desire to maintain or raise prices with respect to specific drugs. These types of communications occur with great frequency across the industry, including among Defendants.

120. For example, from the period of January 1, 2013 through December 31, 2013, senior sales executives and other individuals responsible for the pricing, marketing and sales of

generic drugs at Defendant Teva spoke to representatives of every significant competitor by phone and/or text on multiple occasions. Phone calls and text messages with several of those key competitors during the 2013 calendar year are set forth below. The following Table (Table 1), which is conservative because it is based on phone and text message records from only some of the executives and salespeople at issue, and therefore shows only some of the phone calls and text messages between the Defendants during that period, sheds some light on the frequency with which Defendants communicated with each other throughout 2013.

Table 1
Teva phone/text communications with other Defendants (by month)
January 1, 2013 – December 31, 2013

	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	Jul-13	Aug-13	Sep-13	Oct-13	Nov-13	Dec-13	Totals
Actavis	2	2	0	7	27	1	17	12	15	40	13	47	183
Glenmark	0	3	0	0	26	9	6	8	1	12	14	16	95
Greenstone	2	0	20	1	4	5	6	1	0	2	7	11	59
Lupin	10	5	9	3	33	9	19	9	5	13	6	0	121
Mylan	31	47	32	37	33	26	26	16	1	1	0	11	261
Sandoz	17	5	4	4	12	16	18	14	3	0	9	2	104
Taro	0	0	0	0	2	1	8	11	0	11	1	1	35
Zydus	13	23	42	20	30	40	59	21	34	148	58	43	531
Totals	75	85	107	72	167	107	159	92	59	227	108	131	1389

121. Of the 1,389 calls listed in Table 1, 1,234 of them – or 89% – involved Defendants Green, Patel and Rekenthaler of Teva speaking with competitors. Many – though not all – of those communications involve matters that are addressed throughout this Complaint.

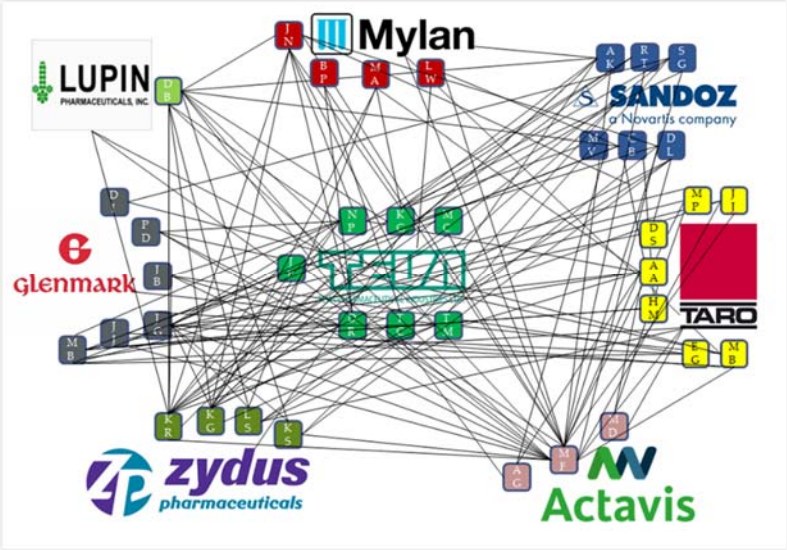
122. Similarly, from the period of January 1, 2014 through December 31, 2014, senior sales executives and other individuals responsible for the pricing, marketing and sales of generic drugs at Defendant Teva continued to speak to representatives of every significant competitor by phone and/or text on multiple occasions. Phone calls and text messages with several of those key competitors during the 2014 calendar year are set forth below. The following Table (Table 2), which is conservative because it is based on phone and text message records from only some of the executives and salespeople at issue, and therefore shows only some of the phone calls and text messages between the Defendants during that period, sheds similar light on the frequency with which Defendants communicated with each other throughout 2014.

Table 2
Teva phone/text communications with other Defendants (by month)
January 1, 2014 – December 31, 2014

	Jan-14	Feb-14	Mar-14	Apr-14	May-14	Jun-14	Jul-14	Aug-14	Sep-14	Oct-14	Nov-14	Dec-14	Totals
Actavis	31	17	47	42	76	9	38	24	36	23	8	14	365
Glenmark	4	11	11	7	7	2	9	6	1	6	3	3	70
Greenstone	17	3	13	3	1	1	6	1	9	0	0	0	54
Lupin	11	5	13	4	0	0	0	0	0	0	0	0	33
Mylan	6	1	1	1	7	2	0	10	13	5	2	9	57
Sandoz	5	10	7	10	0	1	28	7	4	1	6	3	82
Taro	1	1	7	4	17	16	5	2	1	0	0	1	55
Zydus	18	36	44	24	37	14	19	15	5	5	4	4	225
Totals	93	84	143	95	145	45	105	65	69	40	23	34	941

123. Of the 941 calls listed in Table 2, 778 of them – or 83% – involved Defendants Patel and Rekenthaler of Teva speaking with competitors (by this time, Defendant Green no longer worked at Teva). Many – though not all – of those communications involve matters that are addressed throughout this Complaint.

124. It was not just Teva personnel speaking to their competitors, however. All of these individuals were speaking to each other, when needed, hundreds or even thousands of times to ensure adherence to the overarching conspiracy. Because it would be too voluminous to list the total number of calls among all of the Defendants, the following graphic shows the interlocking web of communications and relationships between just some of the individuals employed by Teva and its key competitors. Each line in the graphic below demonstrates that at least one phone call or text message was sent between those individuals (identified by their initials) while they were competitors. For many of these individuals, there were hundreds of calls and texts with competitors, but the volume of those communications is not captured by this graphic.



125. In order to provide some organizational principle around the massive amount of collusive behavior by the Defendants described in this Complaint, certain sections are centered around the relationship between Defendant Teva and another conspirator. However, this convenience should not imply that the Complaint is solely concerned with bilateral relationships involving Teva.

126. The specific drug agreements often involve overlapping sets of Defendants in communication with each other, all following their agreed-upon "fair share" code of conduct. For example, to view only a small portion of the interlocking, overlapping web of collusion formed by Defendants: Teva, Taro and Wockhardt discussed amongst themselves the allocation of the Enalapril Maleate market; Teva and Taro communicated with Sandoz concerning the prices for Ketoconazole Cream; Sandoz worked with Mylan to allocate the market for Valsartan HCTZ; Teva, Mylan and Par all communicated with each other in the spring of 2014 concerning the market for Budesonide DR Capsules. These are not isolated, one-off agreements, but rather demonstrate the ongoing, sprawling nature of the Defendants' overarching conspiracy.

127. Referred to sometimes as the "rules of engagement" for the generic drug industry, the fair share understanding among Defendants dictates that when two generic manufacturers

enter the market at the same time, they generally expect that each competitor is entitled to approximately 50% of the market. When a third competitor enters, each competitor expects to obtain 33% share; when a fourth competitor enters, each expects 25%; and so on, as additional competitors enter the market.

128. When a generic drug manufacturer is the first to enter a particular drug market on an exclusive basis it is commonly understood that that manufacturer is entitled to a little more than its proportional share of the market. For example, when Defendant Dr. Reddy's was about to enter the market for a drug in January 2013, the Vice President of Sales and Marketing explained during negotiations with his competitor that "he views it this way. If they [Dr. Reddy's] are first and others come out after, he deserves 60%. If he launches with others on day [one], he considers fair share 2-50%, 3-33%, 4-25%, etc."

129. Conversely, those generic manufacturers that enter later are typically entitled to a little less than their proportional share. One of the many examples of this occurred in March 2014, when – as discussed more fully below – Defendant Lupin entered the Niacin ER market after Defendant Teva had previously been exclusive. Defendants Patel of Teva and Berthold of Lupin spoke directly by phone a number of times during this period, including three (3) calls on March 24, 2014. That same day, Defendant Rekenthaler of Teva sent an internal e-mail to Defendant Patel stating: "We should concede Optum then defend everything else. This should be it for Lupin. I believe this should be the 40% we were okay with conceding." Here, Teva's expectation to maintain 60% share in a two-player market, after being the first in that market, was consistent with the overarching conspiracy.

130. Defendant Taro went so far as to create a graphic representation of that understanding, taking into account both the number of competitors and order of entry to estimate what its "fair share" should be in any given market:

Market Share - Fair Unit Share assumptions
Order of Entry Grid
Number of Competitors

	Number of Competitors	1	2	3	4	5	6	7
Order of Entry	1	100%	60%	45%	35%	30%	30%	30%
	2		40%	35%	30%	25%	25%	25%
	3			20%	20%	20%	20%	20%
	4				15%	15%	15%	15%
	5					10%	10%	10%
	6						10%	10%
	7							10%
	Total	100%	100%	100%	100%	100%	100%	100%

[TARO_000224150.]

131. Although these general parameters are well-known, there is no precise method for apportioning "fair share" because market share is ultimately determined by either winning or maintaining the business of various customers, which is inherently variable in a given year. The shared objective, however, is to attain a state of equilibrium, where no competitors are incentivized to compete for additional market share by eroding price.

132. This common goal was stated succinctly by Defendant Aprahamian, who advised the Taro Pricing Department in training documents from September and November 2013 that "[g]iving up share to new entrant (as warranted) shows responsibility and will save us in the long run" and "[d]on't rock the boat – [g]reedy hogs go to slaughter." As demonstrated throughout the Amended Complaint, Aprahamian's idea of "responsibility" meant constantly reaching out to competitors in order to coordinate giving up share to reach a "fair" allocation and keep prices high.

133. This scheme to minimize competition and allocate "fair share" is typically implemented as follows. First, Defendants allocate the market for an individual drug based on the number of competitors and the timing of their entry so that each competitor obtains an acceptable share of the market. Then, the competitors agree on ways to avoid competing on price and, at times, significantly raise price. This pattern is frequently followed even in the

absence of direct communication between the competitors, demonstrating the universal code of conduct agreed to by Defendants.

134. This "fair share" understanding has been particularly effective when a new competitor enters the market – a time when, in a free-functioning, competitive market for generic drugs, prices would be expected to go down. In today's generic drug markets, a new competitor will either approach or be approached by the existing competitors. Existing competitors will agree to "walk away" from a specific customer or customers by either refusing to bid or submitting a cover bid. The new competitor's transition into the market is seamless; the new entrant is ceded market share and immediately charges a supra-competitive price. The competitors then continue this process of dividing up customers until the market reaches a new artificial equilibrium. This is referred to as a "stable" market.

135. "Fair share" principles also dictate how generic drug manufacturers respond when a competitor experiences supply issues. If the disruption is temporary, the existing competitors will refrain from taking any action that might upset the market balance. By contrast, if the disruption is for a longer term, the competitors will divide up customers until each player achieves a revised "fair share" based on the number of players remaining in the market. For example, in July 2013, a retail pharmacy customer e-mailed Defendant Taro stating that one of Defendant Mylan's products was on back order and asked Taro to bid for the business. Defendant Aprahamian sent an internal e-mail stating "Not inclined to take on new business . . . Wholesalers have product, let them pull from there temporarily and we can certainly review if shortage persists. Don't want to overreact to this product. Not sure how long Mylan is out."

136. These rules about "fair share" apply equally to price increases. As long as everyone is playing fair, and the competitors believe that they have their "fair share," the larger understanding dictates that they will not seek to compete or take advantage of a competitor's

price increase by bidding a lower price to take that business. Doing so is viewed as "punishing" a competitor for raising prices – which is against the "rules." Indeed, rather than competing for customers in the face of a price increase, competitors often use this as an opportunity to follow with comparable price increases of their own.

137. For example, in May 2013 after a Glenmark price increase on a number of different drugs (discussed more fully below), Teva was approached by a large retail customer requesting a bid for several drugs. Defendant Green immediately sought to determine whether this request was due to a competitor price increase, in order to determine what Teva's strategy should be:

> On May 29, 2013, at 11:52 PM, "Kevin Green" <Kevin.Green@tevapharm.com> wrote:
>
> Do you think the Fluconazole Tabs below is due to a recent price increase. I don't have my list here at home. We are in a great inventory position, but not sure I want to steal it on an increase.

Teva declined to bid, after conversations with its competitors confirming that the reason for the request was due to a competitor's price increase.

138. When a generic manufacturer participates in this scheme, and prices stay high, this is viewed as "playing nice in the sandbox." For example – as discussed more fully below – in December 2014 Defendant Teva was approached by a large retail customer on behalf of Defendant Greenstone. The customer indicated that Greenstone was entering the market for Cabergoline and was seeking to target specific customers. The customer specifically requested that Teva give up a large customer to the new entrant, and indicated that "Greenstone has promised to play nice in the sandbox." After discussing the matter internally, a Teva representative responded to the customer: "[t]ell Greenstone we are playing nice in the sandbox and we will let them have [the targeted customer.]"

139. Similarly, when a generic manufacturer is "playing nice in the sandbox," it is generally referred to as a "responsible" or "rational" competitor. For instance, in May 2013, R.T., a senior sales and marketing executive at Defendant Sandoz, sent an internal e-mail to J.G., another Sandoz senior executive, stating "My sense is that Sandoz is viewed by customers and competition as a respectful/responsible player in the market, which we should be proud of and has taken years to develop. I would be very careful to destroy this through behavior that is too aggressive or desperation."

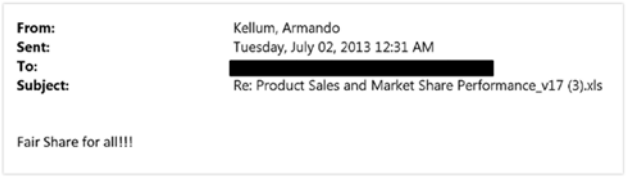
140. Defendant Sandoz, in turn, uses that same terminology to refer to its competitors that are acting in accordance with "fair share" principles. For example, in internal company presentations throughout 2014, Sandoz consistently referred to Defendant Actavis as a "responsible competitor" and Defendant Taro as a "very responsible price competitor."

141. Defendant Teva had its own term of art – referring to the competitors it had the most collusive relationships with as "high quality" competitors. As explored more fully below, Teva had long-standing relationships with these competitors, including several of the corporate Defendants, which affected nearly every overlapping drug they sold. As just one example, Defendant Patel of Teva exchanged seven (7) text messages and had two (2) long phone calls with Defendant Aprahamian of Taro on June 3 and 4, 2014. After a lengthy twenty-five (25) minute call with Aprahamian on the morning of June 4, Patel sent an internal e-mail to K.G., a Teva senior marketing executive, stating "[w]e should probably discuss how we want to handle all Taro increase items. Taro is a high quality competitor – I think we need to be responsible where we have adequate market share."

142. Adherence to the rules regarding "fair share" is critical in order to maintain high prices. Indeed, that is the primary purpose of the agreement. If even one competitor does not

participate (and, thus behave in accordance with) the larger understanding, it can lead to unwanted competition and lower prices. In the relatively few instances where a competitor prioritizes gaining market share over the larger understanding of maintaining "fair share," that competitor is viewed as "irresponsible," and is spoken to by other competitors. For example, in March 2015, Defendant Upsher-Smith learned that Defendant Sandoz had submitted a bid on a product not identified in the Amended Complaint at one of Upsher-Smith's GPO customers. B.P., a senior account manager at Upsher-Smith, forwarded that information internally stating "I can't believe they have chosen to compete against us since we had this business. How does this help us? We play fair and they don't?"

143. "Fair share," "playing nice in the sandbox," and similar terminology have become part of the industry lexicon, and thus part of the larger understanding between Defendants. Generic drug manufacturers actively and routinely monitor their fair share and that of their competitors, as well as discuss customer allocation amongst each other within the context of agreements on specific drugs, as set forth more fully below. For example, in July 2013, L.J., a senior marketing executive at Sandoz, sent an internal e-mail identifying 47 products where Sandoz did not have "fair share" of the market. After some back-and-forth internal joking among Sandoz executives about the idea that Sandoz might actually attempt to compete for business in those markets by driving prices down, Defendant Kellum responded by emphasizing the truly industry-wide nature of the agreement:


From: Kellum, Armando
Sent: Tuesday, July 02, 2013 12:31 AM
To: [redacted]
Subject: Re: Product Sales and Market Share Performance_v17 (3).xls

Fair Share for all!!!

144. Indeed, the concept of "fair share" is so well ingrained in the generic pharmaceutical industry that even customers are aware of, and at times facilitate, collusion

among generic manufacturers. For example, in June 2013, Defendant Dr. Reddy's was entering the market on a product not identified in the Amended Complaint where Defendant Par had previously been exclusive. K.N., a senior account executive at Dr. Reddy's, sent an internal e-mail reporting that "[a GPO customer] has indicated that Par will walk away, so we have put together a proposal based on that information."

145. Similarly, in September 2014, a large wholesale customer reached out to several large generic manufacturers, including Defendant Teva, asking them to submit a "Priority Wishlist of items to gain increased volume in the market." The customer reported to Teva that "7 of the global suppliers have created and submitted wishlists and that [the customer] will be reviewing next week and taking a look at how they can move things around. He said they are hoping to be able to horse trade without having to do ROFR [right of first refusal]."

146. Further, in January 2015, Defendant Teva was in discussions with a large retail customer about the possibility of becoming its supplier for Moexipril HCL HCTZ Tablets. The customer stated "Yes, I would like a OTB [One Time Buy]. Can you provide pricing? And yes, we should discuss an ongoing offer as well. I think you are way under your 'fair share' on this one if I remember correctly."

147. Customers at times also facilitate price increases, asking competitors to "rationalize" a market by raising prices. For example, in November 2013, S.G., a senior account executive at Sandoz, sent an internal e-mail stating "[a large wholesale customer] is indicating that Glenmark and Caraco had taken a price increase on [a drug not identified in the Amended Complaint] in June. [The customer] is asking if Sandoz will be rationalizing the market. . . . Please advise on next steps. Our [lower] pricing is disrupting the market."

148. The "fair share" agreement is not limited to any one market; these principles constantly inform and guide the market actions that generic drug manufacturers decide to take

(or not take) both within and across product markets. For example, in November 2013, Defendant Dr. Reddy's won the "B" slot[2] business at a large wholesale customer on a product not identified in the Amended Complaint. Dr. Reddy's had previously won the "A" slot business at that customer because Defendant Mylan had "walked away" from the business. J.A., a senior account executive at Dr. Reddy's, sent an internal e-mail stating "My concern here is that [Mylan] will retaliate somewhere else. I'm unsure of the $ volume, but this would pull somewhere around 4% share from Mylan, and I don't think they would take that lying down."

149. Similarly, in October 2013, CW-1, a senior pricing executive at Sandoz, sent an internal e-mail, including to Defendant Kellum, stating that Sandoz had decided not to bid on two drugs (Haloperidol and Trifluoperazine HCL – discussed more fully below in Section IV.C.4.a.ii) at a large retail customer. CW-1 explained his reasoning as follows: "We have been running up against Mylan a lot lately (Nadolol/Benaz/Hctz), and fear blowback if we take any more products at this moment. Trying to be responsible in the sandbox." Similarly, in June 2014, Sandoz chose not to bid at a customer on the drug Benazepril HCTZ (discussed more fully below in Section IV.C.4.a.ii) out of concern that Defendant Mylan would retaliate. As CW-1 explained, "I do not want to pursue, I believe this is due to a Mylan increase. We have a lot of products crossing with Mylan right now, I do not want to ruffle any feathers." As discussed more fully below in Section IV.C.4.a, these decisions were made by Sandoz executives as a direct result of communications between the competitors, and in the context of an ongoing understanding between Defendants Sandoz and Mylan to fix prices and avoid competition on a number of different drugs, including Haloperidol, Trifluoperazine HCL, Nadolol and Benazepril HCTZ, among others.

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[2] Some large customers contract with multiple suppliers – referring to them as primary ("A slot") or secondary ("B slot") suppliers – so that in the event of a supply disruption for a particular drug, there is a secondary source of supply.

150. A similar scenario occurred in August 2015, when Defendant Taro declined to bid on Etodolac Extended Release (ER) Tablets at a large supermarket chain where Defendant Zydus was the incumbent. Taro voiced concerns internally that Zydus might retaliate and take share from them on another product, Warfarin Sodium Tablets. As C.L., an analyst at Taro, reasoned in an internal e-mail, Zydus "could hit us on Warfarin. Not worth a fight in the sandbox over 300 annual units for Etodolac." As discussed more fully below, both Etodolac ER and Warfarin were drugs where Taro had previously agreed with its competitors, including Teva and Zydus, to fix prices and allocate customers in 2014. Taro's focus on playing nice in the sandbox was merely an extension of those already-existing agreements.

151. As these examples make clear, the interdependence among generic manufacturers transcends product markets as these companies make decisions not only based on what impact their actions will have in a given product market, but also on how those actions will impact other product markets where the competitors overlap, and any future markets where they might eventually compete.

152. In fact, as explained in more detail below, certain Defendants had long-standing agreements with some of their competitors to limit competition on any products on which the companies overlapped. For instance, shortly after Defendant Patel was hired by Teva in 2013, she reached out to CW-1 and asked how Sandoz handled price increases. Patel explained that she had been hired by Teva to identify products where Teva could increase prices. CW-1 told Patel that Sandoz would follow any Teva price increases and that Sandoz would not poach Teva's customers after Teva increased price. CW-1 reiterated his conversation to Defendant Kellum, who understood and approved.

153. Indeed, generic manufacturers often communicated about, and colluded on, multiple drugs at any given time. As just one example, in July 2013, Defendant Teva increased

pricing on a list of 21 different products. There was a great deal of internal pressure from management at Sandoz – including from Defendant Kellum and CW-1 – to obtain a copy of the Teva price increase list. As a result, CW-2 (then a Sandoz employee) reached out to his former colleague, Defendant Rekenthaler, the Vice President of Sales at Teva, to obtain a copy of the full Teva price increase list. Defendant Rekenthaler forwarded the list to his own personal e-mail address before then forwarding it to CW-2's personal e-mail address. Upon receiving the list, CW-2 read it to his supervisor – CW-1 – over the phone. Notably, the Teva list included a number of products that Defendant Sandoz did not even sell.

154. It was not uncommon for generic manufacturers to communicate with each other about products that they did not sell. In another example, Defendants Teva, Wockhardt, and Mylan collusively raised pricing on Enalapril in July 2013 (discussed more fully below). After a lengthy conversation with Defendant Patel in the midst of the price increases, Defendant Aprahamian of Taro (not in the market for Enalapril at that time) sent an internal e-mail, including to M.P., a senior Taro executive, stating "[t]here has been some significant changes in the market landscape with this product and I'd like to get product back in Taro label (and fast)." And Taro did move fast. By December 2013, Aprahamian spoke again with Defendant Patel, M.A., an account manager at Defendant Mylan, and M.C., a senior sales and marketing executive at Defendant Wockhardt. Taro then re-entered the Enalapril market and matched competitor pricing.

155. In another example, on January 1, 2013 – the day before a substantial Mylan price increase on a number of items – Defendant Green of Teva spoke five (5) times with Defendant Nesta of Mylan. The next day, Defendant Green spoke with Defendant Kellum of Sandoz. Defendant Kellum then sent an internal e-mail to the Sandoz team stating "[j]ust heard from a customer that – Teva and Mylan . . . have raised price on Nadolol to our levels and Mylan took a

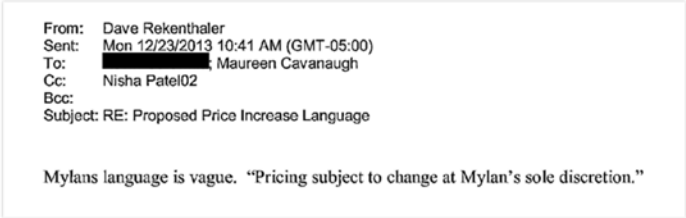
significant price increase on Levothyroxine. Let's please be cautious on both these products." Despite that fact that Teva did not sell Levothyroxine, Green still conveyed to Sandoz that Mylan raised price on that product.

156. Unlike their branded counterparts, generic drugs are commodities and generic manufacturers are constantly making decisions to enter new markets and leave existing markets. Often these decisions are made, at least in part, based on who the competitors are and how strong the relationship is between the two companies. As one example, in July 2013, Defendant Sandoz was looking to implement a "Taro Strategy" that involved temporarily delisting ten products that they overlapped on with Defendant Taro. This strategy would allow Taro to raise price on these products while Sandoz was out of the market, and then Sandoz could re-enter later at the higher price.

157. This interdependence between generic manufacturers is further demonstrated by the countless examples of companies sharing sensitive information with competitors as a matter of course. The Plaintiff States have gathered evidence going back more than a decade of generic companies routinely communicating and sharing information with each other about bids and pricing strategy. This includes forwarding bid packages received from a customer (e.g., a Request for Proposal or "RFP") to a competitor, either on their own initiative, or at the request of a competitor.

158. Defendants and other generic drug manufacturers also share information among themselves regarding the terms of their contracts with customers, including pricing terms, price protection and rebates. Defendants use this information to negotiate prices or terms that are more favorable to them, often to the ultimate detriment of payors and consumers. For instance, in December 2013, Defendant Teva was negotiating new price increase language in its customer contracts, and wanted some comfort that its competitors had similar language. On December 23,

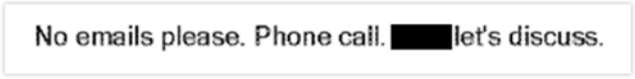
2013, Defendant Rekenthaler spoke with Defendant Nesta of Mylan three times, including a thirteen (13) minute call. Immediately after hanging up the phone with Nesta after the third call, Rekenthaler sent the following e-mail:



From: Dave Rekenthaler
Sent: Mon 12/23/2013 10:41 AM (GMT-05:00)
To: [redacted]; Maureen Cavanaugh
Cc: Nisha Patel02
Bcc:
Subject: RE: Proposed Price Increase Language

Mylans language is vague. "Pricing subject to change at Mylan's sole discretion."

159. Defendants were well aware that what they were doing was illegal and took steps to cover up evidence of the overarching conspiracy. For example, in May 2014, a large customer of Taro's received a bid on a product not identified in the Amended Complaint and gave Taro an opportunity to bid to retain the business. A.L., a senior contracting executive at Taro, sent an internal e-mail stating "FS ok, will not protect." E.G., a senior managed care executive at Taro, responded "explain FS, (Fair Share)?" Defendant Aprahamian replied:



No emails please. Phone call. [redacted] let's discuss.

Similarly, handwritten notes from an internal Sandoz business review presentation from May 2017 – after the States' investigation was well underway – read: "Avoid Fair Share terminology on slides – underdeveloped or overdeveloped is better."

160. To avoid creating a potentially incriminating paper trail, Defendant Kellum of Sandoz routinely admonished colleagues for putting information that was too blatant in e-mails, understanding that it could lead to significant legal exposure for both the company and the individuals involved.

161. It bears noting that the examples referenced in this section, and in the sections that follow, include only illustrative examples of the types of conduct described. Indeed, to date,

many of the Defendants have made no document productions in connection with the Plaintiff States' investigation, including Defendants Amneal, Apotex, Breckenridge, Glenmark, Lupin, and Zydus, and several other Defendants have made only limited productions focused on particular drugs or custodians, including Actavis, Mylan, Par, and Wockhardt. Even Teva, the central figure in this Complaint, has to date only produced documents from two custodians to the Plaintiff States.

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i. Fenofibrate

168. Fenofibrate—also known by brand names such as Tricor—is a medication used to treat cholesterol conditions by lowering "bad" cholesterol and fats (such as LDL and triglycerides) and raising "good" cholesterol (HDL) in the blood.

169. As of the end of 2012, Teva and Lupin were the only major suppliers of generic Fenofibrate 48mg and 145mg tablets, with Teva having approximately 65% market share and Lupin having approximately 35% market share.

170. On February 27, 2013, K.G., a senior marketing executive at Teva, e-mailed multiple Teva colleagues asking them to provide "any noise you may be hearing in the market relative to additional competition on Fenofibrate 48mg and 145mg." Specifically, K.G. was seeking "Competitive Intelligence" on Mylan's potential entry to the market. In order to get this information, Defendant Green called Mylan's Vice President of National Accounts, Defendant Jim Nesta. Over the course of that day, Green and Nesta spoke at least four (4) different times. That same day, Green reported back to K.G. and other Teva colleagues what he had learned: Mylan planned to launch Fenofibrate 48mg and 145mg sometime around November 2013.

171. A few months later, however, Teva learned that Mylan was moving up its launch date for Fenofibrate. In advance of this launch, Teva, Lupin, and Mylan conspired to allocate the

market for Fenofibrate. On May 8, 2013, Defendant Green e-mailed his colleagues at Teva that "Mylan is entering [the market for Fenofibrate] very soon." To assist in Teva's efforts to allocate the Fenofibrate market, Green asked a colleague for the "typical data on Fenofibrate." This request for information was reiterated—and its purpose made clear—the following day when K.G. sent an internal e-mail stating that Mylan expected to launch Fenofibrate 48mg and 145mg tablets "on or around May 14" and that he needed Teva's Fenofibrate sales and profitability information "to determine who we want to keep and who we want to concede" to Mylan.

172. Up to this point, executives for Teva, Mylan, and Lupin had all been in regular contact by phone. These calls include at least those listed below. On these calls, Teva, Mylan, and Lupin executives shared information about Mylan's Fenofibrate launch and the plan to allocate market share to Mylan.

