

No. 19-\_\_\_\_\_

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**In the Supreme Court of the United States**

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ACTAVIS HOLDCO, INC., ET AL., PETITIONERS

*v.*

STATE OF CONNECTICUT, ET AL., RESPONDENTS

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*ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Federal Rule of Civil Procedure 26(b)(1) defines “the scope of discovery” in federal civil cases as “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case[.]” A party may object to discovery requests, and inform the requesting party that “materials are being withheld,” insofar as they exceed “the scope of Rule 26(b).” Fed. R. Civ. P. 34(b)(2)(C). For its part, “the court must limit the \* \* \* extent of discovery” if “proposed discovery is outside the scope permitted by Rule 26(b)(1).” Fed. R. Civ. P. 26(b)(2)(C)(iii).

Early in discovery in this multi-district antitrust litigation, the district court entered a case management order (CMO) requiring petitioners, dozens of pharmaceutical manufacturers, to produce millions of documents containing any of various broad search terms, but forbidding them to “withhold prior to production any documents based on relevance or responsiveness.” The court made no finding of discovery-related misconduct. A divided Third Circuit panel denied mandamus, stating that district courts have broad discretion to compel document production and that the CMO allowed petitioners to attempt to “claw back” irrelevant documents *after* they were produced.

The question presented is:

Whether, contrary to Rule 26(b), this Court’s decisions, and the decisions of five circuits, a district court may compel a party that has not engaged in discovery-related misconduct to produce documents that are neither relevant nor responsive.

## PARTIES TO THE PROCEEDINGS

Petitioners, Defendants-Petitioners below, are Actavis Holdco U.S., Inc.; Actavis Pharma, Inc.; Akorn, Inc.; Akorn Sales Inc.; Amneal Pharmaceuticals, Inc.; Apotex Corporation; Ascend Laboratories, LLC; Aurobindo Pharma USA, Inc.; Citron Pharma, LLC; DAVA Pharmaceuticals, LLC; Dr. Reddy's Laboratories, Inc.; Epic Pharma, LLC; Fougera Pharmaceuticals Inc.; G&W Laboratories, Inc.; Generics Bidco I, LLC; Hi-Tech Pharmacal Co., Inc.; Impax Laboratories, Inc.; Lannett Company, Inc.; Mayne Pharma Inc.; Morton Grove Pharmaceuticals, Inc.; Mylan Inc.; Mylan N.V.; Mylan Pharmaceuticals Inc.; Oceanside Pharmaceuticals, Inc.; Par Pharmaceutical Companies, Inc.; Par Pharmaceutical, Inc.; Perrigo New York, Inc.; Sandoz Inc.; Sun Pharmaceuticals Industries, Inc.; Taro Pharmaceuticals USA, Inc.; Teva Pharmaceuticals USA, Inc.; UDL Laboratories, Inc.; Upsher-Smith Laboratories, LLC; Valeant Pharmaceuticals International; Valeant Pharmaceuticals North America, LLC; Wockhardt USA LLC; Zydus Pharmaceuticals (USA) Inc.

Respondents, Plaintiffs-Respondents below, are ***State Attorney General 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; and State of Wyoming; **Direct Purchaser Respondents:** KPH Healthcare Services, Inc., a/k/a Kinney Drugs, Inc.; FWK Holdings, LLC; Rochester Drug Co-Operative, Inc.; César Castillo, Inc.; and Ahold USA, Inc.; **End-Payor Respondents:** 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; and Valerie Velardi; **Indirect-Reseller Respondents:** Mr. Russell's Discount Drugs, Inc.; Falconer Pharmacy, Inc.; Reliable Pharmacy, Inc.; Chet Johnson Drug, Inc.; and Halliday's and Koivisto's Pharmacy; and **Direct Action Respondents:** The Kroger Co.; Albertsons Companies, LLC; H.E. Butt Grocery Company L.P.; Humana, Inc.; and United Healthcare Services, Inc.

Additional Defendants below who are not signatories to this petition are Breckenridge Pharmaceutical, Inc.; Camber Pharmaceuticals, Inc.; Endo International plc; Glenmark Pharmaceuticals Inc., USA; Greenstone LLC; Heritage Pharmaceuticals, Inc.; Lupin Pharmaceuticals, Inc.; McKesson Corporation; McKesson Medical-Surgical Inc.; Pfizer, Inc.; Teligent, Inc.; Versapharm, Inc.; West-Ward Pharmaceuticals Corp.; Ara Aprahamian; David Berthold; James Brown; Maureen Cavanaugh; Tracy DiValerio; Mark Falkin; James Grauso; Kevin Green; Armando Kellum; Rajiv Malik; Satish Mehta; Jill Nailor; James Nesta; Konstantin Ostaficiuk; Nisha Patel; David Re-kenthaler; and Richard Rogerson.

## **RULE 29.6 CORPORATE DISCLOSURE STATEMENTS**

Actavis Pharma, Inc. (“Actavis Pharma”) is an indirect wholly owned subsidiary of Teva Ltd., a publicly traded company. No other publicly traded company owns more than 10% of Actavis Pharma’s stock.

Actavis Holdco U.S., Inc. (“Actavis U.S.”) is an indirect wholly owned subsidiary of Teva Ltd., a publicly traded company. No other publicly traded company owns more than 10% of Actavis U.S.’s stock.

Actavis Elizabeth, LLC (“Actavis Elizabeth”) is an indirect wholly owned subsidiary of Teva Ltd., a publicly traded company. No other publicly traded company owns more than 10% of Actavis Elizabeth’s stock.

Akorn, Inc. is a publicly traded company, it has no parent company, and no publicly traded company owns 10% or more of Akorn, Inc.’s stock.

Akorn Sales, Inc. is a wholly-owned subsidiary of Akorn, Inc., a publicly traded company. No publicly traded company owns 10% or more of Akorn Inc.’s stock.

Amneal Pharmaceuticals, Inc., a publicly traded company, owns 10% or more of Amneal Pharmaceuticals LLC. T. Rowe Price Associates, Inc. and Fosun International Limited (which is traded on the Hong Kong Stock Exchange and holds shares through one or more affiliates) each own 10% or more of Amneal Pharmaceuticals, Inc.’s Class A stock (but less than 10% of its total stock). No other publicly held entities

own 10% or more of Amneal Pharmaceuticals, Inc.'s stock.

Apotex Corp. is a direct wholly-owned subsidiary of Aposherm Delaware Holding Corporation, which is an indirect wholly-owned subsidiary of Apotex Holdings, Inc. Apotex Holdings, Inc. is a privately owned company, and no publicly traded company owns more than ten percent of the stock of Apotex Holdings, Inc.

Ascend Laboratories, LLC is not a publicly traded company. Ascend Laboratories, LLC's parent company is Alkem Laboratories Ltd., which is a publicly traded company that owns more than 10% of Ascend Laboratories, LLC's stock.

Aurobindo Pharma USA, Inc. ("Aurobindo") is a direct, wholly-owned subsidiary of Aurobindo Pharma Limited, an Indian corporation. Aurobindo is not a publicly-traded entity, and Aurobindo Pharma Limited is the only publicly-traded entity that owns 10% or more of the stock of Aurobindo.

Citron Pharma LLC is a privately held company. Its parent entities are privately held and no publicly traded company owns more than 10% of Citron Pharma LLC's stock.

DAVA Pharmaceuticals, LLC is an indirectly wholly owned subsidiary of Endo International plc, a publicly traded company. No other publicly traded company owns more than 10% of DAVA Pharmaceuticals, LLC's stock.

Dr. Reddy's Laboratories, Inc., is a wholly owned subsidiary of Dr. Reddy's Laboratories, S.A.