Date	Call Typ	Target Name	Direction	Contact Name	Duration
5/6/2013	Voice	Patel, Nisha (Teva)	Outgoing	Berthold, David (Lupin)	0:00:32
5/6/2013	Voice	Patel, Nisha (Teva)	Incoming	Berthold, David (Lupin)	0:22:02
5/6/2013	Voice	Green, Kevin (Teva)	Outgoing	Berthold, David (Lupin)	0:01:00
5/7/2013	Voice	Patel, Nisha (Teva)	Incoming	Berthold, David (Lupin)	0:10:31
5/7/2013	Voice	Nesta, Jim (Mylan)	Outgoing	Green, Kevin (Teva)	0:00:06
5/7/2013	Voice	Nesta, Jim (Mylan)	Incoming	Green, Kevin (Teva)	0:00:18
5/7/2013	Voice	Nesta, Jim (Mylan)	Outgoing	Green, Kevin (Teva)	0:11:12
5/7/2013	Voice	Nesta, Jim (Mylan)	Outgoing	Berthold, David (Lupin)	0:02:53
5/8/2013	Voice	Nesta, Jim (Mylan)	Incoming	Berthold, David (Lupin)	0:00:05
5/8/2013	Voice	Nesta, Jim (Mylan)	Outgoing	Berthold, David (Lupin)	0:08:55
5/8/2013	Voice	Nesta, Jim (Mylan)	Outgoing	Green, Kevin (Teva)	0:00:20
5/8/2013	Voice	Nesta, Jim (Mylan)	Incoming	Green, Kevin (Teva)	0:00:05
5/8/2013	Voice	Nesta, Jim (Mylan)	Outgoing	Green, Kevin (Teva)	0:00:05
5/8/2013	Voice	Nesta, Jim (Mylan)	Incoming	Green, Kevin (Teva)	0:03:46
5/9/2013	Voice	Green, Kevin (Teva)	Outgoing	Berthold, David (Lupin)	0:01:00
5/9/2013	Voice	Green, Kevin (Teva)	Incoming	Berthold, David (Lupin)	0:12:00
5/9/2013	Voice	Nesta, Jim (Mylan)	Incoming	Green, Kevin (Teva)	0:04:05

173. In one striking example of the coordination between the three companies, Defendant Nesta called Defendant Green at 2:42pm on May 7 and they spoke for more than eleven (11) minutes. Immediately after hanging up the phone – at 2:54pm – Nesta called Defendant Berthold and spoke for nearly three (3) minutes.

174. On May 10, 2013, K.G. received the Teva sales and profitability information he requested. After having the information for barely a half hour, and before there was even a formal price challenge by Mylan at any of Teva's customers, K.G. concluded that "it is best to concede Econdisc [to Mylan] and try to maintain the balance of our customers . . . ." By conceding Econdisc to Mylan, Teva would walk away from its single biggest customer (in terms of gross profit) for the 48mg tablets and the third largest out of six customers (in terms of gross profit) for the 145mg tablets. Defendant Patel, who had been at Teva for only two weeks at that point, said she "want[ed] to understand the logic you [K.G.] use for determining this." The logic, of course, was to allocate a customer of sufficient size to Mylan so that Mylan would be comfortable with its "fair share" and not need to compete on price to acquire market share.

175. Teva executives immediately reached out to executives at Mylan and Lupin through a series of phone calls. These calls include at least those listed below. On these calls, executives of Teva, Mylan, and Lupin confirmed the market allocation scheme.

Date	Call Type	Target Name	Direction	Contact Name	Duration
5/10/2013	Voice	Nesta, Jim (Mylan)	Outgoing	Green, Kevin (Teva)	0:00:28
5/10/2013	Voice	Nesta, Jim (Mylan)	Incoming	Green, Kevin (Teva)	0:10:46
5/10/2013	Voice	Nesta, Jim (Mylan)	Incoming	Green, Kevin (Teva)	0:02:19
5/10/2013	Voice	Nesta, Jim (Mylan)	Outgoing	Patel, Nisha (Teva)	0:05:25
5/10/2013	Voice	Patel, Nisha (Teva)	Outgoing	Berthold, David (Lupin)	0:00:17
5/10/2013	Voice	Patel, Nisha (Teva)	Incoming	Berthold, David (Lupin)	0:07:26
5/10/2013	Voice	Patel, Nisha (Teva)	Incoming	Berthold, David (Lupin)	0:17:28

176. Teva made good on its agreement to concede Econdisc to Mylan. On May 15, 2013, Econdisc informed Teva that a new market entrant had submitted a competitive offer for Fenofibrate 48mg and 145mg tablets and asked Teva for a counteroffer to retain Econdisc's business. Less than an hour after receiving the notice of the price challenge, Defendant Green recommended conceding Econdisc based on "prior conversations." K.G. later agreed: "this is the customer we should concede on Fenofibrate."

177. Following Teva's internal confirmation of the market allocation scheme, Teva executives spoke with executives at Mylan and Lupin numerous times. These calls include at least those listed below. On these calls, executives of Teva, Mylan, and Lupin confirmed that Teva was sticking to the market allocation scheme by conceding Econdisc to Mylan.

Date	Call Type	Target Name	Direction	Contact Name	Duration
5/16/2013	Voice	Patel, Nisha (Teva)	Outgoing	Berthold, David (Lupin)	0:00:36
5/16/2013	Voice	Patel, Nisha (Teva)	Incoming	Berthold, David (Lupin)	0:02:07
5/16/2013	Voice	Patel, Nisha (Teva)	Incoming	Berthold, David (Lupin)	0:00:07
5/16/2013	Voice	Patel, Nisha (Teva)	Incoming	Berthold, David (Lupin)	0:03:12
5/16/2013	Voice	Patel, Nisha (Teva)	Incoming	Berthold, David (Lupin)	0:00:04
5/16/2013	Voice	Patel, Nisha (Teva)	Outgoing	Berthold, David (Lupin)	0:05:29
5/16/2013	Voice	Patel, Nisha (Teva)	Outgoing	Berthold, David (Lupin)	0:00:34
5/17/2013	Voice	Berthold, David (Lupin)	Outgoing	Nesta, Jim (Mylan)	0:02:21
5/17/2013	Voice	Berthold, David (Lupin)	Incoming	Green, Kevin (Teva)	0:10:06
5/17/2013	Voice	Nesta, Jim (Mylan)	Outgoing	Green, Kevin (Teva)	0:00:04
5/17/2013	Voice	Nesta, Jim (Mylan)	Incoming	Green, Kevin (Teva)	0:11:50
5/17/2013	Voice	Nesta, Jim (Mylan)	Outgoing	Green, Kevin (Teva)	0:02:23
5/17/2013	Voice	Patel, Nisha (Teva)	Outgoing	Berthold, David (Lupin)	0:00:09
5/17/2013	Voice	Patel, Nisha (Teva)	Incoming	Berthold, David (Lupin)	0:00:21
5/17/2013	Voice	Patel, Nisha (Teva)	Outgoing	Berthold, David (Lupin)	0:11:12
5/17/2013	Voice	Nesta, Jim (Mylan)	Incoming	Green, Kevin (Teva)	0:04:25
5/17/2013	Voice	Nesta, Jim (Mylan)	Outgoing	Green, Kevin (Teva)	0:00:05
5/17/2013	Text	Nesta, Jim (Mylan)	Outgoing	Green, Kevin (Teva)	0:00:00
5/17/2013	Voice	Nesta, Jim (Mylan)	Incoming	Green, Kevin (Teva)	0:16:02

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187. Mylan and Teva maintained regular contact as former Mylan customers came to Teva because of Mylan's supply issues with Clonidine-TTS. For example, Teva submitted bids to CVS and Wal-Mart—which were ultimately accepted by those companies—on October 4, 2012 and October 5, 2012, respectively. In the days leading up to those bids, Teva and Mylan representatives had at least the following phone calls:

Date	Call Type	Target Name	Direction	Contact Name	Duration
10/1/2012	Voice	Rekenthaler, David (Teva)	Outgoing	B.P. (Mylan)	0:01:00
10/1/2012	Voice	Nesta, Jim (Mylan)	Incoming	Green, Kevin (Teva)	0:00:10
10/1/2012	Voice	Nesta, Jim (Mylan)	Outgoing	Green, Kevin (Teva)	0:00:04
10/1/2012	Voice	Nesta, Jim (Mylan)	Incoming	Green, Kevin (Teva)	0:00:06
10/1/2012	Voice	Nesta, Jim (Mylan)	Outgoing	Green, Kevin (Teva)	0:05:00
10/4/2012	Voice	Green, Kevin (Teva)	Incoming	Nesta, Jim (Mylan)	0:11:00

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i. Baclofen

496. Baclofen, also known by the brand names Gablofen and Lioresal, is a muscle

relaxant used to treat muscle spasms caused by certain conditions such as multiple sclerosis and spinal cord injury or disease. It is generally regarded as the first choice of physicians for the treatment of muscle spasms in patients with multiple sclerosis.

497. In June 2014, Defendant Lannett was preparing to re-enter the market for Baclofen, but was faced with limited supply. In an internal e-mail sent to his sales staff, K.S., a senior sales executive at Lannett, stated: "Baclofen launch in four weeks, need market intelligence. We can only take a 10% market share." At that time, Teva had a large market share in relation to the existing competitors in the market.

498. Defendant Sullivan, a Director of National Accounts at Lannett and a recipient of the e-mail, promptly communicated with Defendant Patel (Teva was a competitor for Baclofen) using Facebook Messenger. On June 12, 2014, Sullivan messaged Patel, stating:

The message was sent at 11:16am. At 11:30am, Defendant Patel called Defendant Sullivan and they spoke for seven (7) minutes. This was the first phone conversation between Sullivan and Patel since Patel had joined Teva in April 2013. During the conversation, Defendant Sullivan informed Defendant Patel that Lannett would be entering the market for Baclofen shortly. In a follow-up message through Facebook Messenger later that afternoon, Sullivan confirmed:

499. True to her word, Defendant Sullivan called Defendant Patel on July 1, 2014 and left a voicemail. Patel promptly returned the call, and the two spoke for almost seven (7) minutes.

500. On July 11, 2014, as Teva was evaluating future forecasting and whether to try and take on additional Baclofen business with a large wholesaler, Patel stated to a Teva colleague: "[n]ot sure if it helps your review, but there is another entrant coming to market (Lannett). I'm not sure about their share targets, but I know it's probably soon." That same day, Patel sent a text message to Sullivan asking "Around?" Sullivan immediately called Patel and left a voicemail. Patel called Sullivan back promptly, and they spoke for more than three (3) minutes. After speaking, Patel sent another text message to Sullivan, stating: "Thank you!!" Sullivan responded: "No prob!"

501. Shortly thereafter, on July 22, 2014, Teva was approached by a customer stating "[w]e were contacted by another mfg that is going to be launching Baclofen in the coming weeks." The customer asked whether Teva wanted to exercise its right of first refusal (i.e., offer a lower price to maintain the account). Even though the new manufacturer's price was only slightly below Teva's price, Teva declined to bid. Defendant Patel specifically agreed with the decision to concede, stating "I believe this is Lannett." Teva's internal tracking database noted that the customer had been conceded to a "Strategic New Market Entrant."

502. Teva had significantly increased its price for Baclofen in April 2014 (following an Upsher-Smith price increase), and was able to maintain those prices even after Lannett entered the market a few months later. In fact, when Lannett entered the market it came in at the exact same WAC price as Teva.

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542. As early as 2012, Teva was speaking to competitors about the drug Nadolol.

543. Nadolol, also known by the brand name Corgard, is a "beta blocker" which is used to treat high blood pressure, reducing the risk of stroke and heart attack. It can also be used to treat chest pain (angina).

544. In 2012 and 2013, Teva's only competitors for Nadolol were Mylan and Sandoz. All three companies experienced supply problems of some sort during that time period, but they were in continuous communication to coordinate pricing and market allocation in order to maintain market stability. Nadolol was a high volume drug and one of the most profitable drugs where Teva, Mylan and Sandoz overlapped, so it was very important that they maintain their coordination.

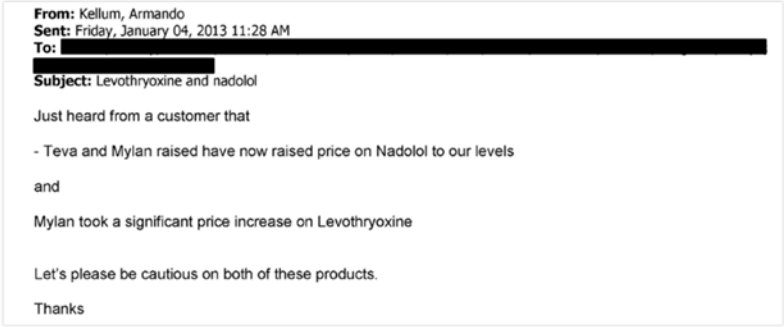
545. Teva's relationships with Mylan and Sandoz are discussed more fully below, but by 2012 an anticompetitive understanding among those companies was firmly entrenched.

546. Teva raised its price on Nadolol on July 31, 2012. In the days leading up to that increase – following a pattern that would become routine and systematic over the following years – Defendant Kevin Green, at the time in the sales department at Teva, was in frequent communication with executives at both Sandoz and Mylan. Green spoke to CW-2 from Sandoz twice on July 29, 2012, and again on the day of the price increase, July 31, 2012. Similarly, Defendant Green was communicating with Defendant Nesta of Mylan often in the days leading up to the increase, including five (5) calls on the day of the price increase.

547. Sandoz followed with its own increase on August 27, 2012. The increases were staggering – varying from 736% to 798% depending on the formulation. The day before the Sandoz increase, Defendant Armando Kellum, then the Senior Director of Pricing and Contracts at Sandoz, called Defendant Green. They had also spoken once earlier in the month, shortly after the Teva increase. CW-2 also called Green twice on August 21, 2012 – the same day that

Sandoz requested approval from its Pricing Committee to raise the Nadolol price. The day after the Sandoz increase, Defendant Green – acting as the conduit of information between Sandoz and Mylan – called Nesta of Mylan twice, with one call lasting fourteen (14) minutes.

548. Mylan, which returned to the market after a brief supply disruption, followed the Teva and Sandoz increases on January 4, 2013. In what had become a routine component of the scheme, the day before the Mylan increase Nesta spoke to Green four (4) times. The next day, Defendant Green conveyed the information he had learned from Defendant Nesta directly to his counterpart at Sandoz. On January 4, 2013 – the day of the Mylan increase – Defendant Green called Defendant Kellum twice in the morning, including a six (6) minute call at 9:43am. Shortly after hanging up with Green, Kellum reported internally on what he had learned – but concealing the true source of the information – a convention that was frequently employed by many Sandoz executives to avoid documentation of their covert communications with competitors:



From: Kellum, Armando
Sent: Friday, January 04, 2013 11:28 AM
To: [redacted]
Subject: Levothryoxine and nadolol

Just heard from a customer that

- Teva and Mylan raised have now raised price on Nadolol to our levels

and

Mylan took a significant price increase on Levothryoxine

Let's please be cautious on both of these products.

Thanks

Being "cautious" on those products meant that Sandoz did not want to steal business away from its competitors by offering a lower price and taking their market share.

549. Defendant Kellum's phone records demonstrate that he did not speak with any customers during the morning of January 4, 2013. At 11:50am the same morning, Defendant Green also called CW-2 at Sandoz and they spoke for fifteen (15) minutes.

550. Significantly, Defendant Green was not speaking with his Sandoz contacts solely about Nadolol, the common drug between Teva and Sandoz, but was also conveying information to Sandoz about a Mylan price increase on another drug that Teva did not even sell – Levothyroxine. Such conversations further demonstrate the broad, longstanding agreement among each of these competitors to share market intelligence in order to facilitate the scheme.

551. To put the Nadolol price increases into context, the Connecticut Attorney General's Office received a complaint from a Connecticut resident who has been prescribed Nadolol for approximately the last 15 years. In or about 2004, that individual paid between $10 and $20 in out-of-pocket costs for a 90-day supply of Nadolol. Today, that same 90-day supply of Nadolol would cost the complainant more than $500.

552. As discussed more fully below, Teva continued to conspire with Mylan and Sandoz about Nadolol and many other drugs throughout 2013 and into the future.

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i. The "High Quality" Competitor Relationships

581. The highest quality competitors in Defendant Patel's rankings were competitors where Teva had agreements to lead and follow each others' price increases. The agreements and understandings regarding price increases were what made each of those competitors a high quality competitor. As part of their understandings, those competitors also agreed that they would not seek to compete for market share after a Teva price increase.

582. Mylan was Teva's highest-ranked competitor by "quality." The relationship between these two competitors was longstanding, and deeply engrained. It survived changes in personnel over time, and pre-dated Defendant Patel's creation of the quality competitor rankings.

583. Defendant Kevin Green, who was employed by Teva beginning in 2006 through late October 2013, first began communicating with Defendant Jim Nesta of Mylan by telephone

on February 21, 2012. From that time until the time that Defendant Green left Teva, Defendants Green and Nesta were in almost constant communication, speaking by phone at least 392 times, and exchanging at least twelve (12) text messages – including at or around every significant price increase taken by either company. This amounts to an average of nearly one call or text message every business day during this period.

584. Shortly after Defendant Patel started her employment at Teva, she called Defendant Nesta on May 10, 2013 and the two spoke for over five (5) minutes. Because Defendant Green had already established a relationship with Mylan, Patel did not need to speak directly with Defendant Nesta very often. Typically, Patel would e-mail Green and ask him to obtain market intelligence about certain Mylan drugs; Green would then speak to Nesta – often about a long list of drugs – and report his findings back to Patel. Several examples of these communications are outlined more fully in various sections below.

585. When Defendant Green left Teva to join Zydus in late October 2013, the institutional relationship and understanding between Teva and Mylan remained strong. Defendant Rekenthaler promptly took over the role of communicating with Defendant Nesta. Starting in December 2013, through the time that Defendant Rekenthaler left Teva in April, 2015, Rekenthaler spoke to Nesta 100 times. Prior to Defendant Green leaving Teva in late-October 2013, Defendants Rekenthaler and Nesta had only spoken by phone once, more than a year earlier in 2012.

586. The relationship between Teva and Mylan even pre-dated the relationship between Defendants Green and Nesta. For example, between January 1, 2010 and October 26, 2011, R.C., a senior executive at Teva, communicated with R.P., a senior executive counterpart at Mylan, by phone or text at least 135 times. The pace of communications between the two companies slowed dramatically in November 2011 after R.C. left Teva and before Green began

communicating with Nesta – but continued nevertheless as needed during that time through communications between Defendant Rekenthaler and R.P. at Mylan.

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g. July 3, 2013 Price Increases

626. Teva implemented its first formal set of price increases using Patel's high-quality competitor formula on July 3, 2013, relating to twenty-one (21) different generic drugs. Many of the drugs slated for price increases were from the May 24, 2013 "Immediate PI File," but several others had been added in the interim. Patel scheduled a conference call for the day before the price increases to discuss those increases with members of Teva's sales and pricing departments:

	Price Increase -- Agenda
Date and Location	Tuesday, July 02, 2013 11:00 AM - 11:30 AM, Call In Number Below/Dave's Office
Attendees	Nisha Patel02; Kevin Green; Dave Rekenthaler; [redacted]
Message	We are currently preparing to announce a price increase effective Wednesday, 7/3/13. The list includes several items. I wanted to take some time to do a quick review of the item list and answer any questions you may have. Dial In: 866-225-0660 Access Code: 4075453

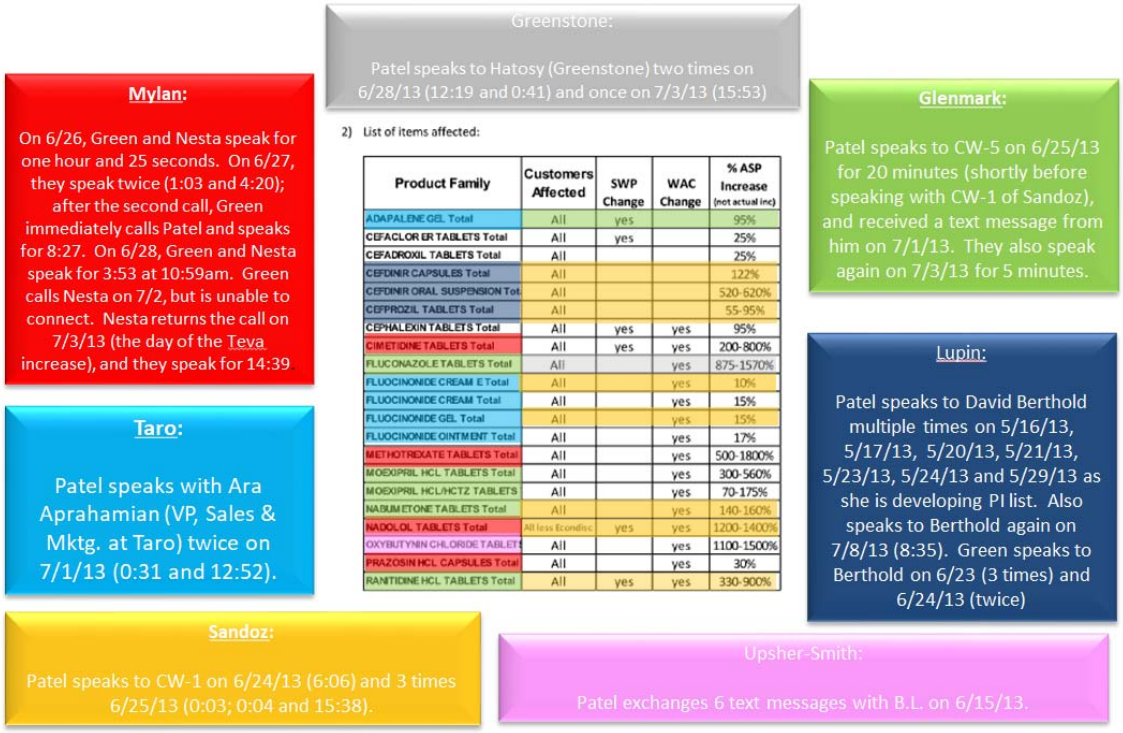
1) Price increase effective Wednesday, 7/3/2013

2) List of items affected:

Product Family	Customers Affected	SWP Change	WAC Change	% ASP Increase (not actual inc)
ADAPALENE GEL Total	All	yes		95%
CEFACLOR ER TABLETS Total	All	yes		25%
CEFADROXIL TABLETS Total	All			25%
CEFDINIR CAPSULES Total	All			122%
CEFDINIR ORAL SUSPENSION Tot	All			520-620%
CEFPROZIL TABLETS Total	All			55-95%
CEPHALEXIN TABLETS Total	All	yes	yes	95%
CIMETIDINE TABLETS Total	All	yes	yes	200-800%
FLUCONAZOLE TABLETS Total	All		yes	875-1570%
FLUOCINONIDE CREAM E Total	All		yes	10%
FLUOCINONIDE CREAM Total	All		yes	15%
FLUOCINONIDE GEL Total	All		yes	15%
FLUOCINONIDE OINTMENT Total	All		yes	17%
METHOTREXATE TABLETS Total	All		yes	500-1800%
MOEXIPRIL HCL TABLETS Total	All		yes	300-560%
MOEXIPRIL HCL/HCTZ TABLETS	All		yes	70-175%
NABUMETONE TABLETS Total	All		yes	140-160%
NADOLOL TABLETS Total	All less Econdisc	yes	yes	1200-1400%
OXYBUTYNIN CHLORIDE TABLETS	All		yes	1100-1500%
PRAZOSIN HCL CAPSULES Total	All		yes	30%
RANITIDINE HCL TABLETS Total	All	yes	yes	330-900%

Following the now-established pattern, Defendants Patel and/or Green spoke to every important competitor in the days and weeks leading up to the July 3, 2013 Teva price increase to coordinate the increases and reiterate the understanding already in place with those competitors.

627. The following graphic details some of the calls between Teva representatives and Teva's competitors in the days and weeks leading up to the July 3, 2013 price increase; color coded to show the calls with specific competitors relating to each drug:



The only drugs that Defendants Patel or Green did not coordinate with Teva's competitors (those not highlighted in the graphic above) were drugs where Teva was exclusive – i.e., had no competitors.

628. Defendant Patel – and other executives at Teva – went to great efforts to coordinate these price increases with competitors prior to July 3, 2013. Some illustrative examples of generic drugs that were added to the list after May 24, 2013 are set forth in more detail below.

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637. The next day, May 7, 2013, Defendant Green spoke to Defendant Nesta at Mylan three times, including one call lasting more than eleven (11) minutes. Defendant Green also called Defendant Patel twice that day to report on what he had learned. Defendants Green and Nesta also spoke a number of times over the next several days, including on May 8 (3:46), May 9 (4:05) and May 10, 2013 (0:28; 10:46 and 2:19).

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iii. Actavis (Clarithromycin ER Tablets, Tamoxifen Citrate and Estazolam

769. Teva and Actavis were coordinating about several drugs increased by Teva on April 4, 2014. One of them was Clarithromycin ER Tablets. As of December 2013, Teva, Actavis and Zydus were the only three generic manufacturers actively selling Clarithromycin ER.

770. On December 30, 2013, however, Cardinal approached Teva looking for a bid on Clarithromycin ER because Zydus was exiting the market. Teva informed Cardinal that it would not have adequate supply to be able to take on this additional market share until April 2014, but if Cardinal could wait until then for Teva to supply, Teva would make an offer. Cardinal agreed.

771. The Cardinal bid request was forwarded to Defendant Patel on the morning of January 2, 2014. At 9:37am that morning, L.R., a customer marketing manager at Teva, suggested providing an offer to Cardinal at "10% under market intel pricing for [the] Watson/Actavis product." L.R. also stated: "[i]f Cardinal is willing to wait until April, I suspect that Actavis isn't interested in picking up a lot of additional share."

772. Immediately after receiving that e-mail, at 9:40am, Defendant Patel called Defendant Rogerson at Actavis and the two spoke for more than seventeen (17) minutes. Shortly

after hanging up the phone with Defendant Rogerson, at 10:12am, Defendant Patel responded to the e-mail, saying: "I think we have an opportunity to go higher. Let's aim for around $148 net and request feedback."

773. On January 9, 2014, Teva learned that Cardinal had accepted Teva's bid at the higher price. At 9:19am that morning, Defendant Patel called Defendant Rogerson at Actavis and they spoke for more than six (6) minutes. Shortly after that call, at 9:45am, Patel sent an e-mail internally at Teva stating: "It looks like Cardinal accepted our bid at the higher price. We may have an opportunity to take some increases."

774. When Defendant Patel sent her supervisor the initial list of "Increase Potentials Q1 2014" on January 14, 2014, Clarithromycin ER was on the list.

775. Similarly, in March, 2014, Actavis implemented its own price increase on several other drugs, including some that overlapped with Teva. Consistent with the ongoing understanding between these high-quality competitors, Actavis understood that Teva would follow the increases or, at a minimum, would not poach Actavis customers after the increase.

776. Following a now very familiar pattern, at 9:54am on March 14, 2014 Defendant Rogerson called Defendant Patel and left a message. Patel called Rogerson back at 10:31am, and the two spoke for more than twelve (12) minutes. Within minutes after hanging up with Rogerson, Patel informed others at Teva about the Actavis increase:

From: Nisha Patel02
Sent: Friday, March 14, 2014 10:47 AM
To: [redacted]
Cc: Dave Rekenthaler; [redacted]
Subject: Market Increases

NAMs,

I'm hearing that Actavis announced a bunch of price increases yesterday. Please share any intel you gather. I believe some of the products, that overlap with Teva, are as follows (not sure if there are any more):

Tamoxifen

Mirtazipine

Estazolam

In actuality, these increases would not become effective until April 15, 2014, again demonstrating that Teva knew in advance of its competitors' price increase plans.

777. Within half an hour of sending that e-mail, Defendant Patel instructed colleagues to add the Actavis drugs to the Teva price increase list. She added: "We intend to follow where we can."

778. Less than two hours later, at 12:37pm, Defendant Patel called Defendant Rogerson again. They spoke for more than five (5) minutes. Shortly after hanging up the phone, at 12:51pm, Patel wrote another e-mail to certain colleagues at Teva, stating: "Actavis took an increase. We will follow. We need to review price per my alert list. Let's wait to see what intel we can get and discuss Monday."

779. First thing the next business day – which was the following Monday, March 17, 2014 – Defendant Patel forwarded the "PI Candidates" list to K.G. at Teva. The list included both Tamoxifen Citrate and Estazolam. Later that morning, Defendant Patel called Defendant Rogerson. After quickly exchanging voicemails, they spoke for more than nineteen (19) minutes. Defendants Rekenthaler of Teva and Falkin of Actavis also exchanged four (4) text messages that day, and had one call lasting more than six (6) minutes.

780. Teva followed the Actavis price increases on Tamoxifen Citrate and Estazolam less than three weeks later, on April 4, 2014. Defendants Patel and Rogerson spoke twice by phone that day. Defendants Rekenthaler and Falkin also spoke by phone that day. Because Teva was able to follow the price increase so quickly, Teva's increase became effective even before the Actavis price increase for those drugs.

781. After the price increases became effective, Teva took consistent steps not to disrupt the market or steal market share from Actavis. For example, on May 14, Defendant Patel declined to bid at ABC on both Tamoxifen Citrate and Estazolam, stating: "unable to bid

(strategic reasons, for internal purposes)." When Defendant Patel and her other conspirators at Teva used the term "strategic" in this context, it was code for the fact that there was an understanding in place with a competitor.

782. Similarly, on May 21, 2014, Teva received a request from a large customer for a bid on Tamoxifen Citrate. As of that date, Teva had 58.4% of the market, and Actavis had 40.7%. A Teva analyst forwarded the request to Defendant Patel and others, recommending (pursuant to the fair share understanding in the industry) that Teva not bid "as we are first in a two-player market with good share already." Defendant Patel responded: "Agree. We should decline to bid."

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o. August 28, 2014 Price Increases

847. On August 28, 2014, Teva raised prices on a number of different drugs, including those set forth below:

Product Description	Competitors	% WAC Increase
AMILORIDE HCL/HCTZ TABLETS	Mylan (88%)	50%
AMOXICILLIN/CLAV CHEW TABLETS	Sandoz (34%)	25%
CARBAMAZEPINE CHEWABLE TABLETS	Taro (59%); Torrent (24.9%)	270%
CARBAMAZEPINE TABLETS	Taro (52%); Torrent (3.2%); Apotex (3%)	1538%
CIMETIDINE TABLETS	Mylan (58%); Apotex (0.4%)	25%
CLEMASTINE FUMARATE TABLETS	Sandoz (13%)	45%
CLOTRIMAZOLE TOPICAL SOLUTION	Taro (54%)	208%
DESMOPRESSIN ACETATE TABLETS	Actavis (43%)	75%
DICLOFENAC POTASSIUM TABLETS	Mylan (37%); Sandoz (13.5%)	50%
DISOPYRAMIDE PHOSPHATE CAPSULES	Actavis (47%)	100%
ENALAPRIL MALEATE TABLETS	Mylan (30%); Wockhardt (22.5%)	230%
EPITOL TABLETS	Taro (52%); Torrent (3.4%); Apotex (3%)	1538%
FLURBIPROFEN TABLETS	Mylan (41%)	75%
FLUTAMIDE CAPSULES	Par (33%); Actavis (26.8%)	140%
FLUVASTATIN SODIUM CAPSULES	Mylan (82%)	32%
HYDROXYUREA CAPSULES	Par (64%)	37%
LOPERAMIDE HCL CAPSULES	Mylan (56%)	25%
PENICILLIN VK TABLETS	Sandoz (26%); Northstar (5.3%); Dava (4%); Aurobindo (3.6%); Greenstone (2%)	100%
PRAZOSIN HCL CAPSULES	Mylan (71%); Mylan Inst. (0.5%)	21%
PROCHLORPERAZINE TABLETS	Mylan (35%); Cadista (30.3%); Sandoz (11%); Mylan Inst. (0.3%)	0%
TOPIRAMATE SPRINKLE CAPSULES	Zydus (81%); Actavis (3.5%)	0%
WARFARIN SODIUM TABLETS 10MG 100	Taro (57%); Zydus (16.2%); Upsher-Smith (5%); Amneal (0.4%);	5%

Following the normal pattern, in the days and weeks leading up to the price increase, Defendants Patel and Rekenthaler were communicating with every high-quality competitor on those drugs to

coordinate the increases in advance. At least some of those communications are set forth in the graphic below:

848. The day before the increase became effective – August 27, 2014 – Defendant Patel spent most of her morning discussing the price increases with her contacts at Sandoz, Actavis, Taro, Zydus and Glenmark:

Date	Call Typ	Target Name	Direction	Contact Name	Time	Duration
8/27/2014	Voice	Patel, Nisha (Teva)	Outgoing	CW-1 (Sandoz)	7:11:03	0:11:13
8/27/2014	Voice	Patel, Nisha (Teva)	Outgoing	Rogerson, Rick (Actavis)	8:02:19	0:00:00
8/27/2014	Voice	Patel, Nisha (Teva)	Outgoing	Rogerson, Rick (Actavis)	8:02:42	0:00:03
8/27/2014	Voice	Patel, Nisha (Teva)	Outgoing	Aprahamian, Ara (Taro)	8:27:27	0:02:25
8/27/2014	Voice	Patel, Nisha (Teva)	Outgoing	CW-1 (Sandoz)	8:31:03	0:00:33
8/27/2014	Voice	Patel, Nisha (Teva)	Outgoing	Green, Kevin (Zydus)	8:32:42	0:20:31
8/27/2014	Voice	Patel, Nisha (Teva)	Incoming	Rogerson, Rick (Actavis)	8:41:01	0:00:00
8/27/2014	Voice	Patel, Nisha (Teva)	Incoming	Rogerson, Rick (Actavis)	8:41:06	0:00:25
8/27/2014	Voice	Patel, Nisha (Teva)	Outgoing	Rogerson, Rick (Actavis)	8:58:01	0:16:23
8/27/2014	Voice	Patel, Nisha (Teva)	Incoming	Green, Kevin (Zydus)	9:23:26	0:18:34
8/27/2014	Voice	Patel, Nisha (Teva)	Outgoing	Brown, Jim (Glenmark)	10:34:34	0:00:06
8/27/2014	Voice	Patel, Nisha (Teva)	Incoming	Brown, Jim (Glenmark)	16:29:08	0:07:52
8/27/2014	Voice	Patel, Nisha (Teva)	Outgoing	Green, Kevin (Zydus)	17:09:15	0:00:06

849. In addition to those phone communications noted above, representatives from Teva and every other defendant met in Boston, Massachusetts shortly before the increase, from August 23-26, 2014, for the NACDS annual event, which was the largest pharmaceutical

industry meeting of the year. Defendants Cavanaugh, Rekenthaler and Patel, along with many other Teva executives, as well as executives from every other corporate Defendant, attended.

850. For those few drugs where the phone records do not identify direct communications between Teva executives and their competitors, these executives, at a minimum, communicated through other competitors.

851. For example, with regard to Enalapril, Defendant Patel was speaking to Defendant Aprahamian at Taro as shown above. Defendant Aprahamian, in turn, spoke to M.C., the Vice President of Sales and Marketing at Wockhardt, on August 8, 2014 for thirteen (13) minutes, and again twice on August 14, 2014, including one call lasting eight (8) minutes.

852. Similarly, with regard to the drug Prochlorperazine, Defendant Rekenthaler communicated with Defendant Nesta at Mylan on August 7 and August 11, as shown above. Defendant Nesta, in turn, communicated with M.D., a senior sales executive at non-Defendant Cadista Pharmaceuticals, on the same days that he had been communicating with Defendant Rekenthaler.

853. A large number of the drugs on Teva's August 28, 2014 price increase list were selected because Teva was following a "high quality" competitor. The coordination between Teva and certain co-conspirators regarding those drugs is discussed more fully below.

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x. James Nesta

1074. Defendant Nesta started his employment with Mylan in 2000 and is currently the Vice President of Sales at Defendant Mylan. Nesta communicates regularly with his counterparts at many of the corporate Defendants. For example, between January 2011 and February 2016, Defendant Nesta exchanged at least 4,429 phone calls and text messages with his

contacts at Defendants Greenstone, Amneal, Teva, Dr. Reddy's, Zydus, Aurobindo, Actavis, Lupin, Sandoz, Lannett, Taro, and Par. These communications are detailed in the table below:

Contact Name	Count	Min Date	Max Date
Hatosy, Robin (Greenstone)	2310	6/9/2011	8/24/2015
Green, Kevin (Teva)	461	2/21/2012	10/4/2013
B.R. (Dr. Reddy's)	386	1/6/2011	6/28/2012
S.R.(1) (Amneal)	215	12/7/2012	12/17/2015
K.R. (Zydus)	121	7/21/2011	10/1/2014
Green, Kevin (Zydus)	117	1/7/2014	8/17/2017
Rekenthaler, David (Teva)	102	4/5/2012	3/17/2015
A.T. (Aurobindo)	95	8/26/2012	5/1/2013
Falkin, Marc (Actavis)	78	12/3/2013	8/17/2015
J.K. (Aurobindo)	76	10/1/2013	1/8/2016
V.B. (Dr. Reddy's)	71	8/7/2014	2/2/2016
Berthold, David (Lupin)	68	4/21/2013	10/13/2014
CW-4 (Sandoz)	67	9/6/2012	10/14/2013
J.A. (Dr. Reddy's)	52	3/9/2011	2/27/2014
K.N. (Dr. Reddy's)	42	6/7/2011	6/9/2011
Nailor, Jill (Greenstone)	40	12/5/2012	11/13/2015
K.S. (Lannett)	35	1/4/2013	4/23/2014
T.W. (Dr. Reddy's)	14	1/11/2013	2/5/2013
P.M. (Aurobindo)	13	4/5/2013	6/19/2013
T.G. (Aurobindo)	12	2/25/2016	2/25/2016
S.R.(2) (Amneal)	11	10/1/2014	1/15/2015
R.C. (Teva and Aurobindo)	10	7/20/2011	11/2/2011
Patel, Nisha (Teva)	10	5/10/2013	8/8/2013
Sullivan, Tracy (Lannett)	7	7/21/2014	7/22/2014
L.P. (Taro)	4	11/2/2012	1/17/2013
B.P. (Zydus)	4	7/21/2011	7/21/2011
C.N. (Sandoz)	3	12/2/2012	12/17/2012
Teva Pharmaceuticals	3	8/2/2011	8/2/2011
J.H. (Par)	2	2/4/2014	2/4/2014

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D. Consciousness of Guilt

1123. The Defendants were aware that their conduct was illegal. They all made consistent efforts to avoid communicating with each other in writing, or to delete written electronic communications after they were made. There are numerous examples, discussed throughout this Amended Complaint, where Teva employees indicated that they could not talk by e-mail, but had additional information that they could only convey personally. This was part of a consistent effort by these individuals, as well as individuals at other corporate Defendants, to avoid putting incriminating information in writing, in order to evade detection.

1124. For example, when Defendant Kevin Green wanted to speak with a particular competitor, he would routinely send a text message to that competitor, saying only "call me."

Again, this was done to avoid putting any potentially incriminating communications in writing. Defendant Patel learned this technique from Defendant Green, shortly after starting at Teva, and adopted a similar strategy for communicating with competitors.

1125. Defendant Armando Kellum of Sandoz was also aware that what he and others at Sandoz were doing was illegal. Kellum had received antitrust training, and knew that conspiring with competitors to fix or raise prices, or to allocate customers or markets, was a violation of the antitrust laws. Kellum would routinely admonish Sandoz employees for putting anything incriminating into e-mails, and voiced concern that the conduct they were engaging in – if discovered – could result in significant liability. As a result of Kellum's admonishments, Sandoz employees (including Kellum himself) routinely lied in e-mails about the sources of their information to camouflage their conduct, claiming they learned the information from a customer instead of a competitor.

1126. Similarly, Defendant Jill Nailor of Greenstone instructed her subordinates to avoid putting any sensitive market intelligence in writing.

1127. Many of the individual Defendants, and others employees of the various corporate Defendants, took active steps to delete their conspiratorial communications with competitors, and destroy evidence of their illegal behavior.

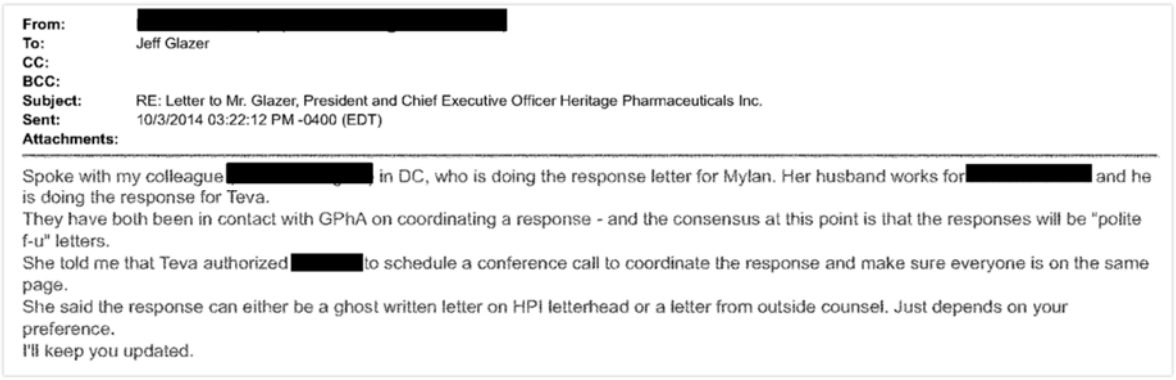
1128. For example, Defendant Nisha Patel produced text messages – in response to the States' subpoena – going back as far as early 2014. Prior to producing those text messages, however, Patel had deleted all of her text communications with competitors from the same time period, including many text messages with individual Defendants Aprahamian, Brown, Cavanaugh, Grauso, Green, Nailor, Rekenthaler and Sullivan; and many other text messages with employees of corporate Defendants Dr. Reddy's, Glenmark (including CW-5), Greenstone (including Defendant Hatosy), Par, Sandoz, Upsher-Smith and Zydus.

1129. Patel deleted these text messages after a conversation with Defendant Rekenthaler in early 2015, when Rekenthaler warned Patel to be careful about communicating with competitors. Rekenthaler was aware of the government investigations that had been commenced, and told Patel that the government was showing up on people's doorsteps. Sometime after that, Patel deleted her text messages with competitors.

1130. Defendant Apotex also destroyed an entire custodial file for one of its key employees (B.H., a senior sales executive), after the States requested it through an investigatory subpoena in July 2017. As discussed above, B.H. was involved in coordinating two significant price increases with Defendant Patel of Teva in 2013, which resulted in Apotex soaring in the quality competitor rankings. After the States' subpoena was issued, Defendant Apotex destroyed B.H.'s custodial file – and did not inform the States that it had done so for over a year.

1131. Many of the Defendants have been coordinating consistently to obstruct the ongoing government investigations and to limit any potential response. This coordination goes back at least as far as October 2014, when Congress first started investigating price increases in the generic drug industry.

1132. For example, in early October 2014, Heritage received a letter from Representative Cummings and Senator Sanders as part of their inquiry into generic drug pricing. Heritage's outside counsel immediately set out to coordinate a response with counsel for Defendants Teva and Mylan, to provide what he referred to as "polite f-u" letters to Congress:



From: [redacted]
To: Jeff Glazer
CC:
BCC:
Subject: RE: Letter to Mr. Glazer, President and Chief Executive Officer Heritage Pharmaceuticals Inc.
Sent: 10/3/2014 03:22:12 PM -0400 (EDT)
Attachments:

Spoke with my colleague [redacted] in DC, who is doing the response letter for Mylan. Her husband works for [redacted] and he is doing the response for Teva.
They have both been in contact with GPhA on coordinating a response - and the consensus at this point is that the responses will be "polite f-u" letters.
She told me that Teva authorized [redacted] to schedule a conference call to coordinate the response and make sure everyone is on the same page.
She said the response can either be a ghost written letter on HPI letterhead or a letter from outside counsel. Just depends on your preference.
I'll keep you updated.

1133. The coordination did not stop there. When the federal government executed a search warrant against Defendant Patel at her home on June 21, 2017, she immediately called Defendant Rekenthaler (from another phone because her phone had been seized) even though Rekenthaler was no longer employed at Teva and was by that point the Vice President of Sales at Defendant Apotex. Rekenthaler then immediately called Defendant Cavanaugh and C.B., another senior Teva executive. Rekenthaler spoke several times to Defendant Cavanaugh before then calling his own attorney and speaking twice. Later that day, Patel called Rekenthaler two more times to coordinate her response to the government.

1134. Other Defendants took similar action in response to events in the States' investigation. Several were speaking frequently at or around the time a subpoena was issued, or when the States were engaging in substantive discussions with their counsel. As just one example, on July 17, 2018 the States sent a subpoena to Defendant Grauso, through his counsel. That same day, Grauso spoke to Defendant Aprahamian for more than twelve (12) minutes. The States then set up a conference call with Defendant Grauso's counsel for July 25, 2018. The day before that call – July 24, 2018 – Defendant Aprahamian spoke to his lawyer, and then shortly thereafter called Defendant Grauso. The next day, shortly after a conversation between the States and counsel for Defendant Grauso, Defendants Aprahamian and Grauso spoke again, this time for nearly seven (7) minutes.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	**MDL 2724** **16-MD-2724**
THIS DOCUMENT RELATES TO:	**HON. CYNTHIA M. RUFE**
State Attorneys General Litigation	**Civil Action No.** **17-3768**
THE STATE OF CONNECTICUT; THE STATE OF ALABAMA; THE STATE OF ALASKA; THE STATE OF ARIZONA; THE STATE OF ARKANSAS; THE STATE OF CALIFORNIA; THE STATE OF COLORADO; THE DISTRICT OF COLUMBIA; THE STATE OF DELAWARE; THE STATE OF FLORIDA; THE STATE OF HAWAII; THE STATE OF IDAHO; THE STATE OF ILLINOIS; THE STATE OF INDIANA; THE STATE OF IOWA; THE STATE OF KANSAS; THE COMMONWEALTH OF KENTUCKY; THE STATE OF LOUISIANA; THE STATE OF MAINE; THE STATE OF MARYLAND; THE COMMONWEALTH OF MASSACHUSETTS; THE STATE OF MICHIGAN; THE STATE OF MINNESOTA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF NEVADA; THE STATE OF NEW HAMPSHIRE; THE STATE OF NEW JERSEY; THE STATE OF NEW MEXICO; THE STATE OF NEW YORK; THE STATE OF NORTH CAROLINA;	**June 15, 2018** **PLAINTIFF STATES' CONSOLIDATED AMENDED COMPLAINT** **Non-Public Version: Filed Under Seal**

THE STATE OF NORTH DAKOTA;
THE STATE OF OHIO;
THE STATE OF OKLAHOMA;
THE STATE OF OREGON;
THE COMMONWEALTH OF PENNSYLVANIA;
THE COMMONWEALTH OF PUERTO RICO;
THE STATE OF RHODE ISLAND;
THE STATE OF SOUTH CAROLINA;
THE STATE OF TENNESSEE;
THE STATE OF UTAH;
THE STATE OF VERMONT;
THE COMMONWEALTH OF VIRGINIA;
THE STATE OF WASHINGTON;
THE STATE OF WEST VIRGINIA;
THE STATE OF WISCONSIN;
THE STATE OF WYOMING;

v.

ACTAVIS HOLDCO U.S., INC.;
ACTAVIS PHARMA, INC.;
ASCEND LABORATORIES, LLC;
APOTEX CORP.;
AUROBINDO PHARMA USA, INC.;
CITRON PHARMA, LLC;
DR. REDDY'S LABORATORIES, INC.;
EMCURE PHARMACEUTICALS, LTD.;
GLENMARK PHARMACEUTICALS, INC.;
HERITAGE PHARMACEUTICALS, INC.;
LANNETT COMPANY, INC.;
RAJIV MALIK;
MAYNE PHARMA INC.;
SATISH MEHTA;
MYLAN PHARMACEUTICALS, INC.;
PAR PHARMACEUTICAL COMPANIES, INC.;
SANDOZ, INC.;
SUN PHARMACEUTICAL INDUSTRIES, INC.;
TEVA PHARMACEUTICALS USA, INC.;
ZYDUS PHARMACEUTICALS (USA), INC.

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PLAINTIFF STATES' [PROPOSED] CONSOLIDATED AMENDED COMPLAINT

The States of Connecticut, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming, the Commonwealths of Kentucky, Massachusetts, Pennsylvania,

Puerto Rico and Virginia, and the District of Columbia (the "Plaintiff States"), by and through their Attorneys General, bring this civil law enforcement action against Actavis Holdco U.S., Inc., Actavis Pharma, Inc., Ascend Laboratories, LLC, Apotex Corp., Aurobindo Pharma USA, Inc., Citron Pharma, LLC, Dr. Reddy's Laboratories, Inc., Emcure Pharmaceuticals, Ltd., Glenmark Pharmaceuticals, Inc., Heritage Pharmaceuticals, Inc., Lannett Company, Inc., Rajiv Malik, Mayne Pharma, Inc., Satish Mehta, Mylan Pharmaceuticals, Inc., Par Pharmaceutical Companies, Inc., Sandoz, Inc., Sun Pharmaceutical Industries, Inc., Teva Pharmaceuticals USA, Inc., and Zydus Pharmaceuticals (USA), Inc. (collectively, the "Defendants") and allege as follows:

I. SUMMARY OF THE CASE

1. In July 2014, the State of Connecticut initiated a non-public investigation into suspicious price increases for certain generic pharmaceuticals. Over time, the investigation expanded and Connecticut was joined in its efforts by forty-five (45) additional states. As a result of the information and evidence developed through that investigation, which is still ongoing, the Plaintiff States allege that the Defendants, and several as-of-yet unnamed coconspirators, entered into numerous contracts, combinations and conspiracies that had the effect of unreasonably restraining trade, artificially inflating and maintaining prices and reducing competition in the generic pharmaceutical industry throughout the United States, including but not limited to, the markets for the following fifteen (15) generic drugs: Acetazolamide, Doxycycline Hyclate Delayed Release, Doxycycline Monohydrate, Fosinopril-Hydrochlorothiazide, Glipizide-Metformin, Glyburide, Glyburide-Metformin, Leflunomide, Meprobamate, Nimodipine, Nystatin, Paromomycin, Theophylline, Verapamil and Zoledronic Acid.

2. Plaintiff States also allege that Defendants participated in an overarching conspiracy, the effect of which was to minimize if not thwart competition across the generic drug industry. The overarching conspiracy was effectuated by a series of conspiracies that affected and continue to affect the market for a number of generic drugs identified in this Consolidated Amended Complaint.

3. The Plaintiff States focus here on the role of these named Defendants and their participation in and agreement with this overarching conspiracy. The Complaint describes conspiracies regarding the sale of specific drugs, and how these specific conspiracies are also part of the larger overarching conspiracy. The Plaintiff States continue to investigate additional conspiracies, involving these and other generic manufacturers, regarding the sale of other drugs not identified in this Complaint, and will likely bring additional actions based on those conspiracies at the appropriate time in the future.

4. Defendants' illegal agreements have raised prices, maintained artificially inflated prices and frustrated the potential of the industry to deliver great value to Plaintiff States and those they represent. Generic drugs are pharmaceutically equivalent to the referenced brand name drug in dosage, form, route of administration, strength or concentration, and amount of active ingredient. Generic drugs can save (and have saved) consumers and other purchasers of drugs tens of billions of dollars annually because generic drugs are a lower-priced alternative to brand name drugs. When the manufacturer of a branded drug loses the market exclusivity that comes with patent rights, generic drugs offer lower prices and greater access to healthcare for all consumers in the United States through genuine competition. A consumer with a prescription can fill that prescription not only with the brand name drug, but also with a generic version of

that drug, if one is available. State laws often require pharmacists to fill prescriptions with generic versions of the drug.

5. Typically, when the first generic manufacturer enters a market for a given drug, the manufacturer prices its product slightly lower than the brand-name manufacturer. A second generic manufacturer's entry reduces the average generic price to nearly half the brand-name price. As additional generic manufacturers market the product, the prices continue to fall slowly. For drugs that attract a large number of generic manufacturers, the average generic price falls to 20% or less of the price of the branded drug.

6. Generic drugs were one of the few "bargains" in the United States healthcare system. Health care experts believe cost savings from the growing number of generic drugs helped keep the lid on increasing health care costs. With the Hatch-Waxman Act of 1984, Congress designed the generic drug market to keep costs low and the market initially operated that way.

7. At some point, that price dynamic changed for many generic drugs. Prices for dozens of generic drugs have risen – while some have skyrocketed, without explanation, sparking outrage from politicians, payers and consumers across the country whose costs have doubled, tripled, or even increased 1,000% or more. The growing outrage and public reports of unexplained and suspicious price increases caused the State of Connecticut to commence its investigation in July of 2014. Shortly thereafter, Congress opened an inquiry and various companies acknowledged that a criminal grand jury investigation had been convened by the United States Department of Justice Antitrust Division.

8. Generic drug manufacturers argued publicly that the significant price increases were due to a myriad of benign factors, such as industry consolidation, FDA-mandated plant

closures, or elimination of unprofitable generic drug product lines. What the Plaintiff States have found through their investigation, however, is that the reason underlying many of these price increases is much more straightforward, and sinister – illegal collusion among generic drug manufacturers. Prices of many generic pharmaceuticals were and remain artificially inflated through collusive bid rigging and market allocation agreements designed to prevent price wars from occurring when key competitive opportunities arise in the marketplace.

9. Generic drug manufacturers, through their senior leadership and marketing and sales executives, have routine and direct interaction. The Defendants exploited their interactions at various and frequent industry trade shows, customer conferences and other similar events, to develop relationships and sow the seeds for their illegal agreements. These anticompetitive agreements are further refined and coordinated at regular "industry dinners", "girls nights out", lunches, parties, frequent telephone calls, emails and text messages.

10. The anticompetitive conduct -- schemes to fix and maintain prices, allocate markets and otherwise thwart competition – has caused, and continues to cause, significant harm to the United States healthcare system, which is ongoing. Moreover, executives at the highest levels in many of the Defendant companies, including but not limited to Defendants Rajiv Malik and Satish Mehta, conceived and directed many of these schemes.

11. Defendant Heritage is a consistent participant in the conspiracies identified in this Complaint, but the conduct is pervasive and industry-wide and the schemes identified herein are part of a larger, overarching understanding about how generic manufacturers fix prices and allocate markets to suppress competition. Through its senior-most executives and account managers, Heritage participated in a wide-ranging series of restraints with more than a dozen

generic drug manufacturers, all of whom knowingly and willingly participated. As a result of these conspiracies, Defendants reaped substantial monetary rewards.

12. Defendants' anticompetitive conduct falls principally into two categories, the overarching goal being to avoid price erosion and maintain inflated pricing within and across their respective broad product portfolios and, at times, increase pricing for targeted products without triggering a "fight to the bottom" among existing competitors. First, to avoid competing with one another and thus eroding the prices for a myriad of generic drugs, Defendants -- either upon their entry into a given generic market or upon the entry of a new competitor into that market -- communicated with each other to determine and agree on how much market share and which customers each competitor was entitled to. They then implemented the agreement by either refusing to bid for particular customers or by providing a cover bid that they knew would not be successful. Defendants agreed to allocate the market for Nimodipine, Meprobamate, Zoledronic Acid, and Doxycycline Hyclate Delayed Release, among others. These schemes reduced or eliminated competition for a particular drug, and allowed Defendants to maintain artificially supra-competitive prices in these markets throughout the United States.

13. Second, and often in conjunction with the market allocation schemes, competitors in a particular market communicated -- either in person, by telephone, or by text message -- and agreed to collectively raise and/or maintain prices for a particular generic drug. The Defendants collectively agreed to raise and/or maintain prices for Acetazolamide, Doxycycline Monohydrate, Fosinopril-Hydrochlorothiazide, Glipizide-Metformin, Glyburide, Glyburide-Metformin, Leflunomide, Meprobamate, Nimodipine, Nystatin, Paromomycin, Theophylline, and Verapamil, among others.

14. Defendants here understood and acted upon an underlying code of conduct that is widespread in the generics industry: an expectation that any time a company is entering a particular generic drug market, it can contact its competitors and allocate the market according to a generally agreed-upon standard of "fair share" in order to avoid competing and keep prices high. While different drugs may involve different sets of companies, this background understanding remains constant and is an important component of the Defendants' ability to reach agreements for specific drugs.

15. The Defendants knew their conduct was unlawful. The conspirators usually chose to communicate in person or by cell phone, in an attempt to avoid creating a record of their illegal conduct. The structure of the generic drug industry provided numerous opportunities for collusive communications at trade shows, customer events and smaller more intimate dinners and meetings. When communications were reduced to writing or text message, Defendants often took overt and calculated steps to destroy evidence of those communications.

16. As a result of the conspiracies identified in this Consolidated Amended Complaint (also referred to herein as the "Complaint"), consumers nationwide, including the Plaintiff States, paid substantially inflated and anticompetitive prices for numerous generic pharmaceutical drugs, and the Defendants illegally profited as a result.

****

218. Defendant Mayne entered the market for Doxy DR in or about February 2014. Even before launching the product, Mayne approached Heritage to discuss its plans. For example, on January 7, 2014, G.S., a Director of National Accounts at Mayne, spoke by phone with A.S., a National Accounts Manager at Heritage, for 12 minutes.

219. As a result of that conversation, Mayne's initial strategy was to avoid bidding on Heritage customers and to instead target Mylan, which at the time had roughly 60% of the Doxy

DR market. That strategy was not entirely successful, however. In an internal Mayne email discussion on February 21, 2014, after learning from a wholesaler that Mylan had retained its business with that wholesaler, C.S., Executive Vice President of Generic Products at Mayne, gave G.S. his understanding of the situation based on his experience in the industry: "How I read this is Mylan has given up several large customers to Heritage and they are not giving any more. We need to go after business at Heritage also." G.S. replied "Perhaps. . . ."

220. G.S. continued to communicate with A.S. about Doxy DR. They spoke by phone on March 13, 2014 and again four days later on March 17, 2014 for 17 minutes. Later that day, in an email to Malek and others at Heritage entitled "Midlothian intel on Doxy DR," A.S. recounted their latest conversation, as well as her current understanding with G.S.:

> I just spoke with [G.S.] of Midlothian (Mayne Pharma) about Doxy DR. She is the "one-man" show for that company -- she has all accounts including GPOs. She has not been able to get much share on the product yet, so she says.
>
> She did not bid OneStop, we have that customer.
> She did not bid Optisource, we have that customer, and she was aware that Rick had no interest in switching.
> She has been shut down at WalMart (Walmart said they couldn't go back to Mylan to reduce price again after we bid); and she was shut down at Rite Aid, Cardinal and ABC -- stating Mylan does not seem to want to give up any share. I shared info that we chose not to bid at Cardinal when asked.
>
> She will be bidding it on the HD Smith RFP.
> She will be targeting M&D now. She may go after NC Mutual but the usage is very small there.
> She already has some GPO business and they already have Publix and WinnDixie business. (Important for tracking reports).
> They are no where near a contract with WAG yet so she feels like that is not an option.
>
> She is feeling pressure from the Mayne Pharma folks to get some share on this product asap. I let her know what accounts we had locked up -- and I got the impression she would not target those folks.