Dr. Reddy's Laboratories, S.A. is a wholly owned subsidiary of Dr. Reddy's Laboratories Ltd. Dr. Reddy's Laboratories Ltd. is a publicly held corporation, and no publicly held corporation owns 10% or more of the stock of Dr. Reddy's Laboratories Ltd.

Epic Pharma, LLC, is not a publicly traded company. Epic Pharma, LLC, is wholly owned by Humanwell Healthcare USA LLC. Humanwell Healthcare USA LLC is wholly owned by Humanwell Healthcare International Ltd. (an Ireland Corporation), which is wholly owned by Humanwell Healthcare Group Co., Ltd (a Chinese corporation), which is a publicly traded company on the Shanghai Stock Exchange in China.

Fougera Pharmaceuticals Inc. ("Fougera") is an indirect, wholly owned subsidiary of Novartis AG, a publicly held company, the shares of which are traded on the SIX Swiss Exchange under the ticker symbol NOVN and whose American Depositary Shares are publicly traded on the New York Stock Exchange under the ticker symbol NVS. There are no publicly traded companies between Fougera and Novartis AG.

Generics Bidco I, LLC is an indirectly wholly owned subsidiary of Endo International plc, a publicly traded company. No other publicly traded company owns more than 10% of Generics Bidco I, LLC's stock.

G&W Laboratories, Inc. is a privately held corporation. It has no parent company, and no publicly traded corporation own 10% or more of its stock.

Hi-Tech Pharmaco Co., Inc. is a wholly-owned subsidiary of Akorn, Inc., a publicly traded company.

No publicly traded company owns 10% or more of Akorn Inc.'s stock.

Impax Laboratories, Inc. (n/k/a Impax Laboratories, LLC), a Delaware limited liability company, is a wholly owned subsidiary of Amneal Pharmaceuticals LLC, a Delaware limited liability company.

Lannett Company, Inc. is a publicly traded company. Lannett Company, Inc. has no parent company, and no publicly traded company owns more than 10% of Lannett Company, Inc.'s stock.

Mayne Pharma Inc. is a directly wholly owned subsidiary of Mayne Pharma Group Ltd., a publicly traded company. No other publicly traded company owns more than 10% of Mayne Pharma Inc.'s stock.

Mylan N.V. is a publicly traded company. Mylan N.V. has no parent company, and no publicly traded company owns more than 10% of Mylan N.V.'s stock.

Mylan Inc. is an indirectly wholly owned subsidiary of Mylan N.V., a publicly traded company. No other publicly traded company owns more than 10% of Mylan Inc.'s stock.

Mylan Pharmaceuticals Inc. is an indirectly wholly owned subsidiary of Mylan N.V., a publicly traded company. No other publicly traded company owns more than 10% of Mylan Pharmaceuticals Inc.'s stock.

Par Pharmaceutical, Inc. is an indirectly wholly owned subsidiary of Endo International plc, a publicly traded company. No other publicly traded company owns more than 10% of Par Pharmaceutical, Inc.'s stock.

Par Pharmaceutical Companies, Inc. is an indirectly wholly owned subsidiary of Endo International plc, a publicly traded company. No other publicly traded company owns more than 10% of Par Pharmaceutical Companies, Inc.'s stock.

Oceanside Pharmaceuticals, Inc. is an indirectly wholly owned subsidiary of Bausch Health Companies Inc., a publicly traded company. No other publicly traded company owns, directly or indirectly, more than 10% of the stock of Oceanside Pharmaceuticals, Inc.

Perrigo New York, Inc. is an indirectly wholly owned subsidiary of Perrigo Company plc, a publicly traded company. T. Rowe Price Associates, Inc., a publicly traded company, owns 13.9% of Perrigo Company plc's stock. No other publicly traded company owns more than 10% of Perrigo Company plc's stock.