221. Malek responded: "[t]hanks for the notes below. How well do you know [G.S.]?" A.S.'s response was "I know her pretty well from over the years in the industry."

222. Only two weeks later, however, Heritage learned that Mayne had made an unsolicited bid for Doxy DR to one of Heritage's large retail pharmacy accounts. On March 31, 2014, Malek emailed A.S. stating that Mayne "[t]ook a shot at our doxy dr [at the large pharmacy account]. Can you reach out?" A.S. responded: "Yes - I can."

223. The next day, on April 1, 2014, A.S. spoke with G.S. for 27 minutes. Immediately thereafter, A.S. sent a text message to Malek stating "[s]poke with [G.S.] of Midlothian. Said she had to go to [the large pharmacy customer]. Just got declined at Walgreens and went back a second time to cardinal and got declined again." Malek responded that Heritage "can't walk from [the large pharmacy customer]. Tell her to try Walmart."

224. G.S. called A.S. again the next day and they spoke for 11 minutes. Malek also emailed the CEO Glazer, stating "[w]e are going to have to take doxy dr 30% lower at [the large pharmacy customer]. They don't pick up the phone for less than 20% difference. In this case, we spoke with Midlothian and they have struck out completely on getting share. They have gone to wag [Walgreens] and cah [Cardinal Health] twice and mylan won't budge. Please let me know your thoughts."

225. A.S. and G.S. spoke again on April 9, 2014 for 3 minutes. A.S. then reported the conversation to Malek and N.O.: "Just got a call from [G.S.] at Midlothian and she said she has offers in to [McKesson] One Stop and Econdisc."

226. The next day, A.S. and G.S. exchanged a series of text messages:

> (1:14pm) A.S.: "Hi! It is [A.S.]! Just getting back to you on our discussion yesterday. I don't have either account but my boss said since we are strategically aligned with both they will probably not

> move. We will protect. Sorry – I know it is not the news you wanted to hear."
>
> (1:16pm) G.S.: "Thanks. Had he given up CVS we would not have gone after the other two. We'll just keep going back as soon as we can."
>
> (1:18pm) A.S.: "I am bummed for you. I am keeping my ears open to understand the landscape too. I will let you know what I find out. Best bets are the RFPs that are out now."
>
> (1:19pm) G.S.: "Need volume. Need one Large account."

227. Mayne continued to look for a large account over the next several months. Heritage did walk away from one account in May, 2014 when Mayne underbid Heritage's price. Upon learning of the unsolicited bid from Mayne, K.F., Associate Director of Pricing and Contracts at Heritage, asked Malek, "[l]et me know what you want me to do on this. Would like to keep, but at the same time, Midlothian will keep going after accounts." To that, Malek responded, "[w]e will walk."

228. In November 2014, Mayne again put in offers to McKesson One Stop and Econdisc. On November 20, 2014, M.E. sent an email to Malek and others at Heritage stating "Midlothian has taken another shot at our business on the Doxy 150mg at Econdisc and we have to respond to this in a timely manner."

229. The next morning, A.S. sent a text message to G.S. stating "Happy Friday! Do you have a minute to talk about Econdisc?" G.S. responded, "Yes. Call me." A.S. then called G.S. and the two spoke for 15 minutes.

230. A.S.'s notes reflect that when they spoke, she asked G.S. what her goals were with respect to Doxy DR. G.S. responded that Mayne was looking for market share; she told A.S. that Mayne had to get a "big customer like Econdisc." G.S. told A.S. that she had also submitted an offer to McKesson 10 days ago. A.S. floated the idea that Heritage may be willing to walk from

Econdisc if Mayne would agree not to price Doxy DR aggressively, and if Mayne would also agree to withdraw its offer to McKesson.

231. Immediately after speaking with G.S., A.S. sent an email to Malek with a subject line "spoke with [G.S.]" and stating "[c]an discuss any time."

232. After conveying to Malek what she had discussed with G.S., A.S. and G.S. exchanged several voicemails and text messages over the course of the day.

233. Later in the afternoon on November 21, 2014, N.O. sent an email to Malek and others at Heritage, stating "Midlothian coming after us @ McKesson. Will discuss with you on Monday." Malek immediately forwarded the email to A.S. who responded, "[G.S.] and I played phone tag after I had spoken to you for the second time so we will definitely connect Monday."

234. On November 24, 2014, A.S. and G.S. connected by phone and spoke for six (6) minutes. After speaking with G.S., A.S. emailed Malek stating "Just spoke with her ... can you call me anytime?" Within a half hour, after speaking with Malek, A.S. made a formal offer to G.S. by text message: "If you retract McK[esson] - we will give up Econ[disc]. I can talk anytime."

235. The next day, November 25, 2014, Malek emailed A.S. asking "[d]id you speak with [G.S.]?" A.S. responded "Yes -- told her exactly what we talked about. She is on vacation this week but was going to try to rescind McKesson. . . ." Malek ended the conversation by saying "[s]ounds like we know what we need to do."

236. In internal email communications in the weeks following this agreement, Heritage CEO Glazer confirmed that Heritage was "walking away from one [customer] so pricing would stabilize" and that Heritage "wanted to give Midlothian market share so they stop eroding" the price for Doxy DR.

237. A.S. and G.S. continued to communicate throughout December 2014, by text message and even in person at the American Society of Health-System Pharmacists ("ASHP") conference on December 9, 2014.

238. When Econdisc put the Doxy DR business out to bid again in January 2015, Heritage made sure that it bid a higher price than Mayne (a "cover bid"), which fulfilled Heritage's end of the agreement by "walking" from Econdisc. As one Heritage employee described it in March 2015, "[w]e basically walked from Doxy DR" at Econdisc.

239. This anticompetitive agreement between Heritage and Mayne continued until at least December, 2015, and the effects were felt for much longer. For example, in September, 2015, Heritage was approached by a large nationwide pharmacy chain requesting a bid on Doxy DR. A.S., initially excited about the opportunity, confirmed internally that Heritage had the capacity to bid. Malek cautioned, however, that "[w]e need to know why this is out to bid and find out who the incumbent is" before providing a response.

240. After finding out that the incumbent supplier was Mayne, A.S. reached out to G.S. by text message. G.S. confirmed that Mayne had no supply issues and that the pharmacy chain was simply shopping for a better price. In accordance with their agreement not to compete with each other and avoid price erosion, Heritage refused to provide a bid. That same day, A.S. sent another text message to G.S. reiterating Heritage's intent to abide by the agreement, stating: "Confirming we are not bidding." G.S. responded: "Thank you."

241. As a result of Heritage's unlawful agreement with Mayne, pricing for Doxy DR has been substantially higher than it would have been in a competitive market.

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333. Teva and Mylan were also in frequent communication during this time period. For example, J.N., Vice President of Sales at Mylan, spoke with D.R., a National Accounts Director at Teva, multiple times on May 9, 2014, including one call that lasted more than seven (7) minutes. The two continued to stay in close contact throughout the rest of 2014.

****

342. Several different Heritage employees were also able to successfully communicate with their counterparts at Aurobindo and reach agreements to raise the price of Glyburide.

343. For example, on May 8, 2014, D.L. of Heritage spoke by phone with P.M. of Aurobindo for sixteen (16) minutes.

****

348. Shortly after this text message exchange, A.S. reported to the Heritage sales team, in an email titled "Citron: Glyburide", that "Citron is launching soon – product is in their warehouse now. They have our version – rated to Micronase. They are on board – communication is good." In a reply the next day, N.O. cautioned that "[t]hey will still need to get some market share. May keep away initially, but we need to be prepared to lose some."

349. On June 26, 2014, A.S. informed her contact at a large wholesaler customer that Heritage's prices would be going up for Glyburide market wide by 200% as of July 1, 2014.

****

352. After reaching agreement with competitors Aurobindo, Citron and Teva to raise prices for Glyburide, Heritage began implementing the price increases. Price Increase Notices were sent out to customers beginning on June 26, 2014. By July 9, 2014, Heritage had been able to successfully increase prices for Glyburide to at least seventeen (17) different customers.

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356. After Heritage raised its price to one large wholesaler in July 2014, that wholesaler solicited bids from both Teva and Aurobindo in an effort to obtain lower pricing. On July 25, 2014, for example, the large wholesaler sent an email to N.P. at Teva indicating that there had been a "change in market dynamics" for Glyburide and certain other drugs and requesting a bid. The same day, the wholesaler sent an identical email to T.G. at Aurobindo.

357. This sparked immediate communication between the competitors as they tried to ensure uniformity and compliance with the scheme. For example, on July 25, 2014, Malek sent a text message to N.O. with the following direction: "Tell [T.G. at Aurobindo] to stay away from [the wholesaler]." N.O. then called T.G. and they spoke for more than thirteen (13) minutes. During that call N.O. conveyed the direction that Aurobindo should not provide a bid to the wholesaler. After conveying this message, N.O. responded to Malek's text message simply: "Done."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	**MDL 2724** **16-MD-2724**
THIS DOCUMENT RELATES TO: ***ALL ACTIONS***	**HON. CYNTHIA M. RUFE**

PRETRIAL ORDER NO. 70
(APPROVING REPORT AND RECOMMENDED ORDER AND ADOPTING PROTOCOL IMPLEMENTING THE COURT'S NOVEMBER 14, 2018 ORDER REGARDING PRIVATE PLAINTIFFS' MOTION FOR ACCESS)

AND NOW, this 31st day of January 2019, upon consideration of the attached Report and Recommended Order of Special Master David Marion and in light of the parties' agreement, it is hereby **ORDERED** that the Report and Recommendation is **APPROVED** and the Stipulated Protocol Implementing the Court's November 14, 2018 Order Regarding Private Plaintiffs' Motion for Access is **ADOPTED** as an Order of the Court.

It is so **ORDERED.**

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	CIVIL ACTION
	MDL 2724
	16-MD-2724
This Document Relates to:	HONORABLE CYNTHIA M. RUFE
ALL ACTIONS	

REPORT AND RECOMMENDED ORDER SUBMITTED TO HONORABLE CYNTHIA M. RUFE BY SPECIAL MASTER DAVID H. MARION ON THE SUBJECT OF A PROTOCOL GOVERNING DISCLOSURE TO THE PARTIES OF DOCUMENTS SUBPOENAED AND COLLECTED BY THE STATES' ATTORNEYS GENERAL

On November 14, 2018, this Court granted Private Plaintiffs' Motion for Access to certain documents and materials obtained by the State Plaintiffs, from certain named parties and non-parties. With the Court's approval, I undertook to assist the parties in developing a Protocol to govern the disclosures of such documents and to resolve a number of significant issues relating to such disclosures.

This effort involved a number of discussions and personal meetings with lead and liaison counsel and other attorneys for plaintiffs, defendants, the State Plaintiffs and the US Department of Justice. I requested that each side submit a proposed Protocol, and held a meeting to discuss the differences in their proposals. When it appeared that no compromise was likely on certain issues, I proposed to prepare an "informal recommendation" draft which could lead to further discussions both with and without the Special Master. After each side proposed changes to my "informal recommendation", we held another meeting during which I indicated clearly where I would come out were I required to recommend an order to the Court. We scheduled a final

meeting on January 29, 2019, before or at which the parties would make a final effort to agree – or at least come as close as they could to my suggestions. I made clear that my suggestions were based on (a) achieving the quickest possible turnover of documents, while (b) providing procedures to protect the legitimate rights and privileges of both parties and non-parties, and (c) adhering to the dictates of this Court's Order granting access to such documents.

At the January 29 meeting, the parties presented a new draft Protocol to which they had agreed, but wanted to discuss with me paragraph by paragraph, with the thought that, if I agreed to their revised draft, it could be presented to the Court for approval. The parties further agreed that the various steps required therein would commence immediately.

Thus, having had that discussion, I now recommend to the Court for approval the parties jointly titled "Stipulated Protocol," attached hereto as Exhibit "A".

Respectfully submitted,

BY: 

David H. Marion, Special Master
WHITE AND WILLIAMS LLP
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Philadelphia, PA 19103-7395
Phone: 215.864.6870

Dated: January 30, 2019

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	**MDL2724** **16-MD-2724** **HON. CYNTHIA M. RUFE**

THIS DOCUMENT RELATES TO:
ALL ACTIONS

STIPULATED PROTOCOL IMPLEMENTING THE COURT'S NOVEMBER 14, 2018 ORDER REGARDING PRIVATE PLAINTIFFS' MOTION FOR ACCESS

1. On November 14, 2018, the Court granted Private Plaintiffs' Motion for an Order Authorizing Access to ... Certain Materials Obtained by the State Plaintiffs. MDL Dkt. No. 758 ("Order") at 11.

2. The State Attorneys General Plaintiffs (the "State Plaintiffs") will "disclose to Private Plaintiffs[1] and Defendants all investigatory subpoenas served on or after the date of filing of the initial State Complaint" and on or before June 18, 2018, and will "disclose in writing whether documents or other information has been produced in response to such subpoenas," as soon as practicable. Order at 11-12 ¶ 2(b).

3. "All AG Documents in the possession of the Connecticut Attorney General's Office must be lodged with this Court under the procedures delineated by the Connecticut Supreme Court." Id. at 11-12 ¶ 2(d). Given the impracticality of physically or electronically lodging millions of documents with the Court, the parties agree that the State

[1] "Private Plaintiffs" include Direct Purchaser Plaintiffs, End-Payer Plaintiffs, Indirect Reseller Plaintiffs and Kroger Plaintiffs.

Plaintiffs maintain custody of all documents subject to this Protocol and treat them as if they had been lodged with the Court under Connecticut Court Rule 7-4C. Accordingly, all such documents will be treated as temporarily "under seal" pending completion of the procedures outlined below. See Order at 11-12 & ¶¶ 2(d)-(e).

4. The provisions of PTO 53 regarding confidentiality will apply to all documents accessed under this Protocol. Order at 11. Unless otherwise agreed by the parties prior to the entry of this protocol, the following procedure will be followed with regard to the confidentiality of documents made accessible under this protocol. The State Plaintiffs will stamp all documents obtained from parties as "Outside Counsel Eyes Only Until 5/29/2019" (120 days from entry of the protocol). Promptly after stamping, the State Plaintiffs will provide Plaintiffs and Defendants access to the party documents hereunder. Defendants will have 120 days from entry of this protocol to make confidentiality designations that are compliant with PTO 53. They will make such designations, if any, by submitting overlays (i.e., images only) to Private Plaintiffs, State Plaintiffs and Defendants. Any documents that Defendants do not timely designate will become non-confidential.

5. The State Plaintiffs will take reasonable steps to ensure that no documents are "produced in a manner that discloses whether the documents were provided to the Department of Justice." Order at 12 ¶ 2(f). In many instances, nothing will have to be done to accomplish this. Where something needs to be done, the Plaintiff States will coordinate with the Department of Justice ("DOJ") to determine what is necessary. Order at 12 ¶ 2(f).

6. Subject to the subsequent "claw back" procedure discussed below, the State Plaintiffs promptly will provide Private Plaintiffs and Defendants access to all "AG Documents" (as defined in the Order at 3 ¶ 2) that the State Plaintiffs obtained on or before October 31, 2017, in the course of their investigation of the generic drug industry. Order at 11-12 ¶ 2 (c).

7. Unless otherwise agreed by the parties prior to the entry of this protocol, if Defendants believe the procedures outlined in paragraph 4 above and/or existing protective orders are insufficient to protect (a) competitively sensitive or trade secret information; (b) business information unrelated to allegations in any MDL pleading; or (c) personal or embarrassing information unrelated to any allegation in the MDL, Defendants can submit an objection to Plaintiffs seeking to "claw back" such documents. Absent good cause (including for such issues as document volume), objections will be made within 30 days after the provision of access to a Defendant's documents. Objections shall identify the documents at issue, together with the grounds for objection. If Plaintiffs disagree with such an objection, it will be considered by the Special Master. Defendants may not seek to claw back documents based on grounds other than those described above or as set forth in PTO 53 pertaining to inadvertent production of privileged material.

8. Once the State Plaintiffs provide the parties to the MDL with copies of their investigative subpoenas under Paragraph 1 of this Protocol, the Private Plaintiffs will promptly notify all non-parties to the MDL who produced documents to the States on or before October 31, 2017, in the course of their investigation in the generic drug industry, that absent objection from such non-parties, their documents will be made available to

Private Plaintiffs and Defendants subject to existing restrictions on Discovery Material, including the limitation that such Discovery Material may be used solely for purposes of prosecuting, defending, or attempting to settle the MDL. Order at 12 ¶ 2(d). Such notice will be "sent by overnight mail to each nonparty's last known address and by email, where known." Order at 12 ¶ 2(d).

a. Non-parties may file Objections to Access to their documents with the Special Master within 30 days of receiving notice under this Protocol. Objections to Access shall identify the documents at issue, together with the grounds for objection. If a non-party's Objections to Access address whether or how production of certain categories of documents would result in identifying documents that were produced to DOJ, that portion of the Response shall be submitted to the Special Master and not served on any other party to the MDL other than the State Plaintiffs.

b. Private Plaintiffs and/or Defendants may oppose such objections, which disputes will be resolved by the Special Master. The State Plaintiffs promptly will provide Private Plaintiffs and Defendants access to any non-party documents ordered to be provided by the Special Master. Order at 12 ¶ 2(d).

c. If a State Plaintiff's Response to Objections to Access includes information concerning disclosure to DOJ or discussion of particular content of specific documents, that portion of the Response shall be submitted to the Special Master and not served on any other party.

d. The State Plaintiffs will provide Private Plaintiffs and Defendants access to all documents originally produced by non-parties who do not timely file objections, promptly after expiration of the time to object. Order at 12 ¶ 2(d).

9. The Special Master and Special Discovery Master shall hold such arguments and/or conferences as may be necessary to resolve any disputes relating to the production of documents pursuant to the Order.

10. The parties, in coordination with the Special Master, will endeavor to maximize the speed, and minimize the burden, of providing access to documents and investigatory subpoenas pursuant to this Protocol. In that regard, the State Plaintiffs need only provide access to documents and investigatory subpoenas to one Private Plaintiff (to be selected by Private Plaintiffs) and one Defendant (to be selected by Defendants). The selected Private Plaintiff and Defendant will be responsible for providing access to the other parties on their side and for providing notice to all MDL parties regarding same. Order at 12 ¶ 2(c).

11. Any Defendant in the MDL that is not named as a defendant by the State Plaintiffs may apply to the Court to be considered a non-party pursuant to Paragraph 8 of this protocol, provided that Defendant notifies Private Plaintiffs and State Plaintiffs prior to entry of this protocol of its intention to do so. Any such application will be made no later than 14 days after entry of this protocol and will not delay access to the documents of any other Defendant. The provisions of Paragraph 4 above shall apply to all Defendants, including any Defendant who files an application under this paragraph; provided, however,

that State Plaintiffs will not provide access to materials produced by any Defendant that files an application under this paragraph until the application is resolved.

12. Access to certain documents created by a Party or Non-Party specifically for provision to the State Plaintiffs – such as transmittal letters to the State Plaintiffs, presentations to the State Plaintiffs, documents created by counsel for the purpose of aiding the State Plaintiffs' investigation, white papers to the State Plaintiffs, and other correspondence with the State Plaintiffs regarding the investigation – will not be produced by the State Plaintiffs at this time and will be deferred until the resolution of a motion by Private Plaintiffs regarding the discoverability of such documents.

IT IS SO STIPULATED.

Dated: January 29, 2019

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APPROVED, Subject to Court Approval:

/s/ David H. Marion
David H. Marion, Esquire
Special Master

APPROVED:

/s/ Cynthia M. Rufe

Cynthia M. Rufe, J.

January 31st, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	**MDL 2724** **16-MD-2724**
THIS DOCUMENT RELATES TO: ALL ACTIONS	**HON. CYNTHIA M. RUFE**

Plaintiff States' Response and Objections to Special Master David H. Marion's August 16, 2019 Report and Recommended Order Setting Forth a Case Management Order and Discovery Schedule

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Introduction

While joining Plaintiffs' Joint Brief, the Plaintiff States ("States") file this additional response to the Special Master's Aug. 16, 2019 Report and Recommended Order Setting Forth a Case Management Order and Discovery Schedule ("R&R") [1] to highlight the States' experience from our investigatory work and the States' focus on vindicating the public interest.

The States object to applying search terms to Defendants' custodial files as recommended by the Special Master. Instead, the States believe Defendants should be required to produce full custodial files for a limited number of certain agreed-upon custodians, which Defendants may review only for privilege and produce by a date certain to Plaintiffs. Based on the States' experience reviewing both custodial files and productions resulting from search terms during our investigation, the States know that full custodial files are essential to understand fully and appropriately link thousands of telephone calls, emails, text messages, and other communications between employees of generic drug manufacturers. Defendants should review full custodial files for privilege only and produce them to Plaintiffs. Prohibiting a subjective review for "relevance" is appropriate not only because it will enable much faster production of documents, but also because Defendants' custodians hid their collusion through codes, phone calls, and in-person meetings. Given this pervasive concealment, Defendants' document reviewers cannot reliably determine relevance and responsiveness.

Accordingly, this Court should order Defendants to collect the full custodial files identified by Plaintiffs, review them only for privilege, and produce them by a date certain to Plaintiffs.

[1] In this Response, the States refer to the Special Master's August 16 Report & Recommendations as the "R&R." The States refer to Exhibit A to the R&R, the Special Master's "Proposed Case Management Order and Discovery Schedule," as the "CMO." Additionally, the States refer to the Special Master's July 31 "Informal Report & Recommendations" as the "Informal R&R."

Background

The States allege that Defendants engaged in an overarching multi-drug conspiracy to fix, maintain, and stabilize prices, rig bids, and engage in market and customer allocation. States' Am. Compl., *Connecticut v. Actavis Holdco U.S., Inc.*, 16-cv-2724 ("CAC"); *Connecticut v. Teva Pharmaceuticals USA, Inc.*, 19-cv-2407 ("Teva Compl."). The States have obtained information so far largely through civil investigative demands ("CIDs") issued during their investigation of the industry. Many Defendants failed to comply with the States' CIDs or complied only in part. *See* Plaintiff States' Motion to Compel Production of Documents Dating from 2006 for Certain Specific Requests Relating to Overarching Conspiracy, No. 17-cv-03768-CMR, Dkt. No. 32, at 8. On February 23, 2018, Plaintiffs served their first request for production in the MDL on Defendants. After nineteen months, Defendants still have produced virtually no substantive documents. Given the posture of this MDL, the most efficient way to ensure that the parties receive the discovery they need to prove or disprove the claims in a timely manner is to order the production of full custodial files for key custodians designated by Plaintiffs.

On July 16, 2019, the Special Master requested that all parties submit letter briefs and proposed Case Management Orders, including a Discovery Schedule. On July 29, Plaintiffs submitted two letter briefs proposing:

1) a timeline for the completion of discovery, summary judgment motions, *Daubert* motions, and class certification motions; criteria for selection of bellwether cases or claims;[2] and segmented components of discovery by party and document type; and
2) that Defendants should produce full custodial files for a subset of key custodians selected by Plaintiffs from the much larger list of agreed-upon custodians.

Defendants proposed a phased approach, setting a cutoff date after which any new or amended complaints – including the States' May 2019 Teva complaint – would be placed in a "Suspense

[2] The States will provide comment on the structure and timing of any trial, including a bellwether trial, after entry of the CMO.

Docket."

On July 31, the Special Master issued an Informal Report and Recommendation Setting Forth a Case Management Order and Discovery Schedule ("Informal R&R"), which proposed in part, "Defendants shall apply the agreed search terms, if appropriate, to the agreed ESI sources and may review the identified documents for privilege, but may not withhold any documents based on relevance or responsiveness prior to production." Although the Special Master recognized that "Plaintiffs presented a strong case in support of their 'full custodial file' option," R&R at 2, he requested a compromise proposal with which Plaintiffs could live but did not prefer. Although Plaintiffs believe applying search terms would be an inferior approach, Plaintiffs complied with the Special Master's request and proposed an alternative to the production of full custodial files. Plaintiffs proposed that Defendants run broad search terms – not limited to drugs or Defendants already in the MDL – across all agreed-upon custodial files and produce all "hits" to Plaintiffs. Defendants would only be permitted to withhold privileged documents.

At the August 1 joint meeting to discuss the Informal R&R, Plaintiffs explained:

1) full custodial files are best suited to prove Plaintiffs' claims and to disprove Defendants' affirmative defenses;
2) search terms are an inferior mechanism for identifying relevant documents due to the nature of the conspiracy (which included concealment and was facilitated by codes and cryptic allusions through various mediums, including text messages and emails); and
3) Defendants' proposal would further delay progress of this litigation.

On August 6, the parties submitted supplemental edits, including proposed deadlines, to the informal recommendation. After the Special Master's *ex parte* meetings on August 7, he provided his formal Report and Recommended Order Setting Forth a Case Management Order and Discovery Schedule ("CMO"), incorporating much of Plaintiffs' compromise (not preferred) proposal.

Argument

This Court should order Defendants to produce full custodial files for selected key custodians for several reasons.

First, production of full custodial files will expedite discovery and capture relevant documents. Courts routinely order production of full custodial files to efficiently manage discovery in mass litigations like this one.

Second, full custodial files are essential to understand the full scope of the conspiracy and to combat Defendants' defenses. Due to the nature of the alleged antitrust conspiracy in this MDL, understanding the context of particular documents is critical; full context is essential to connect inter-competitor communications and to refute Defendants' "justifications."

Third, full production with review only for privilege is appropriate because the custodians relied on subterfuge, using codes and obscure allusions to hide their conspiratorial activity. Search terms are unlikely to capture these coded and cryptic communications. Even if they were to capture relevant documents, allowing Defendants to review for relevance or responsiveness would result in further delay; it would also inevitably lead to unilateral and virtually unchallengeable decisions by Defendant's document reviewers to exclude as "irrelevant" documents that are, in fact, *highly* relevant when reviewed in light of other evidence, such as phone records.

Fourth, Plaintiffs' requested discovery is proportional to the needs of the case and is not unduly burdensome; rather, Plaintiffs' proposal lessens any potential burden by providing a faster and less expensive way to obtain the discovery.

Fifth, the Court's Pretrial Orders will sufficiently protect any sensitive personal information in the custodial files.

To Expedite Discovery and Capture Relevant Documents, Defendants Should Produce Full Custodial Files Instead of Applying Search Terms to Custodial Files.

Prompt production of full custodial files will significantly expedite discovery and, in turn, potential resolution of this case. Based on our experience reviewing full custodial files from certain custodians, the States know that search terms will not reliably capture all relevant documents. Defendants have shown an inability to identify and produce responsive documents. Production of the full file, with review only for privilege, will allow discovery to go full speed. Moreover, courts routinely order production of full custodial files to efficiently manage discovery in large litigations.

In antitrust cases, "[b]road discovery is permitted because direct evidence of an anticompetitive conspiracy is often difficult to obtain, and the existence of a conspiracy frequently can be established only through circumstantial evidence, such as business documents and other records."[3] The scope of discovery permitted under the Rules rests in the sound discretion of the trial court and will not be disturbed absent an abuse of discretion.[4]

Custodial file productions can be helpful discovery tools in large, complex cases, particularly in pharmaceutical cases. As one commentator has noted in an analogous area of law, "[t]he more modern and logical method of record production in mass torts [litigation] is that the defendant be ordered to turn over 'everything' or 'all' documents."[5] As this Court has recognized, in an expansive multi-district litigation like this case, streamlining procedures are essential to efficient

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[3] *In re Automotive Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 7200711, at *3 (E.D. Pa. Oct. 29, 2004).

[4] *Wells v. JPC Equestrian, Inc.*, No. 3:13–CV–2575, 2014 WL 5641305, at *3 (M.D. Pa. 2014); *Wisniewsky v. Johns-Manville Corp.*, 812 F.2d 81, 90 (3d Cir. 1987) ("The conduct of discovery is a matter for the discretion of the district court and its decisions will be disturbed only upon a showing of an abuse of this discretion"); *Marroquin–Manriquez v. I.N.S.*, 699 F.2d 129, 134 (3d Cir. 1983) (same).

[5] Rheingold, LITIGATING MASS TORT CASES § 8:17 "Production and definitions" (June 2019) (The "more traditional method of putting the burden on the plaintiffs to serve demands for production itemizing the records desired, . . . as one would do in an individual case, . . . is not very satisfactory for [mass tort litigation] since plaintiffs have to keep going back and asking for records and arguing about what should have been produced but was not.").

and effective case management, especially in discovery.[6] The production of full custodial files best meets this Court's desire to accelerate discovery and to minimize future discovery disputes. Indeed, as discussed more fully below, this case is particularly well suited to full custodial productions because so much of the time, employment, and work of the selected key custodians concerned the conspiracy and because of the documented and pervasive use of code words and other methods of deceit used by the conspirators to avoid detection.

Indeed, this Court has already ordered the production of full custodial files. When private plaintiffs sought access to the States' investigatory materials (which later were deemed discovery under the AG Access Protocol), some Defendants argued against such access by pointing to their production of full custodial files in the States' investigation. Defendants argued that private plaintiffs should not have access to full custodial files until after Defendants reviewed the files for responsiveness. *See, e.g.,* Certain Defs.' Resp. in Opp. to Private Plaintiffs' Mot. for Unfettered Access to Law Enforcement Investigatory Materials, ECF 628, at 9-10 (June 19, 2018). This Court rejected that argument and granted access without any limitation in pursuit of "a comprehensive approach to discovery." Order Granting Access, ECF 758, at 12; *see id*. at 4 (summarizing Defendants' argument); *id.* at 10 (granting access without any limitation).

Further, as set forth more fully in Plaintiffs' Joint Brief, this Court's decision to allow access to complete custodial files is supported by applicable law. *See* Pls.' Jt. Br. § III (A) (2) at 17-20 (discussing cases granting motions to compel production of entire custodial files).

[6] *See* Nov. 20, 2018 Transcript of Status Conf. at 28:12-29:4 (noting "the structure of the MDL is important to me in terms of how we proceed,… because I do think that the structure is unwieldy in many ways. … I see too many places in the structure of this MDL where we would not be able to readily achieve timely briefing, timely discovery, and then of course whatever would come after that. And I don't know if there isn't another way that might be better to handle these, without anyone waiving any parties' rights and interests. Just a way to streamline discovery is my target right now. And that should also signal to everyone that it's well and high time in this judge's mind that discovery go full speed.").

A. Full Custodial Files Are Essential to Understand the Scope of Defendants' Collusion and to Combat Defendants' Defenses.

Full custodial files are needed to understand the context of the pervasive competitor communications in which Defendants engaged and to connect these inter-competitor communications. The contents of these files are central to the antitrust violations alleged in the States' complaints. Plaintiffs' allegations and evidence show that these key custodians spent much of their daily activity maintaining these illegal agreements. The majority of materials in these files are likely responsive and relevant to Plaintiffs' claims, or are likely to lead to relevant information.

As just one example, Mylan's Vice President of Sales, Defendant Jim Nesta, communicated directly with competitors to develop or facilitate conspiratorial relationships, including with Teva. *See* Teva Compl. ¶¶ 154, 157, 581, 636, 851; CAC ¶¶ 333, 448. Nesta had frequent inter-competitor communications (often multiple times a day) over several years, including over 7,000 calls with competitors. Teva Compl. ¶¶ 171, 174, 176, 186. Most importantly, those communications reflect patterns of communications around price increases and other strategic market decisions: they were often made on the day before the drug price increase became effective, *see, e.g., id.* ¶¶ 847 – 851 (on the day before Teva raised prices on a number of different drugs, Teva discussed the price increases with Mylan's Nesta and other competitors), or before launching a new drug in order to effectuate a market allocation plan. *See, e.g., id.* at ¶¶ 171–176 (noting Nesta had calls with other competitors before the Fenofibrate launch date to allocate the market for that drug). Thus, evidence relating to competitor communications will be found throughout Nesta's custodial files, and his full custodial file is required to connect the communications to illegal coordinated activity. Nesta is not unique – Plaintiffs anticipate the same for all selected custodians.

Full custodial files are also necessary to probe potential defenses. Because Defendants have not identified justifications or non-collusive explanations for the evidence set forth in the complaints, Plaintiffs' search terms cannot focus specifically on defenses or alternative explanations that Defendants might assert. Full custodial files will provide the discovery to which Plaintiffs are entitled on those potential defenses or alternative explanations.

B. Production of Full Custodial Files After Review Only for Privilege Is Appropriate Because Defendants Have Proven That They Are Unable to Determine Relevance and Responsiveness.

The States agree with the Special Master's recommendation that Defendants review the custodial files only for privilege and not for relevance. As this Court has recognized, "[T]he particular nature of the antitrust conspiracy allegations in the MDL mean that an understanding of the context of particular documents may be critical, which could be impeded by the withholding or redaction of responsive documents or document families." *See* April 10, 2019 Order on Proposed ESI Protocol, Dkt. No. 938, at 1. Because Defendants cannot reliably evaluate relevance and responsiveness of documents, full custodial files for these key custodians are needed.

The importance of each document to the States' claims is only evident when evaluated in context. The context enables the States to connect the evidence and to support inferences concerning competitor communications as well as apparent coordinated activities among competitors. Usually, the responding party is in the best position to determine relevance, but Defendants' counsel have repeatedly asserted in court that they are unable to determine what would be relevant to the complaint in this case. In the meet-and-confer process, Defendants also have failed to propose (as provided for in PTO 95 ¶ 9.2) search terms that could aptly capture all relevant documents or exclude irrelevant documents. Tellingly, multiple Defendants have improperly attempted to claw back relevant information– claiming it was irrelevant –which demonstrates that Defendants cannot understand or accurately evaluate their relevance or responsiveness.[7]

In addition to the examples described in the Plaintiffs' Joint Brief, the States highlight the effort by Taro to claw back a large number of documents specifically relevant to their recently-

[7] This admission is amplified by, for example, Teva's initial request to claw back nearly 100,000 documents produced pursuant to Pretrial Order 70, many of which were highly relevant to, or even quoted or referred to in, the States' May 10, 2019 Complaint. *See* Plaintiffs' Jt. Br. §III (A) (1) at 13-16; Pretrial Order No. 70, ECF 841, at Exhibit A ¶ 7 ("PTO 70"). Actavis, Sun, Taro, and Upsher-Smith also have sought to claw back highly relevant documents under PTO 70, including documents relevant to Plaintiffs' allegations of price-fixing and the "fair share" agreement. *Id.*

filed Teva Complaint.[8] In addition to including several direct competitor communications, the 11,559 documents Taro proposed to claw back included hundreds of documents relating to drugs that are the subject of the States' Teva Complaint, including:

- 166 documents relating to the drug Enalapril, including emails directly relating to Taro's entry in the market in 2013 (the States allege that Taro's entry was the subject of illegal market allocation). *See, e.g.*, TARO_000176271; TARO_000427419; TARO_000177363; TARO_000177366; TARO_000177690; TARO_000177798.
- 272 documents relating to the drug Adapalene Gel, including documents listing Taro's sales, costs of goods, and comparisons of Taro's sales of Adapalene to "fair share." *See, e.g.*, TARO_000424726.
- 316 documents relating to the drug Etodolac.
- 536 documents relating to various formulations of the drug Fluocinonide.
- 525 documents relating to various formulations of the drug Carbamazepine.
- 158 documents referring to Clomipramine, including one document directly quoted in the States' Teva Complaint. *See* TARO_000157310.
- 632 documents relating to the drug Warfarin.
- 262 documents referring to Ketoconazole, including emails relating directly to Taro's decision to follow Teva's price increase in April 2014 (which the States allege was the subject of collusion). *See, e.g.*, TARO_000196210; TARO_000196260; TARO_000196137.

Taro also sought to claw back price increase notices sent to, and supply contracts with, the Minnesota Multistate Contracting Alliance for Pharmacy ("MMCAP"), a group purchasing

[8] Taro's attempt to claw these documents back as part of the AG Access Protocol (PTO 70) does not ultimately affect the States' access to these documents as they were obtained by the States pursuant to a lawfully issued investigatory subpoena. These examples are provided here merely to reinforce the States' point that Defendants are unable to properly determine relevance in this case.

organization acting on behalf of numerous Plaintiff States during the relevant time period).

"[A] party should not be limited by its opponent's theory of the case in determining what is discoverable."[9] This is particularly true here, where Defendants would be reviewing their files independent of the telephone records and other evidence of competitor communications, and thus are likely to construe as benign what actually is significant. For example, an internal Teva email from a sales representative to Defendant Nisha Patel in early May 2013 stated simply "[redacted]"[10] That may seem benign without the context of other documents, including phone records. Those phone records show that, shortly after Teva hired Patel in April 2013, she quarterbacked a wide-ranging price-fixing scheme, and, at that time, was in the midst of collecting information about, colluding with, and ranking Teva's competitors based on their "[redacted]" (i.e., willingness to collude on prices) to effectuate the scheme. Teva Compl. ¶¶ 565-600. Even if this document could be identified by applying search terms, it likely would be removed by subjective review, despite its relevance. The States' complaints include many other examples. *See, e.g.*, Teva Compl. ¶ 497 ([redacted]); ¶ 499 ([redacted]); ¶ 956 ([redacted]). Defendants' attempts to claw back numerous relevant documents (which were cited in the States' complaints) further reflect their unreliability in determining relevance and responsiveness. Defendants should not be permitted to determine relevance, but should instead be required to produce full custodial files.[11]

[9] *Trask v. Olin Corp.*, 298 F.R.D. 244, 265 (W.D. Pa. 2014) (internal citation omitted).

[10] *See* TUS000604596 (a document produced by Teva as part of Nisha Patel's custodial file).

[11] Alternatively, if full custodial files are not required to be produced, at a minimum, the Court should sustain the Special Master's recommended CMO and order ¶3, which provides that

C. Search Terms Cannot Capture the Concealed and Coded Competitor Communications That Are Relevant to the Plaintiffs' Case.

Where a party has taken steps to conceal information, courts permit a broader search.[12] In a conspiracy case like this where Defendants have taken active steps to avoid documentation of their wrongdoing, some highly relevant – indeed damning – documents will not be identified using search terms. Further, the use of search terms could reward Defendants' efforts at concealment. For example, the following series of documents would not be hit using search terms:

- [redacted] CAC ¶ 456; HER-CTAG-000001416.
- [redacted] ABUSA_AG-00150467.
- [redacted] Teva Compl. ¶ 647. [redacted]

Defendants should utilize search terms, not limited by drug, across all agreed-upon custodians, and to produce all responsive documents to Plaintiffs without a relevance review. *See* Pls.' Jt. Br. § III (B) at 21-24.

[12] *United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 47 (D. Conn. 2002) (in this criminal matter, the Court noted, "[c]omputer searches, especially those seeking evidence of deletion, are technical and complex and cannot be limited to precise, specific steps or only one permissible method. Directories and files can be encrypted, hidden or misleadingly titled, stored in unusual formats, and commingled with unrelated and innocuous files that have no relation to the crimes under investigation. Descriptive file names or file extensions such as '.jpg' cannot be relied on to determine the type of file because a computer user can save a file with any name or extension he chooses"); *United States v. Welch*, 401 F. Supp. 2d 1172, 1180–1181 (D. Kan. 2005) ("[c]omputer storage devices … can store the equivalent of thousands of pages of information … when the user wants to conceal criminal evidence, he often stores it in random order with deceptive file names. This requires searching authorities to examine all the stored data to determine whether it is included in the warrant").

[redacted]

Obtaining full custodial files for key custodians from every Defendant will allow Plaintiffs to provide appropriate context for seemingly benign conduct. *See also* Pls.' Jt. Br. § III (A) (1) at 10-12 (describing seemingly innocuous documents which are critical parts of the conspiracy). An internal communication about what is "fair," "reasonable," "rational," "acceptable," "sufficient," "all right," "adequate," "okay," "appropriate," "fitting," or "fine" supports an inference of a conspiracy when Plaintiffs know that a participant in that internal communication just spoke with a competitor. Teva Compl. ¶¶ 173, 180-81, 191, 196. Defendants had countless collusive communications via phone, text, email, and social media using cryptic language that, viewed in isolation, might seem innocuous and irrelevant.

Even if search terms were able to capture these collusive communications (and the States believe they would not), these relevant documents would likely be excluded from Defendants' document productions if Defendants were permitted to review for relevance before producing the documents to Plaintiffs. Relevant documents will be missed because Defendants often used cryptic and opaque language in their communications, which requires more context and review of related documents that a contract review attorney would not have or be able to research. In a typical document review, contract reviewers receive the document requests and some guidelines. The documents are divided up and "batched" out to the reviewers (without any pre-sorting or other organization). They review one document at a time and do not conduct additional searches for related documents or cross-check documents against others.

Additionally, Defendants had numerous communications, which were followed up by phone calls, text messages, and intentionally opaque emails about the collusive conduct. A reviewer assigned to review her quota of documents per hour will not be able to understand the context and link the communications together to determine relevance – nor can they, without knowledge of all communications and access to important tools (e.g., phone records). Without the context of full custodial files and the production of otherwise innocuous-seeming materials, large quantities of relevant evidence will be overlooked and never produced to Plaintiffs.

Search terms are also inappropriate because the pervasive collusion utilized specialized vocabulary, inconsistent abbreviations, and opaque language. Defendants' sophistication with hiding the conspiracy varied by Defendant. *See* CAC ¶¶ 454-462 (noting instances when generic manufacturer employees deliberately avoided generating evidence of their collusion). For example, unlike some of its larger competitors, Heritage was comparatively inexperienced with collusion: it concealed and obfuscated more over time, including avoiding putting things into writing. CAC ¶¶ 405 ([redacted]); ¶ 460 ([redacted]). *See generally* CAC ¶¶ 454-62. However, other larger competitors were very experienced at communicating with competitors. This experience led to more sophisticated concealment and development of code words to communicate, such that the usual search terms would be inadequate.[13] *See, e.g.,* Plaintiffs' Jt. Br. at § III (A) (1) at 12; Teva Compl. ¶¶ 780 ([redacted]); HER-CTAG-000020730 ([redacted]). *See also Teva Compl.* ¶¶ 1122-1133; CAC ¶¶ 454-462. Due to Defendants' attempts to conceal and destroy evidence of their collusion, a broader search for what evidence remains is both appropriate and essential.

Because search terms are unlikely to capture such relevant communications – and even if they did, such documents might nevertheless be coded "irrelevant" by subjective reviewers – compelling Defendants to produce complete custodial files is the most effective way to ensure production of all relevant and responsive documents.

[13] *See In re Fasteners Antitrust Litig.*, No. CIV.A. 08-MD-1912, 2011 WL 3563989, at *5 (E.D. Pa. Aug. 12, 2011) ("Price-fixing conspiracies are inherently self-concealing.").

D. The Burden of Producing Full Custodial Files Is Low and Proportional to the Needs of the Case.

Federal Rule of Civil Procedure 26's proportionality standard favors Plaintiffs' request for full custodial files. Rule 26(b), as amended in December 2015, provides that parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Rule 26(b)(1) expressly provides that discovery "need not be admissible in evidence to be discoverable." Thus, the only question under the amended Rule 26 is "whether the discovery sought meets the standard set out in Rule 26(b)(1) for relevance and proportionality."[14]

"Proportionality determinations are to be made on a case-by-case basis," taking into account the factors listed in Fed. R. Civ. P. 26(b)(1): "the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[15] Discovery may be compelled if it is not "unreasonably cumulative or duplicative" or if the burden or expense does not outweigh its likely benefit. *See* Fed. R. Civ. P. 26(b)(2)(C).[16]

Here, each proportionality factor articulated in Fed. R. Civ. P. 26(b)(1) strongly favors producing full custodial files for certain key custodians: this nationwide case concerns anticompetitive conduct affecting millions; monetary harm is likely in the billions; only Defendants have this key information;[17] and discovery of the information is essential to resolve

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[14] *City of Jacksonville v. Shoppes of Lakeside, Inc.*, No. 3:12-cv-850-J-25 MCR, 2016 U.S. Dist. LEXIS 81846, at *4 (M.D. Fla. June 23, 2016) (internal quotations and citations omitted).

[15] *Capetillo v. Primecare Medical, Inc.*, No. 14-2715, 2016 WL 3551625, at *2 (E.D. Pa. June 29, 2016).

[16] *In re Auto. Refinishing Paint Antitrust Litig.*, 2004 WL 7200711, at *3, 5-6 (E.D. Pa. Oct. 29, 2004) ("Discovery in antitrust litigation is most broadly permitted and the burden or cost of providing the information sought is less weighty a consideration than in other cases."); *id.* ("discovery may be limited only if the burden of production outweighs the likely benefit, or if the discovery sought can be obtained through less burdensome processes.").

[17] *Id.* at *3, 5-6.

disputed issues in this case.

Where the discovery being contested is "readily identifiable and available" and there is no "undue expense" or burden associated with production, proportionality will be found.[18] Here, the sought files are readily identifiable and available in Defendants' possession. Further, Defendants have not, and cannot, show any disproportionate burden of production.[19] "Where a party contends that the sought discovery causes an undue burden, they must demonstrate specifically how each item of discovery is objectionable by offering evidence revealing the nature of the burden."[20] Thus, "[a] party's statement that the discovery sought is overly broad, burdensome, oppressive, vague or irrelevant is not adequate to voice a successful objection."[21] Here, there is no "undue" expense associated with the full production of custodial files, as full custodial productions with review only for privilege likely will cost less and will be faster than the process of applying search terms and conducting a subjective review.

To the extent that any burden exists, Plaintiffs' proposal imposes a far lesser burden. Producing full custodial files will likely reduce any potential burden because Plaintiffs are willing to reduce the number of agreed-upon custodians if the Defendants agree to (or are ordered to) produce full custodial files. Despite this concession, Defendants have claimed that due to the "volume," review of custodial files for only a few custodians would result in interminable "extraordinarily long review timelines with corresponding delays in production." Defs. Mem. Regarding Plaintiffs' Proposal for Production of Full Custodial Files at 10. However, compelling

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[18] *In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CVI-20000-RDP, 2015 WL 96964792, at *3 (N.D. Ala. Dec. 9, 2015).

[19] *UPMC v. Highmark Inc.*, 2013 WL 12141530, *1-3 (W.D. Pa. Jan. 22, 2013) (special master recommended granting motion to compel production of former executive's files where Highmark had no "specific" reasons why the request was burdensome, and had not demonstrated any concretely irrelevant subject areas or a feasible way to separate out irrelevant materials).

[20] *Mcdevitt v. Verizon Servs. Corp.*, No. 14-4125, 2016 WL 1072903, at *2 (E.D. Pa. Feb. 22, 2016); *UMPC,* 2013 WL 12141530, at *3 ("[A] party objecting to discovery has the burden to demonstrate in specific terms why a particular request is improper.").

[21] *Auto. Refinishing Paint*, 2004 WL 7200711, at *1 (internal citations omitted).

production of complete custodial files eliminates any burden of finding and reviewing specific documents before production. It will also eliminate the "long delays" which Defendants claim will result from reviewing these files. Moreover, review for privileged material is likely to be easy: each Defendant knows and can search for the few attorneys with whom their employees might have communicated.

Additionally, Defendants cannot reasonably claim that the volume of custodial files is unduly burdensome. In cases of industry-wide collusion, the number of documents produced in pharmaceutical antitrust cases is inherently large.[22] Defendants also over-estimate the total volume of the selected key custodial files, which likely vary by each Defendant's custodian. Several Defendants have already produced full custodial files for some employees (pursuant to investigatory subpoenas): for a single custodian, the custodial files ranged from under seventeen thousand documents to over a hundred thousand documents.[23] Given the nature of this pharmaceutical antitrust MDL, the burden of producing even millions of documents is modest and certainly comparable with similar cases.

Accordingly, the production of full custodial files after a privilege review is proportional to the needs of this MDL.

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[22] *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 614 (7th Cir. 1997) (production of over fifty million pages of documents); *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 429 (S.D.N.Y. 2016) (production of 11 million documents); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 744 (E.D. Pa. 2013) (production of millions of pages); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 103 (D.N.J. 2012) (production of over 60 million pages of documents); *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) (production of millions of pages); *Automotive Refinishing Paint*, 2004 WL 7200711, at *5 (collecting cases).

[23] For example, full custodial files were produced for Sun's GP Singh (16,753 documents); Perrigo's Pete Haakenstad (55,413); Dr. Reddy's Jake Austin (51,020), Patricia Wetzel (167,856 documents) and Victor Borelli (111,560); Citron's Kate Neely (149,389); and Teva's Nisha Patel (91,596) and Teri Coward (160,811).

E. The Court's Pretrial Orders and Discovery Protocols Sufficiently Protect Any Sensitive Personal Information within Defendants' Custodial Files.

A request for documents – even sensitive documents – is not overly broad when it can reasonably lead to information about any issue in the case.[24] Even if sensitive information is intermingled with relevant documents in the custodial files, Plaintiffs believe that the majority of the files of the selected custodians are reasonably likely to contain relevant information concerning the collusion alleged in the States' complaints. Any sensitive information will be sufficiently protected. The Protective Order (PTO 53) will prevent dissemination of personal information in the custodial files. Defendants also may avail themselves of the clawback procedures and confidentiality designations contained within Pretrial Order 70 (as they have in the past). Plaintiffs fully expect that this Court's Pretrial Orders 53 and 70 will sufficiently protect all parties' sensitive information.

Further, an order compelling Defendants to produce full custodial files will not impinge upon any custodian's privacy. In meetings with the Special Master, Defendants raised a vague "due process" argument about custodians' privacy interests in their workplace materials. But courts in this jurisdiction have held that employees have no reasonable expectation of privacy in their workplace email accounts, documents, and computers; thus, employers may search or produce content from such accounts.[25] Indeed, "courts have long recognized that employers, as third parties who possess common authority over the workplace, may independently consent to a search of an

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[24] *City of St. Petersburg v. Total Containment, Inc.*, 2008 WL 1995298, at *4 (E.D. Pa. May 1, 2008) (granting request for all documents for defendant's bank account because the information sought could reasonably lead to defendant's financial records).

[25] *Walker v. Coffey*, 905 F.3d 138, 149 (3d Cir. 2018) (employer searched the contents of employee's email account and provided files for use in a government investigation); *Smyth v. Pillsbury Co*., 914 F. Supp. 97 (E.D. Pa. 1996) (no expectation of privacy in employee email sent via company email system despite employer's announcement that email communications would remain confidential); *Ober v. Miller*, 2007 WL 4443256, at *17 (M.D. Pa. 2007) (collecting cases from the Fourth, Eighth, Ninth, and Tenth Circuits).

employee's workplace documents or communications."[26] Because Defendants exercise common authority over the workplace computers and email accounts of these employees, they can and should produce these full custodial files.

Conclusion

Under Plaintiffs' proposal, Plaintiffs will select a limited number of full custodial files for production and Defendants may review those files for privileged materials before production. Reviewing only for privilege will expedite the discovery process exponentially. Because these files are so important to establishing the conspiracy and to understanding the Defendants' extensive communications with their competitors, Defendants should not be permitted to withhold any materials from these custodial files based on their inadequate and unreliable views of what is relevant and responsive. Plaintiffs do not object to including the "claw back" provision in the protocol for access to state investigatory material, as provided by Pretrial Order 70.[27]

For the reasons above and set forth in the Plaintiffs' Joint Brief, Plaintiff States respectfully request that this Court order Defendants to collect the full custodial files selected by Plaintiffs, review them for privilege and produce them by a date certain. After production, Defendants may avail themselves of the claw-back procedures set forth in Pretrial Order 70.

[26] *Walker,* 905 F.3d at 148-149; *United States v. Matlock*, 415 U.S. 164, 171 (1974) (holding government "may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected").

[27] The threshold condition of the "claw back" provision is that Defendants demonstrate why existing protective orders are not sufficient. *Id.*

Respectfully,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	**MDL NO. 2724** **16-MD-2724**
THIS DOCUMENT RELATES TO: ***ALL ACTIONS***	**HON. CYNTHIA M. RUFE**

PLAINTIFFS' RESPONSE TO AUGUST 16, 2019 REPORT AND RECOMMENDED ORDER FROM SPECIAL MASTER DAVID H. MARION SETTING FORTH A RECOMMENDED CASE MANAGEMENT ORDER AND DISCOVERY SCHEDULE

PUBLIC VERSION
REDACTED PURSUANT TO MDL 2724 PROTECTIVE ORDER

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Federal Rules

Pursuant to Rule 53(f) of the Federal Rules of Civil Procedure, Plaintiffs[1] submit this Response to the August 16, 2019 *Report and Recommended Order from Special Master David H. Marion Setting Forth a Case Management Order and Discovery Schedule* (attached as Exhibit A).[2] For the reasons set forth below, Plaintiffs submit certain objections and proposed modifications to the recommended CMO issued by Special Master Marion, and respectfully request that the Court sustain those objections and enter a modified CMO in the form attached hereto as Exhibit B. Attached as Exhibit C is a "redline" version showing Plaintiffs' proposed modifications to the recommended CMO.

I. INTRODUCTION

For the past several months, the parties and Special Master David Marion have engaged in numerous meetings in an attempt to achieve two goals set by the Court: development of a comprehensive case management structure for this ever-evolving MDL, and progress in discovery. *See, e.g.*, Tr. of Nov. 20, 2018 Status Conf. at 28:12-29:4. The culmination of those extensive efforts is now before the Court in the form of the Special Master's recommended CMO, which is an attempt to set forth "a fair and workable compromise." R&R at 2. Plaintiffs propose below modifications to the recommended CMO as follows:

First, the Special Master has proposed that discovery of Defendants' custodial files should proceed primarily by applying broad search terms and, after a privilege review, producing all responsive hits to Plaintiffs. Significantly, because no subjective and time-consuming

[1] Plaintiffs include the States, Direct Purchaser Plaintiffs, End-Payer Plaintiffs, Indirect Reseller Plaintiffs, and the Kroger, Humana and United Direct Action Plaintiffs.

[2] In this Response, Plaintiffs refer to the Special Master's Report as the "R&R." Plaintiffs refer to Exhibit A to the R&R, the Special Master's "Proposed Case Management Order and Discovery Schedule," as the "CMO."

"relevance" review would occur, Defendants' documents would finally be produced promptly, by the end of this year. *See* CMO ¶ 3.d. While this broad search-terms-with-no-relevance-review approach recommended by the Special Master would provide a needed boost to discovery, it was not Plaintiffs' preferred approach because it still risks missing certain critical evidence. Plaintiffs' preferred approach – production of full custodial files for a selected set of Defendants' employees – was not adopted by the Special Master even though it would avoid that risk, be less burdensome for Defendants, and allow even greater insight into the anticompetitive conduct at issue. *See* Part III.A-B, *infra*. Both approaches (whether it be broad search terms with no relevance review, or full custodial files) are vastly superior to Defendants' proposal, which would stay many (if not most) of Plaintiffs' claims indefinitely; likely lead to the continued non-production of a number of important, responsive documents; delay any significant document discovery for many more months; and leave resolution of this MDL out of reach for many years to come. *See* Part III.D, *infra*.

Second, Plaintiffs respectfully suggest that the Special Master's recommended CMO contains certain other issues that should be corrected (such as typos) and certain procedures that should be clarified (such as when claw back procedures should apply). *See* Part III.C, *infra*.

Third, while Plaintiffs are not now suggesting any specific changes to the Special Master's proposed CMO deadlines, Plaintiffs offer some observations. As a general matter, Plaintiffs welcome the entry of case deadlines that will definitively move discovery forward in the near future. However, Plaintiffs have some reservations about the proposed CMO deadlines relating to later aspects of the case, such as those governing merits expert discovery, class certification, and summary judgment. Only time will tell, but given the many uncertainties that

presently exist in this MDL, as Special Master Marion has observed,[3] Plaintiffs believe there may need to be some flexibility as these later deadlines approach. As the parties begin to work through earlier deadlines and as the MDL continues to develop with the filing of additional complaints, bellwether selection, and more fulsome document production, Plaintiffs are committed to working with Defendants and the Special Master to determine whether changes in deadlines are appropriate. *See* Part III.E, *infra*.

II. RELEVANT PROCEDURAL HISTORY

Plaintiffs filed their first complaints more than three and a half years ago;[4] the MDL was formed more than three years ago and expanded to its current form more than two and a half years ago.[5] Nevertheless, no Defendant has yet made a significant production of substantive documents or, until just recently,[6] data in the MDL.

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[3] *See* CMO ¶ 10 n.2 ("Dates hereafter may be modified either by agreement or by Order of the Court, dependent on the selection of bellwether criteria.").

[4] *See* Class Action Complaint, *Int'l Union of Operating Engineers Local 30 Benefits Fund v. Lannett Co., Inc., et al*., No. 16-cv-00990 (E.D. Pa. Mar. 2, 2016), Dkt. No. 1.

[5] *See In re Generic Drug Pricing Antitrust Litig.,* 227 F. Supp. 3d 1402 (U.S. Jud. Pan. Mult. Lit. 2016) (forming the Digoxin and Doxycycline MDL); *In re Generic Drug Pricing Antitrust Litig.*, 222 F. Supp. 3d 1341, 1342-43 (U.S. Jud. Pan. Mult. Lit. 2017) (expanding the MDL to include additional drugs, renaming the MDL, and noting that coordination of common discovery "will be essential").

[6] On August 29, 2019, the Akorn/Hi-Tech Defendants produced data for two drugs, and on September 3, 2019, Defendant Teva produced data for twelve drugs. Plaintiffs are assessing these recent productions, which are the first substantive productions of data in the MDL, but note that they are incomplete because they do not include data for all drugs at issue in the MDL that these Defendants manufactured or sold. For example, the data production of twelve drugs that Teva made on September 3, 2019 did not include any of the 95 new drugs in the States' Teva Complaint.

Not much has changed since March 2019, when Plaintiffs approached Defendants and sought a discovery schedule.[7] Plaintiffs sought an agreed discovery schedule in the hopes it would bring an end to meet and confers, fulfill the Court's repeated exhortations to move discovery forward, and finally result in production of Defendants' documents and data.

First, Defendants took a month to respond to Plaintiffs' March 2019 inquiry, after which negotiations concerning a discovery schedule finally got underway. In the midst of these negotiations, on May 10, 2019, the States filed a complaint in the United States District Court for the District of Connecticut. *State of Connecticut, et al. v. Teva Pharmaceuticals USA, Inc*., *et al.*, No. 19-cv-00710 (the "States' Teva Complaint"). The States' Teva Complaint added at least 95 generic drugs to the approximately 30 drugs already in the MDL at the time, alleging these additional drugs were subject to the same anticompetitive conduct already at issue.