Sandoz Inc. ("Sandoz") is an indirect, wholly owned subsidiary of Novartis AG, a publicly held company, the shares of which are traded on the SIX Swiss Exchange under the ticker symbol NOVN and whose American Depository Shares are publicly traded on the New York Stock Exchange under the ticker symbol NVS. There are no publicly traded companies between Sandoz and Novartis AG.

Sun Pharmaceutical Industries, Inc. is a majority-owned subsidiary of Sun Pharmaceutical Holdings USA, Inc. and a minority-owned subsidiary of Sun Pharmaceutical Industries, Ltd. No publicly traded company owns 10% or more of Sun Pharmaceutical Industries, Inc.'s stock.

Taro Pharmaceuticals U.S.A., Inc. is a wholly-owned subsidiary of Taro Pharmaceutical Industries Ltd., which is a publicly traded company. Sun Pharmaceutical Industries, Ltd., a publicly traded company, is a majority owner of Taro Pharmaceutical Industries, Ltd. No other company owns 10% or more of Taro Pharmaceuticals U.S.A., Inc.'s stock.

Teva Pharmaceuticals USA, Inc. ("Teva USA") is directly owned by: (i) Orvey UK Unlimited (Majority Shareholder), which is directly owned by Teva Pharmaceuticals Europe B.V., which is directly owned by Teva Ltd.; and (ii) Teva Pharmaceutical Holdings Coöperatieve U.A. (Minority Shareholder), which is directly owned by IVAX LLC, a direct subsidiary of Teva USA.

Teva Ltd. is a publicly traded company. Teva Ltd. has no parent company, and no publicly traded company owns more than 10% of Teva Ltd.'s stock.

UDL Laboratories, Inc. is an indirectly wholly owned subsidiary of Mylan N.V., a publicly traded company. No other publicly traded company owns more than 10% of UDL Laboratories, Inc.'s stock.

Upsher-Smith Laboratories, L.L.C., is a privately-owned company. Upsher-Smith Laboratories, L.L.C. is wholly owned by Sawai America, L.L.C. No publicly held corporation which is not a party to this proceeding has a financial interest in the outcome of this proceeding.

Valeant Pharmaceuticals North America, LLC, now known as Bausch Health US, LLC, is an indirectly wholly owned subsidiary of Bausch Health

Companies Inc., a publicly traded company. No other publicly traded company owns, directly or indirectly, more than 10% of the stock of Valeant Pharmaceuticals North America, LLC.

Valeant Pharmaceuticals International, now known as Bausch Health Americas, Inc., is an indirectly wholly owned subsidiary of Bausch Health Companies Inc., a publicly traded company. No other publicly traded company owns, directly or indirectly, more than 10% of the stock of Valeant Pharmaceuticals International.

Wockhardt USA LLC is ultimately 100% owned by Wockhardt Bio AG, a publicly held company. Wockhardt Bio AG is 100% owned by Wockhardt Limited, a publicly held company.

Morton Grove Pharmaceuticals is ultimately 100% owned by Wockhardt Bio AG, a publicly held company. Wockhardt Bio AG is 100% owned by Wockhardt Limited, a publicly held company.

Zydus Pharmaceuticals (USA) Inc. (“Zydus”) is an indirect wholly owned subsidiary of Cadila Healthcare Limited, a publicly traded company. No other publicly traded company owns more than 10% of Zydus.

**RELATED PROCEEDINGS**

Proceedings directly on review:

*In re: Actavis Holdco U.S. Inc., et al.*, No. 19-3549 (3d Cir. Dec. 6, 2019)

Related proceedings:

*In re Generic Pharmaceuticals Pricing Antitrust Litigation*, No. 2:16-md-2724-CMR (E.D. Pa. Oct. 24, 2019)

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## INTRODUCTION

Petitioners seek review of a divided Third Circuit decision that raises an issue of exceptional and recurring importance to federal civil procedure law.