In reaction to this filing, Defendants contended they would only agree to a discovery schedule for the cases filed *before* the States' Teva Complaint (involving approximately 30 drugs previously in the MDL) if the parties *also* could agree to a case management schedule that "phases" the litigation. While the parties continued to negotiate the discovery schedule, Defendants made an independent case-management proposal under which discovery would proceed only as to the approximately 30 drugs previously in the MDL. Under Defendants' plan, once discovery on those drugs was sufficiently complete, the parties would proceed with respect to class certification and summary judgment on those drugs only. As they described it, Defendants wanted to "put a fence" around these approximately 30 drugs and stay all other

[7] Plaintiffs are not attaching the correspondence or exchange of proposals summarized herein but will gladly provide them at the Court's request.

proceedings, including discovery on the States' Teva Complaint containing approximately 95 additional drugs and all other future complaints, indefinitely.

Plaintiffs continued to meet and confer with Defendants on a discovery schedule, while at the same time working on their own case management plan. During these discussions, it became apparent to Plaintiffs that any discovery schedule and case management plan must be harmonized in order to enable a more effective path toward resolution of the MDL. Having received Defendants' proposal to prevent the States' Teva Complaint and any new drugs from going forward until years in the future, in early July 2019 Plaintiffs proposed to Defendants a combined discovery schedule and case management order. Plaintiffs' July 2019 proposal was designed to enable discovery to go forward efficiently on *all* present and future claims in the MDL. Some key considerations drove Plaintiffs' proposal:

- In order to truly move this case toward resolution, the best path forward is to accelerate discovery, not slow it down by phasing or suspending it. Discovery should occur in a single stage and include all drugs, rather than stopping for new, seemingly endless rounds of time-consuming meet-and-confers whenever new drugs are added to the MDL, and having discovery proceed on a piecemeal basis.

- Recent experience in the MDL has shown that efficient discovery techniques such as PTO 70—which established a mechanism for producing the States' investigative documents (some of which are full custodial files)—are well suited to this complex case and are needed to level the information playing field for all parties. Accelerating discovery through other streamlined methods would further illuminate the most important facts and information relevant to all extant and potential claims at issue.

- Proceeding in this manner would also allow for meaningful settlement discussions between any interested parties. In any settlement discussion, Defendants surely would want releases covering all the drugs that have been included in any MDL complaint. But no plaintiff reasonably will be able to engage in such discussions if discovery were stayed on many drugs, keeping many important facts unknown to Plaintiffs.

Plaintiffs therefore proposed that Defendants should produce full custodial files for a more limited set of custodians. Plaintiffs would select certain custodians for each Defendant whose full files would be produced, which would enable Plaintiffs to accept fewer custodians overall for each Defendant. Because such productions would be done without search terms or subjective attorney review, they could be expedited, although Defendants would still have the opportunity to perform a privilege review and claw back documents under PTO 70. It is clear from the experience to date that full custodial files, analyzed in conjunction with phone records and other materials, allowed the States to better understand the conspiracy and thus pursue the broadest claims to date. In light of the States' experience, this is the best way for all parties to uncover the most important facts in the most timely and cost-efficient manner.

In late July and into August 2019, the Special Master convened a number of meetings in an attempt to bridge the gap between the parties. During these discussions, Plaintiffs ultimately offered alternative means for achieving this Court's frequently-expressed goal of finally moving this MDL toward resolution: (1) preferably, requiring Defendants to produce full custodial files for a subset of key custodians selected by Plaintiffs from among the custodians whom the parties have already extensively discussed; or (2) alternatively, requiring Defendants to run broad search terms – not limited by drug – across all agreed-upon custodians and to produce to Plaintiffs all documents that "hit" on those terms. *See* R&R at 2 (summarizing Plaintiffs' proposals).

The Special Master's recommended CMO, by adopting significant aspects of Plaintiffs' *alternative* proposal – namely, broad search terms with no subjective attorney review, full discovery with no limitations on drugs or parties, and prompt deadlines for document production – goes a long way toward significantly advancing this litigation. It calls for discovery to go

forward immediately on the full scope of Defendants' anticompetitive conduct, with respect to *all* drugs in the MDL, and in a manner that allows Plaintiffs to pursue evidence supporting their claims of a broad, overarching conspiracy spanning the generic drug industry. *See In re Generic Pharmaceuticals Pricing Antitrust Litig.*, MDL 2724, 2019 WL 3842901, at *10 & *16 (E.D. Pa. Aug. 15, 2019) ("discovery will be required" to determine the scope of each Defendant's anticompetitive agreement, and "whether there was or is a broad overarching conspiracy connecting the alleged individual generic drug conspiracies").

Thus, while entry of the Special Master's recommended CMO would be very helpful in moving this litigation forward, as set forth herein and in the States' Memorandum, Plaintiffs respectfully suggest that requiring Defendants to produce the *full custodial files* of certain key witnesses is an even more expedient and efficient way to move discovery forward, and to avoid the non-production of responsive documents, as has already occurred. *See* Part III.A.1 at 13-16, *infra*. Some additional clarifying changes to the recommended CMO are also warranted. *See* Part III.D, *infra*. By adopting the modifications described below and reflected in Plaintiffs' Proposed Order (Exhibit B), the Court will ensure that this MDL proceeds toward resolution as expeditiously as possible.[8]

[8] The Court decides *de novo* all objections to conclusions of law made or recommended by the Special Master. Fed. R. Civ. P. 53(f)(4). However, on procedural matters such as those presented herein, the Court may set aside the Special Master's ruling only for an abuse of discretion. Fed. R. Civ. P. 53(f)(5).

III. ARGUMENT

A. Production of Defendants' Full Custodial Files Is Necessary and Appropriate

1. Production of the Full Custodial Files for a Carefully Selected Set of Individuals Is Appropriate Given the Facts Here and Will Efficiently and Fairly Advance the Litigation.

Although Special Master Marion eventually settled on a compromise centered on search terms without subjective attorney review, he noted that Plaintiffs had "presented a strong case" for the production of full custodial files. R&R at 2.

Plaintiffs continue to believe that the most efficient way to move this case forward is to require Defendants to produce the full custodial files of certain key witnesses. This approach is not without risk to Plaintiffs, who would have to forgo documents from witnesses known to possess relevant documents, in favor of receiving the complete files of others. Plaintiffs believe the benefits that would be gained from this approach – *e.g.*, learning the whole story about key conspirators, preventing the exclusion of highly pertinent documents as a result of a subjective attorney review, bypassing much of the need for laborious negotiations over search terms, and avoiding duplicative discovery in the event additional drugs or parties are added to the case, all of which would save a great deal of time – are worth taking that risk. Plaintiffs believe that a deep dive into the files of the key witnesses will be more useful in helping to explain the pervasive and persistent nature of competitor contacts across many drugs than a broad but shallower review of the files of hundreds of custodians.

Plaintiffs submit that requiring the production of full custodial files is the better choice based on the real-time, specific experience of this case so far.[9] For example, four Defendants produced 12 full custodial files to the States, and those files have been produced in the MDL via the AG Access Protocol (PTO 70). Those full custodial files have been the most revealing of all the materials yet produced in this case. Indeed, the facts pled in the States' Teva Complaint – the largest to date – were drawn largely from the files of just one custodian, Teva's Nisha Patel. Further, through the claw back procedure established by PTO 70, Plaintiffs and the Special Master have seen what would be missed if Defendants were allowed to conduct their necessarily subjective relevance review before producing documents: countless centrally relevant documents would never see the light of day.

As this Court has recognized, "context" is "critical" in a conspiracy case, and so the discovery parameters in this MDL should facilitate the parties' ability to fully discover the "who, what, where, when and how" of Defendants' unlawful activity. *See* April 10, 2019 Order on Proposed ESI Protocol, MDL Dkt. No. 938, at 1 ("[T]he particular nature of the antitrust conspiracy allegations in the MDL mean that an understanding of the context of particular documents may be critical, which could be impeded by the withholding or redaction of responsive documents or document families."). Indeed, this is precisely why the Court adopted Plaintiffs' version of the initial protective order, PTO 45, and rejected Defendants' competing version, which would have "siloed" discovery drug-by-drug. *See* Defendants' Submission Regarding the Protective Order, MDL Dkt. No. 517.

[9] For a discussion of case law supporting the custodial file approach see Part III.A.2, *infra*, and the States' separate Memorandum submitted simultaneously with this Response.

Similarly, in resolving a dispute regarding the ESI Protocol in this MDL, the ESI Special Master established a rule of discovery recognizing the importance of providing Plaintiffs with full and complete access to all of the available pieces of the conspiracy puzzle. *See* June 28, 2019 Report and Recommendation from Special Discovery Master for ESI Daniel L. Regard, at 4 ("Production of the metadata for suppressed emails will allow for analysis of the timing, cadence, and frequency of party communications, which is obviously material given the allegations in this case.").[10]

In large, public-impact litigation like this, courts have found "extensive discovery … proportional to the needs of the case." *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-CV-101, 2018 WL 2088760, at *2 (M.D. Pa. May 4, 2018); *First Niagara Risk Mgmt., Inc. v. Folino*, 317 F.R.D. 23, 27-28 (E.D. Pa. 2016) (finding "rather broad" discovery requests "proportional to the needs of this case" where the issues at "stake [were] of grave importance" to the plaintiff who "who need[ed] to conduct broad discovery to uncover the scope of [defendant]'s alleged misdeeds").

Documents collected by the States during their investigation show how difficult it can be to determine whether a particular document, viewed in isolation, is relevant to the allegations of conspiracy. Only with access to and an understanding of the full factual context does the importance of certain seemingly benign or irrelevant documents become apparent. *See In re*

[10] These decisions are consistent with black-letter law allowing broad discovery in antitrust cases. *See, e.g., IQVIA, INC. v. Veeva Sys., Inc*., No. 2:17-CV-00177-CCC-MF, 2019 WL 3069203, at *4 (D.N.J. July 11, 2019) (granting motion to compel discovery in case including antitrust claims, noting that "[i]t is well recognized that the federal rules allow broad and liberal discovery'" and "[r]elevance is a broader inquiry at the discovery stage than at the trial stage") (quoting *Pacini v. Macy's*, 193 F.3d 766, 777-78 (3d Cir. 1999)); *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 234, 240 (E.D. Pa. 2014) ("There is a 'general policy of allowing liberal discovery in antitrust cases.'") (citation omitted).

Mushroom Direct Purchaser Antitrust Litig., No. 06-0620, 2012 WL 298480, at *4 (E.D. Pa. Jan. 31, 2012) ("conduct is generally covert and must be gleaned from records, conduct, and business relationships"); *Callahan v. A.E.V., Inc.*, 947 F. Supp. 175, 179 (W.D. Pa. 1996) (same). For example:

- In June 2014, Heritage implemented a 200% price increase for Glyburide. States' June 18, 2018 Consolidated Amended Complaint ("CAC") ¶ 349. In advance of this price increase, Heritage employees spoke to a number of competitors, including Aurobindo, who agreed to support the increase. *Id*. ¶¶ 342-43, 352. After Heritage increased its price, a large distributor solicited bids from Teva and Aurobindo to obtain lower pricing. *Id*. ¶ 356. In response, on July 25, 2014, Heritage President Jason Malek sent a text message to his subordinate, Neal O'Mara, stating: "Tell Tim [Gustafson of Aurobindo] to stay away from abc [AmerisourceBergen, a large distributor sometimes known as "ABC"]." *Id*. ¶ 357 (quoting HER-NO-63735, attached as Ex. D). Mr. O'Mara then called Mr. Gustafson and they spoke for more than 13 minutes. *Id*. ¶ 357. During that call, Mr. O'Mara conveyed the direction that Aurobindo should not provide a bid to ABC. *Id*. **After the call, Mr. O'Mara sent a text message to Mr. Malek that simply says: "Done."** *Id*. (quoting HER-NO-63736, attached as Ex. E).

- A June 12, 2014 Facebook message from Tracy Sullivan of Lannett to Nisha Patel of Teva stated "I was hoping to touch base with you about some industry news. What is your cell phone? Or could you give me a call when you have a minute…" States' Teva Complaint ¶ 497. This message was sent at 11:16 am. At 11:30 am, Patel called Sullivan and they spoke for seven (7) minutes. During the conversation, Sullivan informed Patel that Lannett would be entering the market for Baclofen shortly. In a follow-up message through Facebook Messenger later that afternoon, Sullivan confirmed: "Definitely Mid-July. I'll touch base with you in a few weeks." *Id.* True to her word, Sullivan called Patel on July 1, 2014 and left a voicemail. Patel promptly returned the call, and the two spoke for almost seven (7) minutes. *Id*. ¶ 498. On July 11, 2014, as Teva was evaluating future forecasting and whether to try and take on additional Baclofen business with a large wholesaler, Patel stated to a Teva colleague: "[n]ot sure if it helps your review, but there is another entrant coming to market (Lannett). I'm not sure about their share targets, but I know it's probably soon." *Id*. ¶ 499. That same day, Patel sent a text message to Sullivan asking "Around?" Sullivan immediately called Patel and left a voicemail. Patel called Sullivan back promptly, and they spoke

for more than three (3) minutes. **After speaking, Patel sent another text message to Sullivan, stating: "Thank you! !" Sullivan responded: "No prob!"** *Id.* (quoting LANNETT-TDS-00002950, attached as Ex. F)

- By 2013, Heritage had an agreement with Dr. Reddy's regarding market share for Zoledronic Acid. *See* CAC ¶¶ 149-64. Whenever there were challenges between Heritage and Dr. Reddy's for specific customers for Zoledronic Acid, any issues were resolved through direct communications between the companies. *Id*. ¶ 162. Mr. Edelson of Heritage's contact at Dr. Reddy's was Jake Austin. *Id*. ¶¶ 157-58. In the midst of these Heritage/Dr. Reddy's communications, Mr. Edelson sent a September 24, 2013 email to Heritage's President, Mr. Malek, stating [redacted] (HER-CTAG-45863) (Ex. G) – an apparent reference to a call between Mr. Edelson and Mr. Austin that, based on the timing, likely involved the Heritage/Dr. Reddy's agreement on Zoledronic Acid. *See* CAC ¶¶ 161-64.

- Mayne entered the market for Doxy DR in February 2014. CAC ¶ 218. Throughout 2014, Heritage and Mayne had direct communications when Mayne pursued a Heritage Doxy DR customer. *See generally, id*. ¶¶ 218-41. In November 2014, Mayne bid for business with two large customers, McKesson and Econdisc. *Id*. ¶ 228. Soon after, Ann Sather of Heritage and Gloria Schmid of Mayne spoke, and Ms. Sather told Ms. Schmid that Heritage might be willing to walk away from Econdisc if Mayne would agree not to price Doxy DR aggressively, and if Mayne would withdraw its offer to McKesson. *Id*. ¶ 230. Immediately after speaking with Ms. Schmid, Ms. Sather sent an e-mail to Heritage President Jason Malek with the subject line **"spoke with Gloria"** and the message **"Can discuss anytime."** *Id*. ¶ 231 (quoting HER-JM-000099408) (Ex. H). Over the next few weeks, Ms. Sather continued to speak with Ms. Schmid and reached an agreement to allocate customers. When Econdisc requested bids for Doxy DR in January 2015, Heritage made sure to bid higher than Mayne, which fulfilled its part of the agreement by "walking" away from Econdisc. *Id*. ¶ 238.

In isolation, these communications – "Done," "No prob," "[redacted]" "spoke with Gloria" – appear innocuous or meaningless. Even less oblique statements like, "Tell Tim to stay away from abc" are not, without appropriate context, likely to be understood, much less deemed relevant, by one of Defendants' document reviewers. Neither search terms nor the most scrupulous attorney review by Defendants is likely to identify such documents as responsive or

relevant to the claims in this MDL. And yet, they are pieces of the conspiracy puzzle. It is only when these seemingly innocuous documents are paired with other evidence that their relevance becomes apparent. Thus, by requiring production of full custodial files, the Court can maximize the likelihood that all pieces of the puzzle will be produced in discovery, rather than withheld.[11]

This is all the more necessary given the fact that Defendants are known to have taken affirmative steps to conceal their wrongdoing by using code words and avoiding putting things into writing (especially on work email accounts):

- For example, in May 2014, a large customer of Taro's received a bid and gave Taro an opportunity to bid to retain the business. In response to this, a senior contracting executive at Taro, sent an internal e-mail stating: "FS ok, will not protect." F.G., a senior managed care executive at Taro responded "explain FS (Fair Share)?" Defendant Ara Aprahamian of Taro replied: "No emails please. Phone call . . . let's discuss." States' Teva Compl. ¶ 158.

- In May 2014, Patel of Teva declined to bid at a customer for two drugs stating: "unable to bid (strategic reasons, for internal purposes)." When Patel and her other conspirators at Teva used the term "strategic" in this context, it was code for the fact that there was an understanding in place with a competitor. States' Teva Compl. ¶ 780.

- In January 2013, a Sandoz executive sent an internal email noting that Sandoz should be "cautious" on Levothyroxine and Nadolol due to information that he had "heard from a customer." States' Teva Compl. ¶ 546. In fact, this was a lie; the Sandoz executive actually learned the information from a Teva executive. Concealing the true source of information was a convention that was frequently employed by many Sandoz executives to avoid documentation of their covert communications with competitors. Further, being "cautious" on these products meant that Sandoz did not want to steal business away from its competitors by offering a lower price and taking their market share. *See id*.

[11] The States' Objections contain additional examples of documents they obtained in their investigation that, although appearing innocuous or irrelevant, are nevertheless probative of conspiratorial conduct. *See* States' Mem. at 6-9.

Plaintiffs' concerns that Defendants who employ a linear document-by-document "relevance" review will fail to produce many relevant documents is not mere conjecture or speculation. It is based on what already has transpired in this MDL. Pursuant to PTO 70, approximately 250,000 Teva documents were produced in the MDL from the States' investigative files. Teva's document production to the Connecticut Attorney General had included two full custodial files. Pursuant to PTO 70's claw back procedures, Teva sought to "claw back" approximately *100,000 documents*, or 40% of the collection, claiming those documents were all "unrelated to any MDL pleading, and do not concern the drugs at issue in the MDL, including any of the drugs at issue in the [States' Teva Complaint]." June 17, 2019 Letter from Teva Counsel to Plaintiffs' Counsel, at 1 (Ex. I). But even a quick review revealed this was not true. Many of the documents Teva sought to claw back on relevance grounds are in fact highly relevant and showed precisely the types of collusive behavior that are central to the claims in this MDL. Included among Teva's proposed claw backs were the following:

- A document showing Teva [redacted];
- An internal Teva discussion about [redacted] – a named individual defendant in the States' Teva Complaint – [redacted]
- Another document relating to [redacted];
- Social media communication in July 2014 between [redacted]
- A [redacted]
- A document relating to [redacted];

- A document relating to [redacted];
- A Teva document stating, [redacted]
- Another document stating that Teva [redacted]
- Documents directly quoted in the States' Teva Complaint; and
- The resume [redacted].

Ironically, in making its claw back request, Teva claimed that it had taken "a *very broad view of relevance* and has only requested to claw back documents that *squarely fall* within the categories set forth in PTO 70." *Id.* at 2 (emphasis supplied). *See generally* Exs. I - L (June 17, 2019; June 27, 2019; July 2, 2019; and August 15, 2019 letters).

Ultimately, Teva relented, withdrawing nearly **90%** of its claw back requests, including all the documents specifically identified by Plaintiffs. Ex. L (August 15, 2019 letter). But that concession does not solve the problem; it highlights it. Were it not for the production of full custodial files, Plaintiffs never would have known of the existence of nearly 90,000 documents – including all the ones listed above – that Teva eventually conceded were relevant to the allegations of the MDL. If Teva had not produced custodial files to the Connecticut Attorney General and instead had made a production based on its own "very broad view of relevance," **none** of these important documents would have been produced. Neither Plaintiffs, nor the Special Master, nor the Court ever would have known of their existence.[12]

[12] Teva's proffered reasons for this episode are beside the point. Whether it acted in good faith, or was hurried, or made mistakes, or sought to withhold the documents for any other reason is of no moment to the present discussion. What is important is that, for whatever reason,

Significantly, Teva is not alone. Of the eight Defendants who have sought to claw back documents under PTO 70, five – Actavis, Sun, Taro, Teva and Upsher-Smith – have sought to claw back highly relevant documents, including documents relevant to Plaintiffs' allegations of price fixing and the "fair share" agreement.[13]

For example, Actavis sought to claw back an email thread among Actavis personnel, [redacted] two named defendants in the States' Teva Complaint, [redacted] Ex. M (AGNE-0000003424).

Taro, too, sought to claw back documents directly related to the allegations in the MDL. [redacted] (email discussing [redacted]); TARO_000424726 (presentation summarizing [redacted]; TARO_000082996 (identifying the "[redacted] for numerous drugs); TARO_000427419 (email discussing plans [redacted]); TARO000006812 (email thread discussing [redacted]); TARO000015218 (email of Taro employee [redacted]"); TARO_000157310 (email quoted in States' Teva complaint discussing [redacted]); TARO000002757 (listing [redacted]

Teva deemed these documents irrelevant and therefore it would not have produced them absent a full custodial file production.

[13] Plaintiffs are not attaching all of the voluminous correspondence regarding these Defendants' claw back requests but will gladly provide them at the Court's request.

[redacted]); TARO_000243964 [redacted] *See* Ex. N (July 9, 2019 letter from Plaintiffs' counsel to counsel for Taro).

Sun did much the same. *See, e.g.*, SUN-CTOAG_0108541 (email stating Sun was [redacted]" on the drug [redacted], a drug at issue in the States' Teva Complaint); SUN-CTOAG_0006865 (communication involving [redacted]); SUN-CTOAG_0007482 (discussing [redacted]). *See* Ex. O (July 9, 2019 letter from Plaintiffs' counsel to counsel for Sun).

So did Upsher-Smith. S*ee, e.g.*, USL-CTAG_00089833 (email noting that [redacted]); USL-CTAG_00046578 (email discussing a [redacted]); USL-CTAG_00074085 (email discussing Upsher-Smith [redacted]); USL-CTAG_00005295 (chat conversations in 2016 between [redacted], who are alleged to have colluded, *see* States' Teva Complaint ¶¶ 632, 822)); USL-CTAG_00003372 ([redacted]). *See* Ex. P (July 9, 2019 letter from Plaintiffs' counsel to counsel for Upsher-Smith).

Thanks to PTO 70, Plaintiffs have these documents (and others like them) and have been able to reject improper claw backs and, if necessary, are able to seek the assistance of the Special

Master to retain them. But again, this is cold comfort to Plaintiffs, as without full custodial files, Plaintiffs will have no ability to identify such missing documents in future productions.

Given the sweeping nature and complexity of the unlawful conduct at issue in this MDL, and Defendants' assiduous efforts to conceal their wrongdoing and withhold relevant materials, even assuming all document reviewers are attentive, steeped in the facts and allegations of the case, working in good faith, and applying a "very broad view of relevance," there simply is no doubt that highly relevant documents will be withheld, and no one will ever know. Within the unique context of this MDL, production of full custodial files from key individuals is the best mechanism to minimize this problem.

Moreover, the production of full custodial files will take *less* time and cost *less* money. First, there will be no need to engage in drawn-out negotiations over search terms, which are inherently unfair in any event because the producing party (who knows what is in the documents) tries to create terms to limit the production, while the receiving party tries to guess at terms that might be present in relevant documents. Second, there will be no need to engage in subjective attorney review, which as noted above is particularly unreliable in this case. Third, there will be fewer custodians' files to produce and review. Fourth, any disputes over relevance in front of the Special Masters will occur in the context of claw back proceedings, with all parties having equal access to the documents at issue, rather than the producing party having a monopoly on information while the receiving party tries to guess at what has not been produced. Fifth, there will be no need to review the same files a second or third or fourth time if and when new drugs are added to the case or discovery reveals a new line of inquiry.

2. Caselaw Supports the Production of Full Custodial Files

Defendants argued to the Special Master that the production of full custodial files would be "extraordinary."[14] But as noted above, several Defendants produced custodial files to the Connecticut Attorney General during its investigation: Dr. Reddy's (5 custodial files); Sandoz (3 custodial files); Teva (2 custodial files); and Taro (2 custodial files). Those files now have been turned over to all Plaintiffs pursuant to PTO 70, which has been an efficient mechanism in streamlining discovery.

Further, in a number of other cases, courts have held that requiring the production of the full custodial files of key individuals is necessary to ensure that all relevant documents are produced. As discussed above, in antitrust conspiracy cases such as this MDL, a seemingly innocuous or inscrutable email, examined by itself, may not appear to a document reviewer to be relevant, even though it was part and parcel of the anti-competitive scheme.

The decision in *UPMC v. Highmark, Inc.*, No. 2:12-cv-00692-JFC, 2013 WL 12141530 (W.D. Pa. Jan. 22, 2013), is instructive. In that antitrust conspiracy case brought under Sections 1 and 2 of the Sherman Act, UPMC alleged that Highmark monopolized the health insurance market in Western Pennsylvania and conspired with West Penn Allegheny Health System ("WPAHS"), UPMC's competitor, to cripple UPMC as a provider of healthcare and health insurance in order to preserve Highmark's health insurance monopoly. At issue before the Special Master was a motion by UPMC to compel Highmark to produce "all documents concerning John Paul," a former UPMC executive who went on to work as an executive and

[14] Defs.' Mem. Regarding Pls.' Proposal for Production of Full Custodial Files, at 1 (Ex. Q).

consultant for Highmark. *Id*. at *1. UPMC alleged that Mr. Paul was a key player in facilitating the alleged antitrust conspiracy with WPAHS on Highmark's behalf.

Highmark argued that the document request was overbroad because it encompassed "every email Mr. Paul has ever sent, received or been copied on, every document mentioning his name, indeed every document he has ever handled for any purpose that is found in his files or in the files of the 110 other Highmark custodians." *Id*. UPMC countered that "the narrowing proposed by Highmark will be insufficient because Paul was intimately involved in Highmark operations and narrowing the request will prevent UPMC from 'fully understand[ing] the work Paul is doing for Highmark.'" *Id*. at *2.

The Special Master agreed with UPMC and granted its motion to compel, reasoning as follows:

> Insofar as Highmark argues that UPMC's request amounts to little more than a "transparent fishing expedition"… UPMC has provided a reasonable explanation as to why all of the requested material is relevant. **UPMC argues that, because Paul's "range of responsibilities is broad," and because UPMC cannot fully understand these responsibilities without access to discovery regarding all of his activities, any refinement of its request would be "unworkable and … exclude relevant documents."**
>
> While it may be true that not "every single document" will be relevant to UPMC's claims, Highmark has not demonstrated that there are any concrete subject areas that are not relevant, nor has Highmark suggested any feasible way of separating arguably irrelevant material from relevant material. Instead, Highmark offers only the unsubstantiated argument that "[UPMC's allegations] in no way entitle UPMC to every single document that has anything to do with John Paul." Highmark's argument is not sufficient to support its lack of relevance contention.

Id. (emphasis supplied, internal citations omitted).

Courts have ordered production of custodial files in other cases as well, finding such files to be both relevant and proportional to the needs of the case. Significantly, these orders have encompassed sales representatives, like the custodians whose files are sought here. *See, e.g., In re Actos (Pioglitazone Prods. Liab. Litig.)*, MDL No. 6:11-md-2299, 2013 WL 4776346 (W.D. La. Sept. 3, 2013) (granting motion to compel custodial files of twelve managers, three senior sales reps, and eight directors); *Cunningham v. Smithkline Beecham*, 255 F.R.D. 474, 479 (N.D. Ind. 2009) (granting motion to compel production of "complete sales files of any sales representatives that called on [the decedent's physician] between 2000 and 2004"); Order, *In re Prempro Prods. Liab. Litig*., No. 4:03-cv-01507-WRW (E.D. Ark. Aug. 2, 2007), Dkt. No. 1594 (ordering defendants to produce "all pre-September 2004 call notes and custodial files for sales representatives who called on Plaintiffs' doctors") (attached as Ex. R); *see also Momah v. Albert Einstein Med. Ctr*., 164 F.R.D. 412, 417 (E.D. Pa. 1996) (granting motion to compel production of complete personnel records and finding defendants' prior production of selected documents from the records that defendants deemed relevant was insufficient).

Here, as in *UPMC*, Plaintiffs seek custodial files of individuals who played key roles in the antitrust conspiracy. Because of the broad range of responsibilities of each custodian in relation to the conspiracy, and the substantial risk that Defendants will be unable to distinguish potentially irrelevant from relevant materials as discussed above, Plaintiffs need full custodial files. *See UPMC*, 2013 WL 12141530, at *2. Anything less would inevitably lead to the exclusion of relevant documents.[15]

[15] Before the Special Master, Defendants advanced a vague argument that the production of full custodial files somehow implicated their due process rights, relying on *Millsaps v. Aluminum Co. of America*, No. 10-84924, 2011 WL 6019220 (E.D. Pa. Dec. 2, 2011). A reading of that

Finally, Defendants have not shown how they would be unfairly prejudiced by the production of full custodial files. As noted above, the production of custodial files would cost them less and require them to do less. They would be permitted to withhold privileged documents. If their productions contain irrelevant documents of a personal or embarrassing nature, for example, Defendants could utilize the claw back procedures set forth in PTO 70 to seek their return. In addition, the Protective Order entered by the Court (PTO 53) will safeguard against public dissemination of such materials. *See UPMC*, 2013 WL 12141530, at *4 (Special Master overruled defendant's objection that production of all of John Paul's emails would include personal information; "the stipulated Protective Order is sufficient to ensure that any personal information contained in the discoverable material will remain confidential" and will "protect against improper use of such documents or inappropriate interference of someone's personal privacy interests"). The only possible prejudice to Defendants would be that certain

---

opinion reveals that "due process" is never mentioned. Plaintiffs have not found **any** case in which due process has been successfully invoked to resist a request for custodial files or other documents. In addition, *Millsaps* is factually dissimilar from this case because: (a) it was a wrongful death asbestos case; and (b) the plaintiff did not request custodial files of key defense employees who were allegedly involved in the wrongful conduct. Rather, the plaintiff sought 1300 boxes of documents gathered but not produced in a different asbestos case that had settled. 2011 WL 6019220, at *1. In denying plaintiffs' motion to compel, the Court stressed that "many if not most of the documents are not discoverable." *Id*. at *2.