Early in discovery in this multi-district antitrust litigation, the district court entered a case management order (CMO) that required petitioners, dozens of competing pharmaceutical manufacturers, to produce millions of documents containing any of various broad search terms, but forbidding them from “withhold[ing] prior to production any documents based on relevance or responsiveness.” App. 8a. The court recognized that petitioners need to review their documents, many of which contain competitively sensitive and highly personal information, for relevance. Yet the court inverted the normal discovery procedure, ruling that petitioners could not conduct relevance review until *after* production—and even then could only *attempt* to retrieve irrelevant documents via a “clawback” process. In support, the court cited a discovery standard that this Court, seeking to tighten Rule 26’s relevance requirement and reduce the burden of discovery, deleted from the rule in 2015.

A divided Third Circuit panel denied mandamus, holding that district courts generally have “wide latitude” in directing discovery and in crafting “clawback” provisions. App. 3a. But as Judge Phipps explained in dissent, the CMO “constitutes a serious and exceptional error” that upends the most fundamental norms of civil discovery. App. 4a. “[T]he rules of civil procedure allow for a review for responsiveness and relevance *before* production,” and “a court does not spontaneously gain authority to compel production of

non-responsive, irrelevant documents simply by establishing a period of time afterwards for the review and potential return of the documents produced.” *Ibid.*

The Third Circuit’s decision contravenes Rule 26’s text, structure, and history. That Rule limits discovery to material that is “relevant to any party’s claim or defense,” and it imposes a mandatory duty—not discretion—whereby the district courts “must limit the \* \* \* extent of discovery” to “the scope permitted by Rule 26(b)(1).” Fed. R. Civ. P. 26(b)(1), 26(b)(2)(C)(iii). This is especially clear in light of the Court’s 2000 and 2015 amendments to Rule 26, which strictly limited discovery to material that is “relevant to any party’s claim or defense” and eliminated language allowing discovery “reasonably calculated to lead to the discovery of admissible evidence.”

The Third Circuit’s view that the courts of appeals may accord district courts “broad” discretion to compel the production of irrelevant documents (App. 3a) conflicts with this Court’s admonition that Rule 26(b)(1)’s requirement “that the material sought in discovery be ‘relevant’ should be firmly applied.” *Herbert v. Lando*, 441 U.S. 153, 177 (1979). It further conflicts with the decisions of five circuits that have granted mandamus in comparable circumstances to rein in discovery orders requiring production of irrelevant material.

In a break from both the Rules and settled practice, moreover, the decision below sanctions an unprecedented use of “clawbacks.” That after-the-harm-is-already-done procedure has been used to mitigate the legal effect of parties’ inadvertent disclosures of privileged materials, not as a fig leaf to justify court-ordered mass disclosure of materials outside the lawful scope of discovery. The decision thus invites parties

to abuse discovery by seeking material—including sensitive business information—unrelated to any claim or defense, and then to use the specter of having to produce that material to coerce settlement. In fact, the Special Master below acknowledged that the unusual CMO here was adopted in part because “extensive and broad-ranging discovery” was “essential for any meaningful settlement.” App. 29a.

The Third Circuit did not offer any reasons specific to this case why such a discovery order was any more appropriate here than in other multi-party litigation. It is thus fair to assume that, if the CMO is allowed to stand, future class-action plaintiffs will request such orders routinely. But the district courts should not be given discretion to flip the Rules of Civil Procedure from a regime in which parties may “object[] to the production of documents on responsiveness and relevance grounds before producing them,” to one where “production comes first, followed by objections.” App. 5a (Phipps, J., dissenting). The implications of the CMO thus extend far beyond this case.

If the Court agrees that the decision below was unquestionably wrong, it should summarily reverse. If the Court believes there are plausible arguments to support the decision, it should grant plenary review. Either way, the Court should grant certiorari and reverse. If allowed to stand, the decision below will only metastasize and become the new norm.