Defendants cited a number of other cases limiting document production, but notably, none is an antitrust case. Most are employment cases. *See Russell v. Kiewet Corp.*, No. 18-2144-KHV, 2019 WL 2357525 (D. Kan. June 4, 2019) (retaliation); *Banerjee v. Univ. of Tennessee*, No. 3:17-CV-526-HSM-HBG, 2019 WL 1062378 (E.D. Tenn. Mar. 6, 2019) (employment discrimination); *Tingle v. Hebert*, Civ. No. 15-626-JWD-EWD, 2017 WL 2536584 (M.D. La. June 9, 2017) (retaliation); *Strauch v. Computer Sciences Corp.*, No. 3:14 CV 956 (JBA), 2015 WL 7458506 (D. Conn. Nov. 24, 2015) (FLSA); *Peterson v. Seagate U.S. LLC.* No. 07-2502 (MJD/AJB), 2009 WL 3430150 (D. Minn. Oct. 19, 2009) (age discrimination). And in *Russell*, *Banergee* and *Tingle*, the files sought were plaintiffs' files, not those of alleged wrongdoers. None of these cases involved a request for the custodial files of centrally relevant witnesses who engaged in repeated acts relevant to the conduct alleged, but whose documents might not, on their faces, be obviously relevant unless placed in context.

documents they want to withhold would be produced. For relevant documents (such as the ones discussed above), obviously their production would not be unfair to Defendants. Quite the contrary, Plaintiffs would suffer substantial prejudice if those documents are not produced.

B. Alternatively, the Court Should Sustain the Recommended CMO and Require Defendants to Produce Custodial Documents After Application of Broad Search Terms

Although Special Master Marion noted that Plaintiffs had made a strong case for the production of full custodial files, ultimately he recommended a compromise: the parties are to negotiate a set of electronic search terms to be applied to Defendants' custodial documents, with Defendants then producing all non-privileged documents "hit" by those search terms, without further review for relevance.

Plaintiffs respectfully submit that Special Master Marion's proposal lacks some of the important benefits of Plaintiffs' full-custodial-files proposal. For example, it would not narrow the list of custodians; it would not permit the "deep dive" into the files of the key conspirators; it would necessitate complicated negotiations, and probably motion practice, over search terms; and it may require additional reviews of files if and when new complaints are filed. And of course, no matter how good the search terms, they inevitably will miss key evidence, as shown above.

However, Plaintiffs recognize that Special Master Marion's proposal would provide at least two important benefits to the MDL. First, it would streamline and accelerate a discovery process that has already taken enormous time and resources and thus far produced minimal results. After more than *500* meet-and-confers and *thousands* of communications between the parties, no Defendant has made a substantive production of custodial documents. Something

needs to be done to jumpstart this process, and Special Master Marion's proposal would accomplish that. Second, it would take subjective attorney review out of the process, thereby eliminating the possibility that the Teva scenario outlined above will be repeated, but out of the light of day.[16] As discussed above, in this case it is not always easy even for an attorney steeped in the facts to tell a relevant document from an irrelevant one. And while some undoubtedly relevant documents will be missed even by electronic search terms, Special Master Marion's proposal at least takes human error out of the equation.

Because Special Master Marion's proposal reflects a compromise, it also has some of the benefits Defendants seek. Under Special Master Marion's proposal, there will be relevance filters – the search terms – applied to the custodial documents and Defendants will have a seat at the table in selecting them. Defendants will also be able to make confidentiality designations to take advantage of the protections provided by PTO 53. Further, after production, Defendants will be able to claw back trade secrets and irrelevant personal or embarrassing information.

Defendants have argued that they have some kind of "right" to have their attorneys remove documents that are hit by the search terms if they deem them to be "irrelevant."[17] But they do not. The Court has broad authority to "construe[], administer[], and employ[]" the Rules "to secure the just, speedy, and inexpensive determination of every action…." Fed. R. Civ. P. 1. Far from "extraordinary," as argued by Defendants, production of all "hit" documents without

[16] It bears emphasis that the only reason Plaintiffs had the Teva documents was because of the production of two full custodial files. If that had not occurred, Plaintiffs would have been unaware of the many responsive documents that Teva would have otherwise withheld based on its own view of "relevance."

[17] The purpose of a "relevance" review is not to actively seek out "relevant" documents so they can be produced to Plaintiffs. Rather, subjective attorney review serves the sole purpose of identifying purportedly irrelevant documents so they can be withheld from Plaintiffs.

subjective attorney review is contemplated by a provision of the ESI Protocol *that Defendants agreed to in this case*, which notes that parties might "Produce[ ] all non-privileged documents and ESI that meet specified, disclosed search criteria" without "a responsiveness review." PTO 95 ¶ 9.1a(i)-(ii), Dkt. No. 1045.

Indeed, many courts have ordered procedures similar to that recommended by Special Master Marion. *See, e.g.*, *Littlefield v. NutriBullet, L.L.C.*, No. CV 16-6894 MWF (SSx), 2017 WL 10439692, at *4 (C.D. Cal. Dec. 20, 2017) ("Plaintiffs shall submit a set of keywords to Defendant to be run on the system.… Defendant shall run the search and produce all resulting hits except those protected from disclosure by a privilege. Defendant may not withhold documents from the production based on relevance."); *Progressive Cas. Ins. Co. v. Delaney*, No. 2:11-cv-00678-LRH-PAL, 2014 WL 3563467, at *12 (D. Nev. July 18, 2014) (ordering production of all documents "hit" by search terms, subject to claw back provisions of Federal Rules and ESI protocol in case); *Carrillo v. Schneider Logistics, Inc.*, No. CV 11-8557-CAS (DTBx), 2012 WL 4791614, at *11 (C.D. Cal. Oct. 5, 2012) (ordering retention of outside vendor to collect electronically stored documents and conduct keyword searches; "All documents and emails collected by the vendor may be reviewed by Schneider for privilege and confidentiality.… However, no documents identified by the vendor may be withheld on relevance grounds."); *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*, No. CV 05-1516-RSWL SHX, 2007 WL 2758571, at *19 (C.D. Cal. Sept. 18, 2007) (ordering retention of outside vendor to collect electronic documents and conduct keyword searches; "All documents and emails collected by the outside vendor may be reviewed by New Line for privilege and confidentiality designations; however, no documents identified by the vendor may be withheld

on relevance grounds."); *Tulip Computers Int'l B.V. v. Dell Computer Corp.*, No. CIV. A. 00-981-RRM, 2002 WL 818061, at *7 (D. Del. Apr. 30, 2002) ("Dell shall provide the e-mails from the hard disks of the identified executives in electronic form to Ontrack [Tulip's consultant]. Ontrack will search the e-mails based on an agreed upon list of search terms. Tulip will give Dell a list of the e-mails that contain those search terms. Dell will then produce those e-mails to Tulip, subject to its own review for privilege and confidentiality designations.").[18] *See also Wilson v. Rockline Industries, Inc.*, No. 08-5191, 2009 WL 10707835, at *1 (W.D. Ark. Oct. 22, 2009) (cited by Defendants (*see* Ex. Q at 3-4) for proposition that court should permit subjective attorney review, but court's holding was limited to situations, unlike here, where there had been no "showing that relevant information is being withheld").

Although Plaintiffs believe the best way to ensure the speedy production of relevant materials is through full custodial files, Special Master Marion's compromise clearly is better than the *status quo* or any alternative that has been proposed by Defendants. Removing time-consuming, error-prone subjective attorney review is a significant step forward, as is Special Master Marion's rejection of Defendants' "fence" proposal in favor of permitting discovery on all drugs in the case.

C. Defendants' Proposed Indefinite Stay Would Delay Resolution of This MDL for Years.

Plaintiffs anticipate that Defendants' objections will continue to press the arguments they made to the Special Master: rejecting the concept of full discovery of all pending drugs and claims in the MDL, and instead placing a "fence" around the pre-May 2019 version of the MDL

[18] In some of these cases, the procedure ordered by the court was a remedy for a party's failures to produce relevant documents. As described above, there is every reason to believe that subjective attorney review will have the same effects here.

involving approximately thirty drugs, and litigating only that. *See* R&R at 3 (summarizing Defendants' arguments). Defendants want to prohibit full discovery in all other cases, which allege (or soon will allege) the same or similar conduct as to 95 or more other drugs. *See id*.

Defendants' proposal flies in the face of this Court's repeated admonitions to get the MDL moving expeditiously towards resolution. It would drag out this MDL for years; result in redundancy of discovery efforts (*e.g.*, multiple time-consuming searches in the same files for responsive documents, multiple depositions of the same witnesses, multiple productions of each Defendant's transaction-level sales data pulled from the same databases); compound costs and delay; and thwart the goals of judicial economy and efficiency that led to the JPML's creation of this MDL in the first place. *See* R&R at 4 ¶ 2 ("The phased approach proposed by the Defendants may risk redundancy, multiple depositions of witnesses, and confusion"). All the drugs that have been sued upon in this MDL were sold by Defendants during the same time period, and many were the subject of unlawful conspiratorial conduct by the same people. Thus, Defendants' proposal to limit discovery to a limited set of approximately thirty drugs is illogical and unwarranted.

The further delays in discovery proposed by Defendants would cause substantial prejudice to Plaintiffs. Over the past three and a half years, memories have already begun to fade, witnesses have begun to die (at least two witnesses have passed since the first complaint was filed in March 2016), and relevant materials have been lost (Apotex, for example, has "inadvertently" destroyed the entire custodial file of Beth Hamilton, one of its key witnesses). Most importantly, the victims here – Plaintiffs – would be denied their right to seek full and

timely recovery of the massive antitrust damages they suffered because of the violations committed by Defendants.

Affording Defendants a continued asymmetric information advantage by allowing them to continue to withhold relevant documents, data, and other materials from Plaintiffs is not only unfair, but also impedes the progress of this litigation. The biggest leaps toward leveling the playing field in this MDL were this Court's Orders granting the private Plaintiffs' motion for access to the States' collection of documents. *See* Order of 11/14/2018, Dkt. No. 758; PTO 70, Dkt. No. 841. The surest path towards resolution of this MDL is to continue to level the playing field through the provision of more information sooner rather than later. Fulsome discovery without further delay on the nature and scope of Defendants' anticompetitive agreements – which is the central issue in every single case in this MDL – is necessary to inform how the cases will ultimately be adjudicated, and is essential for any meaningful settlement discussions.

D. Objections to Other Provisions of the Recommended CMO

Separate from the broader questions addressed above, Plaintiffs object to certain discrete provisions of the recommended CMO. Plaintiffs respectfully request that these provisions be modified so as to promote the overall goal as stated in the R&R: for discovery to "proceed promptly, efficiently and in accordance with the Federal Rules." R&R at 5.

1. Procedures involving confidentiality re-designations and claw backs are unnecessary where attorney review is allowed (¶¶ 4.e & 7).

A core component of the Special Master's recommended CMO is Paragraph 3.b's prohibition on subjective attorney review in connection with discovery of Defendants' custodial files. *See* CMO at 2 ¶ 3.b. When those documents are produced in the MDL, they will be stamped "Outside Counsel Eyes Only" for a period of 120 days, during which Defendants may

re-designate the documents as Confidential, Highly Confidential, or Outside Counsel Eyes Only, *see id*. ¶ 3.e.i-ii, and may seek to claw back certain documents under the procedures established in PTO 70. *See id*. ¶ 3.e.iii. These post-production re-designation and claw back procedures are an effective substitute for a subjective attorney review and are intended to "protect Defendants' asserted rights." R&R at 4 ¶ 3.

Such re-designation and claw back procedures are unnecessary where the Special Master's recommended CMO *does* allow for attorney review, as it does in paragraph 4 in connection with certain "targeted" discovery of Defendants' documents (which is separate from the discovery of Defendants' custodial files in paragraph 3). Paragraph 4 addresses targeted document searches and necessitates each Defendant performing an attorney review to identify relevant targeted documents for production. Thus, there is no need for a re-designation or claw back process. And yet, perhaps by oversight, those procedures are included in paragraph 4.e. Because re-designation and claw back processes are unnecessary in connection with "targeted" discovery, Plaintiffs respectfully request that paragraph 4.e be stricken from the recommended CMO.[19]

2. Certain procedures applicable to Defendant discovery should not apply to Plaintiff discovery (¶ 7).

Paragraph 7.d governing Plaintiffs' document productions seeks to incorporate certain unidentified "procedures" that apply to Defendants' document productions. It states:

[19] Because paragraph 7.d governing Plaintiffs' document productions incorporates the "procedures" in paragraph 4 by reference (*see* CMO ¶ 7.d), eliminating paragraph 4.e also will make clear that re-designation and claw back procedures, which were never contemplated in connection with Plaintiffs' discovery, do not apply to Plaintiffs' document productions. *See also* Part D.2, *infra*.

> Plaintiffs' production in response to Defendants' discovery requests shall otherwise proceed simultaneously *and under the same procedures applicable to Defendants' production as set forth above in paragraphs 4-6*.

CMO ¶ 7.d (emphasis added). With one exception, however, none of the "procedures" outlined in paragraphs 4-6 can logically be applied to Plaintiffs' document production under paragraph 7.

First, the Special Master's recommended CMO contains separate meet-and-confer and document production deadlines for Defendants (¶¶ 4-5) and for Plaintiffs (¶ 7), so there is no need to incorporate those "procedures" by reference.

Second, as noted in Part III.D.1, *supra*, the re-designation and claw back procedures are unnecessary where attorney review is permitted, as it is for targeted discovery of Defendants' documents under paragraph 4 and for Plaintiffs' discovery under paragraph 7. Accordingly, the re-designation and claw back procedures in paragraph 4 should not be incorporated by reference to Plaintiffs' document production procedures. Striking paragraph 4.e from the recommended CMO, as Plaintiffs proposed in the previous section, will resolve this issue.

Third, although Plaintiffs agree with the procedures and language in paragraph 5, which govern production of Defendants' transactional data (*i.e.*, transaction-by-transaction data), cost information and related documents,[20] the same procedures are not appropriate when applied to production of Plaintiffs' transactional data. For instance, Paragraph 5.a calls for production of transaction-level sales data and cost "samples" – something Plaintiffs have been requesting from Defendants for more than a year and which the Special Master included in the recommended CMO at Plaintiffs' request. Such samples will enable Plaintiffs to discuss and evaluate

[20] As recognized by Special Master Marion, Defendants' sales and cost data for all drugs at the most granular level available (*i.e.*, at the "transaction-level") are relevant, proportional to the needs of the MDL, and should be produced in a prompt and orderly fashion. *See* CMO at 4 ¶ 5.

Defendants' available transaction-level sales data and cost data prior to complete production. As Defendants have made clear from the beginning of meet and confers concerning their data, they do not want to pull data multiple times. Thus, to address this concern and others, Special Master Marion's recommended CMO envisions a logical and orderly process for Defendants' data productions: the parties first meet and confer concerning samples of transaction-level sales data and cost data. Then, production of "complete transaction-level sales data and cost information" for all drugs comes next, no later than January 16, 2020.

On the other hand, Defendants have never pressed Plaintiffs to provide any data samples, nor did they ask Special Master Marion to include a provision in his recommended CMO that would require Plaintiffs to provide such samples. Discussions between Defendants and Private Plaintiffs have already exhaustively addressed Plaintiffs' data fields, and those discussions are now complete, so production of Plaintiffs' data samples would be superfluous. And while the recommended CMO requires Defendants and Plaintiffs to meet and confer about Defendants' data samples and bring any disputes to the Special Master well in advance of the January 16, 2020 production deadline (and by no later than December 13, 2019) (*see id*. ¶¶ 5.a-b), it contains no parallel provisions or deadlines concerning Plaintiffs' data samples (*see id*. ¶ 7). All of this suggests that incorporation of the sampling requirements of paragraph 5 was probably inadvertent.

Finally, paragraph 6 requires that all outstanding signatures and/or verifications for Rule 33 interrogatories be produced by October 11, 2019. However, Defendants have not served any interrogatories on Plaintiffs. Accordingly, paragraph 6 should not be applied to Plaintiffs.

To address the foregoing issues, and for the sake of clarity, Plaintiffs respectfully request that Paragraph 7.d be amended as follows to provide that only paragraph 5.c.ii applies to Plaintiffs:

> Plaintiffs' production in response to Defendants' discovery requests shall otherwise proceed simultaneously and under the same procedures applicable to Defendants' production as set forth above in paragraph~~s 4 6~~ 5.c.ii.

See Exs. B & C ¶ 7.d. In addition, Plaintiffs have modified the recommended CMO to include a transaction data production deadline for Plaintiffs, which mirrors Defendants' deadline in paragraph 5.c.ii. *See id*. ¶ 7.e. These edits will avoid any confusion as to Plaintiffs' obligations in discovery under the CMO.[21]

E. As the MDL Develops, the CMO Deadlines May Need To Be Modified to Fit the Needs of the Case.

Plaintiffs believe that deadlines are a highly effective case management tool. That is why Plaintiffs initiated discussions with Defendants in March 2019 seeking agreement on specific deadlines to govern discovery. Plaintiffs whole-heartedly endorse the Special Master's recommended deadlines governing document and data discovery, because the prompt and fulsome production of documents and data will significantly advance this MDL toward resolution.

However, given the present procedural posture, questions remain about whether the recommended CMO deadlines governing merits expert discovery (¶ 10), class certification (¶ 11), and summary judgment (¶ 12), are realistic. At this stage, Defendants have produced very

[21] Plaintiffs note that a few of the recommended CMO provisions require minor corrections. First, in paragraphs 5.c.i, 5.c.ii, and 8.c, due to typographical errors, "2019" should be "2020." Second, to provide greater clarity in paragraph 5.c.ii, the words "as of" should be replaced with "after." These changes are reflected in Plaintiffs' proposed CMO. *See* Exs. B & C.

few documents and therefore much remains unknown by Plaintiffs about the facts and issues presented in this MDL. Additional complaints alleging conspiracies on many new drugs will also likely be filed in the coming months.

Most significantly, selection of the bellwether(s) is yet to occur and could greatly impact the deadlines for experts, class certification, and summary judgment – a fact the Special Master recognized. *See* CMO ¶ 10 n.2 ("Dates hereafter may be modified either by agreement or by Order of the Court, dependent on the selection of bellwether criteria."). The Special Master's recommended CMO sets forth a schedule to discuss the selection of bellwethers, but it is unknown which or how many Plaintiffs, Defendants, drugs or cases will be included in the bellwether(s). Very different schedules may be appropriate depending on whether, *e.g.*, the bellwether(s) will involve a dozen Defendants or just a few; all Plaintiff groups or just a subset; a dozen drugs or just one.

For the Court's convenience, Plaintiffs have compiled a chart setting forth the deadlines contained in the Special Master's CMO. *See* Ex. S. Plaintiffs note that the meet and confer deadlines are keyed off the date of entry of the recommended CMO (*see id.* at 1), which has not occurred yet. If, as has happened in the past, the parties fail to reach agreements and disputes must be submitted to the Special Masters, a final decision on those disputes (including any appeals to the Court under PTO 68) may take some time to resolve. If enough time passes, the related document production deadlines in the recommended CMO may need to be modified.

Given these uncertainties, the Special Master's proposed deadlines are worthwhile placeholders to focus the parties' efforts, ensure timely compliance with the CMO's discovery provisions, and establish general expectations for sequencing of events. But the CMO's

deadlines may need to be adapted to the needs of the case as discovery progresses, additional complaints are filed, bellwether selection is completed, and the existing information imbalance between Plaintiffs and Defendants is eliminated.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court sustain their objections and enter a modified Case Management and Discovery Schedule in the form attached hereto as Exhibit B.

Dated: September 13, 2019

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	.	Case No. 2:16-MD-02724 (CMR)
	.	
GENERIC PHARMACEUTICALS	.	
PRICING ANTITRUST	.	U.S. Courthouse
LITIGATION	.	601 Market Street
	.	Philadelphia, PA 19106
	.	
	.	September 24, 2019
. . . . .		11:17 a.m.

TRANSCRIPT OF CIVIL HEARING
BEFORE HONORABLE CYNTHIA M. RUFE
UNITED STATES DISTRICT JUDGE

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I N D E X

COURTROOM DEPUTY: All rise. The Court is now in session for the United States District Court for the Eastern District of Pennsylvania. The Honorable Cynthia M. Rufe presiding.

THE COURT: Good morning, everyone.

THE COURTROOM: Good morning, Your Honor.

THE COURT: Please be seated. So, we started early this morning with a conference with liaison counsel and we're now ready to address remaining issues on the agenda and I would like to know who... since I have a sign-in sheet, I believe there's also counsel on the telephone? Do I have a list of them?

FEMALE VOICE 1: - - .

THE COURT: So, if you wish to speak and you're on the telephone, you must identify yourself, please, when that happens. I don't know which of these pages...

MR. WILLIAM STEWART: Hi, this is Bill Stewart from Schneider Wallace on the line.

THE COURT: Hello? Who else is on the phone? I believe we have our Special ESI Master--

MS. NIKOLE BROCK: [Interposing] - - Attorney General's Office on the line.

THE COURT: Would you repeat that, please?

MS. BROCK: Nikole Brock from the Pennsylvania Attorney General's Office.

THE COURT: Thank you. Who else?

MR. FRANK DELEON: Frank DeLeon [phonetic] from the Montana Attorney General's Office, Your Honor.

THE COURT: Thank you. Anyone else?

MS. LEEANNE APPLEGATE: LeeAnne Applegate, Kentucky Attorney General's Office.

THE COURT: Thank you. Who else, please?

MS. LAURA MARTELLA: Laura Martella from the Connecticut Attorney General's Office.

THE COURT: Thank you. Anyone else--?

MS. RACHEL DAVIS: [Interposing] Rachel Davis from the Connecticut Attorney General's Office. I do not intend to speak.

THE COURT: I did not hear that.

MALE VOICE: That was Rachel Davis from the Connecticut Attorney General's.

MR. TIMOTHY FRASER: Timothy Fraser, Florida AG's Office.

THE COURT: And who was that?

MALE VOICE: Tim Fraser from the Florida Attorney General's.

THE COURT: All right. Anyone else?

MR. DANIEL REGARD: This is Dan Regard, the Special Master for ESI discovery.

THE COURT: Thank you, Mr. Regard. I did try to

introduce you a moment ago and thank you for joining us this morning.

MR. REGARD: Yes, ma'am.

THE COURT: Anyone else on the phone?

MS. JUDITH ZAHID: Your Honor, it's Judith Zahid and Eric Buetzow for United HealthCare Services, Inc.

THE COURT: Thank you.

MS. ELIN ALM: Elin Alm from the North Dakota Attorney General's Office.

THE COURT: Thank you. Might that--

MS. HUGHES: [Interposing] - - Hughes on behalf of Nisha Patel.

THE COURT: Okay. Thank you.

MR. RYAN: - - Ryan on behalf of Jay Nesta [phonetic].

THE COURT: Thank you, sir.

MR. ROBERT CONLEY: Robert Conley [phonetic] on behalf of James Grosson [phonetic].

THE COURT: Thank you.

MR. JOHN SELDEN: John Selden, Alabama Attorney General's Office.

THE COURT: Thank you, sir.

MS. ELIZABETH HAAS: Elizabeth Haas with Foley and Lardner on behalf Apitex.

THE COURT: Thank you.

MS. TAMARA WEAVER: Tamara Weaver from the Indiana Attorney General's Office.

THE COURT: Thank you.

MR. MATTHEW MCKINLEY: Matthew McKinley from the Ohio Attorney General's Office.

THE COURT: Thank you.

MR. DAVID HASSELMAN: David Hasselman [phonetic] on behalf of Impax.

THE COURT: Thank you. I guess that's it. Thank you very much.

Let's address the joint proposed agenda. It has two items. Of course, there are other items that the Court could entertain, if there is time this morning. But I would like to address what counsel--liaison counsel believe should be addressed first. And I'm going to ask the Plaintiffs to proceed.

MR. JOSEPH NIELSEN: Good morning, Your Honor. Joe Nielsen from the State of Connecticut Attorney General's Office on behalf of the Plaintiff states.

THE COURT: Good morning.

MR. NIELSEN: I think number one on the agenda is we wanted to notify the Court that the Plaintiff states will be amending, as of right, the complaint that we filed on May 10th, 2019. We're planning to add several additional Plaintiff states and jurisdictions as well as, likely, an additional

MR. NIELSEN: Thank you, Your Honor.

THE COURT: The sooner, the better.

MR. NIELSEN: Understood.

THE COURT: Okay. Now, I think the largest substance that we can deal with this morning are the issues raised in the Report and Recommendation from Special Master David Marion setting forth the Case Management Order and Discovery Schedule. And we would like to address the various objections that have been raised by filing briefs. We reviewed them but I would like to give everyone that has filed such objections an opportunity to address the Court. Briefly, succinctly, but I still think it's appropriate. So, again, we'll start with Plaintiffs.

MS. LIEBENBERG: Thank you, Your Honor. Good morning, Bobbie Liebenberg on behalf of the EPPs.

THE COURT: Good morning.

MS. LIEBENBERG: I planned to offer some brief introductory remarks to provide an overview of Plaintiffs' response to Special Master Marion's Report and Recommendation. I'm going to then turn the presentation over to Mr. Nielsen who will address the reasons why we believe full custodial files for certain key custodians should be produced. Or, alternatively, why Special Master Marion's recommendation to require the use of broad search terms without a prior relevance review should be applied to the document productions.

As you know, Plaintiffs first filed their complaints in March 2016, almost three and a half years ago, and, yet, Defendants have not begun to make any meaningful production of substantive documents. This Court has repeatedly emphasized its desire to expedite discovery and to put in place a Case Management Order and, in fact, one of the reasons these cases were consolidated to the MDL by the JPML in the first place was to promote the coordination of efficiency and resolution of the--timely resolution of these cases.

The Court now has before it a comprehensive and carefully considered Case Management Order that reflects a fair and workable compromise of the competing proposals that had been submitted by the Plaintiffs and Defendants, supplemented by Plaintiffs' proposed modifications, which are set forth in our brief, we believe this CMO will propel these cases towards completion with undue delay. The Court's recent decision denying the motions to dismiss found that Plaintiffs had plausibly alleged an overarching conspiracy regarding the broader market of generic drugs that extended beyond any individual drug.

The Court was very specific in its opinion and we reiterated several times that discovery is needed to test the scope of the overarching conspiracy allegations and the defenses to them. Thus, Special Master Marion correctly concluded that under Rule 26, Plaintiffs were entitled to

conduct discovery concerning the full scope of Defendants' unlawful anticompetitive conduct with respect to all drugs in the MDL as well as--including discovery that relates to what this Court described as the connective tissue between any individual single drug conspiracy and the broader overarching conspiracy.

Thus, the Report and Recommendation, consistent with Your Honor's recent ruling, provides an effective framework for the timely completion of discovery for all drugs in this MDL now as well as additional drugs that will be brought into the MDL through new or amended complaints. Indeed, I think it really bears emphasis that, under the recommended CMO, completion of document discovery as to all of these drugs is contemplated to be done in just one stage within the next year. And I want to repeat that. That is a really way-to-go forward in this case. And that stands in stark contrast to the Defendants' proposal which seeks to phase and silo discovery and to create a suspense docket that will encompass the vast majority of drugs that are involved in this MDL. Defendants specifically propose to limit--limiting discovery, in a phase one, to approximately the thirty drugs that were at issue in this MDL before the states filed their May 20th, 2019, Teva complaint. And to suspend all discovery and other pretrial proceedings as to the approximately ninety-five drugs that were added to the MDL by that complaint as well as new drugs and new

Defendants.

Under the Defendants' proposal, the states' May 2019 Teva complaint and all other complaints filed under that date will not come out of the suspense docket until after the Court's decision on the class certification of the phase one overarching conspiracy complains, which doesn't even include all of the thirty complaints at issue, and completion of summary judgment as to those briefing. And Plaintiffs estimate that that won't occur until sometime fall of 2021. And by that time, the conduct at issue in this case would have taken place six to eleven years earlier.

The undue delay inherent in Defendants' phased discovery approach will cause substantial prejudice to Plaintiffs. And time, Your Honor, is of the essence. In the three and a half years that has elapsed, two witnesses have died, memories have faded, and at least one key custodian's files have been destroyed.

Thus, Special Master Marion's Report and Recommendation properly rejected Defendants' phased discovery approach and the proposed suspense docket recognizing that it would cause delay, redundancy, multiple depositions of witnesses, and confusion. Court have repeatedly emphasized that administering an MDL is very different than overseeing an individual case and it often requires the adoption of special procedures. Indeed, in the PPA product liability litigation, a

case cited by the Defendants, the Ninth Circuit emphasized that effective coordination of an MDL proceeding requires that a district court be given even greater discretion to structure a procedural framework that will move the case as a whole and that Rule 16 authorizes the Court to manage these cases so that disposition is expedited and settlement is facilitated.

Plaintiffs endorse the Case Management proposal set forth by Special Master Marion because it provides an efficient procedural framework for the timely commencement and completion of discovery for all drugs in these cases and it avoids the substantial delays inherent in Defendants' phased discovery approach. I'm now going to turn the presentation over to Mr. Nielsen to address really what we think are the two key discovery issues before this Court and that is the use of custodial files or broad search terms. Thank you, Your Honor.

THE COURT: Mr. Nielsen?

MR. NIELSEN: Thank you, Your Honor. Before I start, I just wanted to mention that with me today is Angelina Whitfield, an Assistant Attorney General from the State of Illinois, sitting in the jury box, who prepared the briefing for the states on this issue and I wanted her to introduce herself to the Court.

THE COURT: Thank you.

MR. NIELSEN: As Ms. Liebenberg said, I did want to address the two key issues involved in the case management

briefing and that is the Plaintiffs' request for full custodial file productions from certain key individuals at the Defendants as well as the Defendants' request to filter their productions based on responsive - - relevance prior to producing the documents as to the Plaintiff states.

First, Your Honor, with regard to the custodial file issue, I wanted to make it clear that the Plaintiffs are requesting full custodial files for a limited set of the key individuals from each company. This is not an expansion of what the Plaintiffs were previously seeking in discovery. In fact, the Plaintiffs had negotiated a much larger list of custodians in the meet and confer with the Defendants prior to this case management proposal. So, this is actually a concession in that respect from the Plaintiffs and there is a lot of risk involved from the Plaintiffs' perspective to make this proposal. There will certainly be a number of custodians who had relevant and, indeed, highly relevant documents that the Plaintiffs would be willing to forgo discovery on in order to focus on the limited set of key individuals and getting a real deep dive into their documents. Because they are the key individuals responsible for engaging in the collusion or in the price increases that were at issue in the complaints.

And in the context of making this proposal, Your Honor, what the Plaintiffs are trying to do here is come up with an innovative and creative way to accomplish the

objectives of the JPML and of this MDL, which are number one, to avoid duplication of discovery and, two, to conserve the resources of the parties, their counsel, and of this Court.

The Plaintiffs believe that the production of full custodial files is the most efficient and reasonable approach to move the entire MDL forward as quickly as possible while still taking into account and accommodating future complaints that will be filed and not putting all of those cases into a suspense docket where they would be stayed indefinitely.

Full custodial file production, Your Honor, would reduce the number of custodians at issue significantly. It would, therefore, reduce the number of places where the Defendants have to go to find and produce documents. It will likely reduce the total number of documents that have to be produced by the Defendants. And that's just common sense, Your Honor. Less custodians equal less documents. Especially when the alternative is what Special Master Marion has proposed which would be broad search terms apply to a larger, much larger, number of custodians.

And, in their brief, Your Honor, the Defendants argue, and I'm quoting from page 11, that the sheer size of a typical custodial file would make the volume of documents to be reviewed unworkable. And I can tell you from experience that that's flatly incorrect. Number one, many of these Defendants have actually produced full custodial files to the states

during the course of their investigation so, I know it's not unworkable.

Also, the volume of the documents in those custodial files that have been produced is not overwhelming. In fact, the largest custodial file that the states received as part of their investigation was a total of 167,000 pages. Which, in a very large antitrust case such as this one, is not significant overall where typically cases involve hundreds of millions of documents in cases like this. But even if the custodial file were much larger than 167,000 pages, that would be proportional to the scope and magnitude of this MDL. The sheer size, the volume of the evidence, the allegations, the overarching conspiracy, and the importance of the market that we're talking about, Your Honor.

Production of full custodial files will also be quicker and more efficient. We can eliminate search terms entirely from the process. And I would point to pages 18 to 23 of the Defendants' brief, Your Honor, where they go through and describe the inherent delays associated with applying search terms. In particular, the parade of horribles that will result if Special Master Marion's recommendation is applied to them. They go through and they seek, you know, they describe the significant delays that will result. Many of those delays are just the basic fundamental agreement on search terms themselves. Which search terms are going to be applied and

will there be a dispute about that? And I would point to page 19 of the Defendants' brief, Your Honor, where the Defendants actually say, without knowing--without having done any testing on any of the search terms and without having gone through meet and confer on any of these proposed search terms from Special Master Marion's recommendation, that most if not all of the Defendants will dispute the search terms. They say they know that that's going to happen, and the production of full custodial files will cut through all of that, leaving only a privileged review by the Defendants. And there are many ways for these Defendants to engage in a very efficient and reasonable privileged review that can be done quickly and protect their rights.

The production of full custodial files would also eliminate duplication, which again is one of the primary objectives of the MDL. With full custodial files documents are produced once, that is it. These Defendants will never have to go back to that custodian's files ever again for anything. And they will accomplish discovery in the cases that are on file currently as well as future cases that involve different drugs but the same companies.

These key individuals at these companies had responsibility for all the companies' drugs and would be involved and key players in future cases as well.

Custodial files will also reduce the number of

potential depositions as well as the risk of multiple depositions of the same individuals over time. As additional documents are produced piecemeal... If we do this the way the Defendants proposed to do it, as additional cases come out of the suspense docket and new discovery is conducted, additional depositions of the same individuals would have to happen multiple times over and over again. The production of full custodial files will cut through that.

And, in additional to all these benefits and savings, the production of full custodial files is appropriate based on the allegations in the complaints that are on file. This is an extremely unique case with the volume of the allegations, the allegations of an industry-wide overarching conspiracy and the volume of the evidence and communications that has already been alleged. But I just want to identify one example of why a full custodial file would be important, Your Honor. And that involves the full custodial file that the Defendant Teva produced with regard to Nisha Patel who was also an individual Defendant in the state's May 10th complaint. Having the full custodial file from Defendant Patel allowed the states to understand the extensive nature of the conduct and develop that complaint based almost primarily on her full custodial file.

As you may or may not know, if you haven't read the full entire complaint, it goes through in painstaking detail alleging how the Defendant Nisha Patel started at Teva, she

began formulating price increase lists and formulating--ranking competitors based on their quality and identifying price increase candidates based on the relationships that she and others at Teva had with these competitors. And she... Ultimately, we determined that she spent a good day [sic] of her--of each of her workday communicating with competitors to identify and seek agreements on these price increases.

And this story, when you read it in the complaint, Your Honor, it seems obvious and apparent but none of that was obvious or immediately apparent from the documents as they were produced. Significantly, Nisha Patel never once referred to a single competitor that she communicated with by name in a document. When she spoke to these competitors and then passed along information internally to her colleagues, in emails or in other documents, she would often do it using code or veiled, opaque references to information that she had learned from the competitors.

Throughout the complaint, you see terms like strategic, to identify that there was an agreement in place with a competitor on a certain drug. When she would get off the phone with a competitor, she would send an email saying there was a rumor of a price increase. It didn't say where she got the information, who she had spoken to, any of those things. She used terms like fluff pricing to indicate a cover bid where Teva would not seek to obtain the business from their

competitor. Even the term quality, Your Honor, doesn't necessarily immediately jump out at you as identifying that there is a collusive relationship in place. All of that, the context of each and every document was important and could not be properly evaluated without having access to many other sources of information, many of which the Defendants just simply won't have in order to look through these documents and determine relevance.

For example, the states have an industry-wide phone record database where it makes it very easy for the states to identify which competitors were talking to each other, when and for how long. We have developed extensive information about pricing and price increases throughout the industry over time relating to specific companies and the states also, in the course of their investigation, have a number of documents from competitors that we can look at to determine the context and determine whether these documents are relevant.

And all of these documents and all of these sources of information were necessary in order to create this context where the documents in her full custodial file could be properly understood. And she is not alone, Your Honor. We identified a number of individuals at various companies who are also named as individual Defendants in our complaint who engaged in conduct at similar levels in terms of communicating with competitors. And at a minimum, the states have

established through their allegations that the full custodial files from the individual Defendants would be appropriate based on the scope and volume of their conduct.

Full custodial files would also be necessary and appropriate in order to evaluate the defenses that will be raised by the Defendants in this case. Just on example of a defense that will be hotly contested, Your Honor, is the authority of these individuals to engage in price fixing agreements and market allocation agreements with their competitors. And the full custodial files are necessary to determine the scope of these individuals' authority on an everyday basis. Is this part of their authority to identify price increases or to list price increases or to do these different things? The full context, even with regard to drugs that are not at issue in the complaint, will be relevant to determine these key individuals' authority. And full custodial files will be necessary to evaluate that.

One thing that the...one opposition that the Defendants raised to the production of full custodial files is that they will contain a lot of personal information. And I can tell you, Your Honor, from experience, some of that personal information is actually highly relevant to the case and to the story on what happened over time.

One example I'll point out, I'll be brief, it also involves Nisha Patel while we're on that theme of Nisha Patel.

Nisha Patel went on maternity leave during a period of time when she was engaged in this price increase campaign and the fact that she--the dates of when she was on maternity leave and when she started to come back where important for a number of reasons. Number one, it showed and demonstrated that no one else at Teva was doing anything with regard to price increases at all other than Nisha Patel. The activity on price increases completely stopped and that was important to establish her authority and her domain over identifying and implementing price increases.

Secondly, the communication patterns between the companies changed during the time she was out and knowing when she was out it was important because, for example, another Defendant--individual Defendant in the case, his name is David Berthold [phonetic]. He was a high-level executive at Defendant Lupin. He had been communicating with Nisha Patel up until the time of her maternity leave and when she was out, he just communicated with the VP of sales and other individual Defendant in our case and one other person at Teva. And that fact, Your Honor, is important for a couple of reasons. Number one, it shows that Nisha Patel was not a rogue employee who was out on her own, communicating with competitors. This was an institutional agreement between these companies that was understood at higher levels than her. And so, even personal information can be part of the story and the context is very

important. We would not have been able to make these connections or develop this information without her full custodial file.

And lastly, Your Honor, on the issue of custodial files. They're also critically important because search terms will undoubtedly miss some highly relevant documents. The Defendants in this case understood that their conduct was unlawful, and they took steps to avoid documentation of the conduct in writing. They used veiled, opaque references in their documents. They used code words. Some even took active steps to destroy documents, any evidence of their conduct. And all of that context makes it very difficult to find search terms that will come up with every relevant document.

And I would point the Court to two examples that we have attached to the joint brief. Exhibits "D" and "E", Your Honor. And if you don't have a copy of those immediately, I can--

THE COURT: [Interposing] I have a copy.

MR. NIELSEN: You do. So, Exhibits "D" and "E" are two different text messages between Jason Malek, a former Heritage executive, and an unknown recipient. The only information in there on the recipient is a phone number. So, one of the text messages from Jason Malek says, "Tell Tim to stay away from ABC." And then there's a response from the unknown number saying, "Done." Now, those two documents are

key documents in the states' case against Heritage, the first complaint that the states filed. Highly relevant and those documents will never, ever come up using any search terms that could be devised by any of the parties. Even if they did come up, Your Honor, it's likely that no one would understand that there were relevant documents to begin with. There are actually... When you read the documents in the context of the allegations in the complaint, it makes sense. But when you look at those documents by themselves, you can't tell that they're relevant without doing about five different steps of investigation in order to determine relevance.

First, you have to determine who is Jason Malek even talking to. There's just a phone number in the documents. So, you have to do a lot research to identify the phone number, which involves a lot of document review, trying to find that number in a document database or through other sources. Turns out, in this case, Jason Malek is talking to a Heritage employee, a subordinate. He's telling a subordinate to go talk to Tim.

But, second, you have to understand what they might even be talking about. And in order to do that, that requires a lot of document review of other Heritage documents surrounding this time period to see what was going on with ABC, how did this issue come up? As it turns out, ABC had asked Heritage for an offer on a drug called Glyburide. But that

wasn't immediately obvious.

Third, you have to determine who Tim is. Is Tim a Heritage employee? Is Tim, you know, a competitor? There's a lot of document review involved in trying to find who this unknown Tim might be. You have to look at org charts from competitors, search documents, a lot of different things. It takes a while. As it turns out here, Tim is a sales rep at a competitor, Aurobindo.

Then, you have to look and see whether the Heritage subordinate actually talked to Tim. And in order to do that, you need phone records. You have to actually subpoena the phone records from either the Heritage person or Tim. It turns out the states had already done that and, once you look at the phone records, you find that the subordinate does actually call Tim and then sends that second text message saying, "Done."

And, last, you have to try to fit that communication and that context into a story about a conspiracy. And it doesn't immediately fall into a timeline. There's a lot of work. And so, my point here is many of these documents, not only do they not come up in search terms but they're hard to even determine whether they're relevant. And there's a lot of context involved.

I would point out just one other example, very quickly, Your Honor, of a document that will never come up using any search terms although it is highly relevant. And

that's in paragraph 647 of the Plaintiffs states' May 10th complaint. It's an email from David Rekenthaler, who's an individual Defendant in the case, a VP of sales at Teva, where he sends a Teva pricing list, price increase list, to his personal email account so he can then forward it from his personal email account to a competitor's personal email account to avoid detection. And the reason that this document will never come up using search terms, even though it has a full list of price increases, is because he copied that and pasted it into his email as an image so there are actually no words associated with it. So, any search terms that come up will not hit on that document even though that is an attempt by this senior executive to avoid any documentation of his collusion with a competitor through using personal email.

The Defendants actually propose a solution for finding these types of documents in their brief, Your Honor, in pages 15 to 16 of their brief. But the solution is completely absurd when you look at what would have to be done in order to comply with their solution. The Defendants propose that, for these types of instances where we know of communications between competitors. We can meet and confer on every single communication these competitors ever had and devise document review projects where the Defendants will actually look at documents surrounding the time periods of all these communications and see if they can identify and then produce to

us relevant documents that would not otherwise hit on search terms. So, they're essentially proposing that we meet and confer on tens of thousands of different communications and then devise independent, individual document review projects for each which would just delay this case forever. And in addition, it would require the Plaintiffs to provide the Defendants with all our work product on all of the different collusive communications that we have found which is, again, another reason it's not appropriate.

So, Your Honor, that is the Plaintiffs' position on custodial files. I would also want to make a point on the relevance review issue. And that is that the Defendants contend that the Federal Rules require that only they should be responsible for filtering their documents in determining relevance and responsiveness. They cite cases to that effect. However, their own cases that they cite actually demonstrate that there are circumstances where that is inappropriate. For example, the Defendants block quote the following passage from Wilson versus Rockline Industries at page 7 of their brief. And, in that case, the Court in Rockline--Wilson actually says in our system of law we allow the party responding to discovery to filter his own documents and provide only those which are relevant to the litigation. In the absence of some showing that relevant information is being withheld, and here there is none, there's no basis to make the responding party produce all

information. So, what the Court is actually saying is where there is a showing that relevant information is being withheld, then there should be a no relevance review.

And here we have made that show and we've gone through at length in our briefs, Your Honor, demonstrating how many of these Defendants have attempted to provide--to impose a relevance review on the PTO 70 AG access documents that were produced and claw back a number of documents based on relevance. And we highlight a number of those.

I would just mention a couple. For example, Teva produced 250,000 documents to the states during the course of their investigation. In the context of PTO 70, they tried to claw back initially 100,000 of those documents or 40 percent of that production. And they claimed to be using a very broad definition of relevance that took into account the states' May 10th, 2019, complaint. However, when we loaded those documents into our document review platform and we dandled them together, it was immediately obvious that there were, you know, approximately a hundred documents that had been coded hot. There were several hundred warm documents. And we don't even code for relevance, Your Honor, so, it's uncertain how many of those documents were just clearly obviously relevant. We only code the very significant documents but, you know, they--Teva actually tried to claw back documents that were quoted in our complaint. A number of documents about playing nice in the

sandbox, documents showing that Teva had advance knowledge of a Heritage price increase on a drug called Theophylline, which is the subject of the states' first complaint. Documents demonstrating the relationship between Teva and - - and a number of other price increases that are at issue in the complaint.

Taro was another Defendant who sought to do this on a much smaller scale. However, with the same results in terms of clawing back highly relevant documents. Taro also tried to claw back a document that was actually quoted in our complaint as well as hundreds and hundreds of other documents specifically relating to drugs at issue that in the states' complaint that we had sued Taro about. Just a few examples. Enalapril is a drug that we allege Taro entered the market and illegally agreed to allocate customers as they were entering the market. They were a number of emails there relating to Taro's entry into the market for Enalapril that were--tried to be clawed back. Adapalene gel, which is a price increase drug in the complaint. There are documents relating to Taro's evaluation of its fair share for that drug. Ketoconazole, which is another price increase drug in the states' complaint. There are emails, internal Taro emails, that they seek to claw back directly relating to their decision to follow Teva's price increase which is specifically the subject of the states' complaint.

And we listed a number of other examples, I'm not going to go through them but from activist - - those are detailed throughout pages 16 and 17 of the joint brief.

And the Defendants' own proposal, Your Honor, in determining how they would provide discovery relating to the overarching conspiracy, that proposal by itself shows that the Defendants are incapable of determining relevance in this case. The Defendants make a proposal that the original 31 drugs in this case will be... offense will be placed around those cases. The rest of the cases will be put in a suspense docket, no discovery. But what they do offer is some discovery on overarching conspiracy that could apply to all the cases. But what they do is they specifically limit overarching conspiracy discovery to two specific requests for production which they are referring to as relationship documents. The relationship documents, however, are only a small fraction of what is needed to properly evaluate the overarching conspiracy in this case. By limiting overarching conspiracy discovery to two RFEs, Defendants would necessarily exclude a significant amount of important evidence including meetings and communications with competitors where the subject matter of those communications is unknown. We actually provide an example of that document where a Heritage representative said, "Spoke with Gloria" and she's actually referring to a competitor and that's a part of the whole ongoing story. We wouldn't get any of those trade

association related requests including girls' nights out and similar events. The Court has indicated in her overarching conspiracy decision on the motion to dismiss that those are highly relevant documents, important pieces of the conspiracy puzzle. We wouldn't get any of those calendars, expense reports, journals, text messages, for employees who may have engaged in price fixing. None of that would be produced.

But, probably most importantly, Your Honor, their proposal would exclude those basic everyday documents that show that these companies are acting in accordance with the agreement that they have with these competitors.

So, conceding--deciding to concede share to a new market entrant, as they enter the market, would be actions consistent with the overarching conspiracy. Not stealing a competitor's share when the competitor raises price. Again, the same thing. These are all dividing up customers. When a company is losing exclusivity, all actions showing that these companies have a consistent adherence to the common scheme. We would not get any of that under the Defendants' proposal and, for those reasons, we believe that Special Master Marion's proposal not allowing for relevance review is appropriate if the Court does not agree that we should get the full custodial files for those limited set of key custodians.

And I just want to make one additional point, Your Honor, and this has to do with the--putting a fence around the

original 31 drugs and placing everything else in a suspense docket. The states in particular, and I'm speaking for the states here, have a fundamental objection to that idea. When we filed our complaint in May, we did not object to a transfer to the MDL here. And it was never contemplated when we took that action that that case would be placed in a suspense docket and discovery on it would be stayed indefinitely.

And any future complaints that we file, we similarly would not expect that and if that were the case, we would fundamentally object to them being transferred here. It would be a big problem for the states to have those cases stayed. And I think for everybody, it would be a big problem.

Fundamentally doing that, and I believe that this is what the Defendants intend, will stay a huge majority of the drugs at issue in the MDL. Those are in the states' complaint filed in May. 114 different drugs at issue substantially expanded the scope and Defendants' proposal would essentially stay that entire case.

Your Honor, given the extraordinarily high stakes involved in this MDL, as well as the parties' relative access to information and the importance of discovery in resolving these issues, broad discovery is warranted here on all the cases. Thank you, Your Honor.

THE COURT: Thank you, Mr. Nielsen. Anyone else from the Plaintiffs' side?

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	**MDL 2724** **16-MD-2724**
THIS DOCUMENT RELATES TO: ***ALL ACTIONS***	**HON. CYNTHIA M. RUFE**

MEMORANDUM OPINION

Rufe, J. **January 9, 2020**

Defendant Heritage Pharmaceuticals, Inc. contends that Plaintiff State of Connecticut, through the Office of the Attorney General (the "Connecticut AG"), has violated the Protective Order in this case.[1] Heritage contends that the Connecticut AG included excerpts of a privileged email in the Complaint and Amended Complaint filed in one of the cases in the MDL,[2] publicized those excerpts, and possibly released a sealed document to the press. Heritage has moved to compel the Connecticut AG to comply with the Protective Order by allowing Heritage to claw back the emails, to strike the Amended Complaint, and for sanctions. The Connecticut AG opposes the motions, and argues that it is Heritage's unjustified accusations of wrongful conduct that warrant sanctions.

At issue is an exchange of emails on October 3, 2014, between Heritage's outside counsel at the time and Heritage's then-CEO, Jeffrey Glazer. The email chain begins with the forwarding of a letter sent by members of Congress to Heritage. After some back and forth, the attorney in the final email relays information received from a colleague representing another company as to the

[1] Pretrial Order No.. 53 [MDL Doc. No. 697].

[2] *Connecticut v. Teva Pharmas., Inc.*, Civil Action No. 19-2407 (E.D. Pa.).

coordination of responses among several companies and through a pharmaceutical industry trade association. Heritage's then-counsel produced the email chain to the Connecticut AG on June 26, 2017, as part of the state investigation.[3] In addition to conducting the investigation pursuant to Connecticut law, the Connecticut AG, joined by many other States, has filed antitrust actions. The first case brought by the Plaintiff States was conditionally transferred into the MDL on May 3, 2017; the order was made final on August 3, 2017.

An image of the final email in the chain was included (with the names of individuals other than Mr. Glazer redacted) in the sealed, unredacted version of the Plaintiff States' Complaint filed on May 10, 2019.[4] Although Heritage is not a named Defendant in that case, when the Plaintiff States notified Defendants' Liaison Counsel of their intent to file a motion to unseal the complaint on May 21, 2019, Heritage would have received copies of the motion and the unsealed Complaint as a Defendant in the MDL. The Plaintiff States filed the motion on June 6, 2019.[5] Several Defendants, not including Heritage, filed a letter response explaining that because the Complaint had been sent (by whom, the Court does not know, and Plaintiffs have denied doing so) to a news organization and published online, there was no longer any point to maintaining the Complaint under seal.[6] The Court granted the motion to unseal on June 21, 2019.[7] Heritage filed its motion the next month.[8] With the knowledge of the parties to the MDL and the Court, the Plaintiff States filed an Amended Complaint on November 1, 2019, which again reproduces the final email.[9]

[3] *See* MDL Doc. Nos. 286, 417.

[4] Civil Action No. 19-2407 Doc. No. 1 at ¶¶ 1031–31.

[5] Civil Action No. 19-2407, Doc. No. 12.

[6] Civil Action No. 19-2407, Doc. No. 45.

[7] Civil Action No. 19-3407, Doc. No. 48.

[8] MDL Doc. No. 1038.

[9] Civil Action No. 19-2407, Doc. No. 106 at ¶ 1132.

Heritage, which is still not named as a Defendant in that action, has filed a motion to strike the Amended Complaint.[10]

The parties disagree as to whether the Protective Order in this case applies. There is some room for uncertainty in this regard, but it ultimately does not control the decision as to whether the email must be returned to Heritage. Heritage can prevail only if the emails are covered by attorney-client privilege and the common-interest privilege. The other designations of confidential material covered by the Protective Order—Confidential, Highly Confidential or Outside Counsel Eyes Only— do not apply to the emails, and no in-depth analysis of the interlocking provisions of the Protective Order is necessary for the resolution of the dispute. Instead, the Court will determine whether the emails are privileged. If they are, the Court has the inherent authority to restrict the use of privileged documents in the MDL to preserve the integrity of its judicial proceedings.[11]

Attorney-Client and Common-Interest Privilege

"'[T]he attorney-client privilege may be invoked . . . with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.'[12] "Although the communications are often relevant and highly probative of the truth, they are protected in order 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'"[13] The privilege does not extend to the

[10] MDL Doc. No. 1154.

[11] *In re Shell Oil Refinery*, 143 F.R.D. 105, 109 (E.D. La. 1992).

[12] *Emmanouil v. Roggio*, 499 F. App'x 195, 199 (3d Cir. 2012) (quoting Restatement (Third) of the Law Governing Lawyers § 68)).

[13] *In re Grand Jury Subpoena*, 745 F.3d 681, 687 (3d Cir. 2014) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

disclosure of underlying facts incorporated into the communication.[14] "Where a lawyer provides non-legal business advice, the communication is not privileged"[15] In addition, particularly where the attorney is providing both business and legal advice, the privilege does not apply when "an attorney is merely conveying to his client the substance of what a third party has conveyed."[16]

The common-interest privilege (also referred to as the community-of-interest privilege) is an exception to the general rule that attorney-client privilege is waived following disclosure to a third party, and it "allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others."[17] To be protected, "the communication must be shared with the *attorney* of the member of the community of interest" as "[s]haring the communication directly with a member of the community may destroy the privilege."[18] In addition, all members of the community "must share at least a substantially similar legal interest."[19] This has been interpreted to mean that "the interests must be closer to 'legally identical' than 'legally similar.'"[20] Moreover, "the party asserting the privilege has the burden of establishing the elements of the attorney-client privilege generally, as well as those of the common-interest privilege."[21] Thus, "there should be a demonstration that 'the disclosures would not have been made but for the sake of securing, advancing, or supplying legal representation.'"[22]

[14] *Upjohn*, 449 U.S. at 395–96.

[15] *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007) (internal citations omitted).

[16] *TVT Records, Inc. v. Island Def Jam Music Grp., a Div. of UMG Recordings, Inc.*, No. 02-6644, 2003 WL 749801, at *2 (S.D.N.Y. Mar. 5, 2003) (internal quotation marks and citations omitted)

[17] *In re Teleglobe Comms. Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (citations omitted).

[18] *Id.*

[19] *Id.* at 365.

[20] *Gelman v. W2 Ltd.*, No. 14-6548, 2016 WL 8716248 at *4 (E.D. Pa. Feb. 5, 2016).

[21] *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011) (citations omitted).

[22] *Leader Tech., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010) (quoting *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996)).

In the final email, the attorney is conveying information from third parties, not providing legal advice. The record does not show that Heritage, Mylan, and Teva (the companies referenced in the final email)[23] shared a sufficiently common legal interest in responding to the congressional inquiries, and the communications extended beyond individual companies to an industry trade association (the GPhA), as stated in the final email. The Court therefore concludes that the final email is not privileged.[24] The other emails in the chain however, do not contain such communications, and as they may reasonably be construed as seeking legal advice the Court will order that they may not be used in the MDL, except for the congressional inquiry letter itself (which is listed as an attachment but not included in the printout of the document).[25]

Sanctions

Running throughout the motions and responses is an underlying tension among the parties, as demonstrated by dueling requests for sanctions. The Court previously denied without prejudice

[23] Mylan and Teva, both of which are named as Defendants in the relevant Complaint, did not raise any privilege claim as to the final email.

[24] The final email reads as follows:

> Spoke with my colleague [redacted] in DC, who is doing the response letter for Mylan. Her husband works for [redacted] and he is doing the response for Teva.
>
> They have both been in contact with GPhA on coordinating a response – and the consensus at this point is that the response will be "polite f-u" letters.
>
> She told me that Teva authorized [redacted] to schedule a conference call to coordinate the response and make sure everyone is on the same page.
>
> She said the response can either be a ghost written letter on HPI letterhead or a letter from outside counsel. Just depends on your preference.
>
> I'll keep you updated.

[25] Plaintiff States argue briefly that any claim to attorney-client privilege has been waived because the document was produced more than two years before Heritage objected to its use. Given the massive volume of documents produced in the investigation, the Court will not be quick to find waiver. Similarly, Plaintiff States' invocation of the crime-fraud exception to the attorney-client privilege is a cursory discussion that puts the cart before the horse by assuming a conspiracy to obstruct a congressional inquiry; the Court will not rule on such an important issue that has not been fully developed. Because the email quoted in the Amended Complaint is not privileged, the Motion to Strike will be denied.

a motion filed by certain Defendants to limit extrajudicial statements.[26] That motion stemmed from the dissemination to a media outlet of the then-sealed Complaint and interviews given by the Connecticut AG. Heritage also cites the use of the final email on social media platforms as a basis for sanctions. The Connecticut AG vehemently denies that it has leaked any sealed documents to the press.

The Court will not impose sanctions against either party at this time.[27] The stakes in this MDL are very high for all parties, and the public interest is great. There is no evidence whatsoever that the Connecticut AG has acted unethically or contravened this Court's orders. The Court will assume that the intemperate language employed by Heritage reflects those high stakes but cautions all counsel not to let zeal run ahead of facts. As the Court previously ruled, any party who contravenes the Court's authority with regard to sealed documents would be subject to sanctions, but the Court will not impose limits on extrajudicial statements unless and until such statements jeopardize the fairness of the judicial proceedings.[28]

[26] MDL Doc. No. 825.

[27] *See Doering v. Union Cty. Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988) (stating that the standards for awarding sanctions are stringent as sanctions "1) are in derogation of the general American policy of encouraging resort to the courts for peaceful resolution of disputes; 2) tend to spawn satellite litigation counter-productive to efficient disposition of cases; and 3) increase tensions among the litigating bar and between the bench and the bar." (internal quotation marks and citations omitted).

[28] MDL Doc. No. 825.