## **OPINIONS BELOW**

The Third Circuit's opinion (App. 1a–5a), order denying rehearing (App. 56a), and order directing respondents to answer petitioners' mandamus petition (App. 54a–55a) are unreported. The district court's Memorandum Opinion & Order denying Applicants' stay motion (App. 16a–25a), its order adopting the CMO (App. 6a–15a), the Special Master's Report & Recommendation (App. 26a–40a), and the Special Master's Supplemental Summary (App. 41a–44a) are unreported.

## **JURISDICTION**

The Third Circuit entered judgment on December 6, 2019. App. 1a. The court denied a timely rehearing petition on January 6, 2020. App. 56a. This Court has jurisdiction under 28 U.S.C. 1254(1).

## **FEDERAL RULES INVOLVED**

Federal Rule of Civil Procedure 1 provides:

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Federal Rule of Civil Procedure 26(b)(1) provides:

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: 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, considering the importance of the issues at stake in the action, 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Federal Rule of Civil Procedure 26(b)(2)(C) provides:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Federal Rule of Civil Procedure 26(b)(5)(B) provides:

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return,

sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Federal Rule of Civil Procedure 34 provides in relevant part:

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

\* \* \*

(b) Procedure.

\* \* \*

(2) Responses and Objections.

\* \* \*

(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

## STATEMENT

### A. The relevance requirement of Rule 26(b)(1) and its evolution

This Court promulgates the Federal Rules of Civil Procedure under the Rules Enabling Act, 28 U.S.C. 2072. As the Court has explained, “the discovery rules set forth in the [Rules]” are “the law of the United States.” *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 533 (1987).

Federal Rule of Civil Procedure 26(b), entitled “Discovery Scope and Limits,” states in pertinent part: “Unless otherwise limited by court order, the scope of discovery is as follows: 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[.]” Fed. R. Civ. P. 26(b)(1). Rule 26(b)(1) thus contains two requirements—relevance and proportionality—that combine with the privilege rules to delimit “the scope of discovery.” That scope may be further “limited by court order,” but not *expanded*. *Ibid*. Rather, Rule 26 expressly mandates that the district courts enforce its requirements: “the court *must* limit the frequency or extent of discovery” whenever “the proposed discovery is outside the scope permitted by Rule 26(b)(1).” Fed. R. Civ. P. 26(b)(2)(iii) (emphasis added).

Over the years, the district courts have not always heeded this Court’s teaching that “the requirement of Rule 26(b)(1) that the material sought in discovery be ‘relevant’ should be firmly applied” (*Lando*, 441 U.S. at 177), prompting this Court to tighten the requirement. In 2000, for example, citing “[c]oncerns about costs and delay” (Fed. R. Civ. P. 26 Advis. Comm. Notes (2000)), the Court narrowed the scope of discovery by limiting discovery allowed as of right to material “‘relevant to any party’s claim or defense’” and requiring a showing of good cause to justify any further discovery “‘relevant to the subject matter involved in the pending action.’” C. Wright & A. Miller, 8 *Federal Practice & Procedure* § 2008 (3d ed. 2019). “This amendment, like other discovery amendments since 1983, sought to rein in discovery costs and provide greater judicial supervision of discovery.” Bernadette B. Genetin, “*Just a Bit Outside!?: Proportionality in Federal Discovery and the Institutional Capacity of the Federal Courts*,” 34 *Rev. of Litig.* 655, 670–671 (2015).

Then, in 2015, the Court eliminated the provision for discovery concerning “the subject matter involved,” allowing only discovery “relevant to any party’s claim or defense.” 8 *Federal Practice & Procedure* § 2008. The same year, the Court deleted language permitting discovery “reasonably calculated to lead to the discovery of admissible evidence.” The Advisory Committee noted that “[t]he ‘reasonably calculated’ phrase” was removed because it “ha[d] continued to create problems.” Fed. R. Civ. P. 26 Advis. Comm. Notes (2015).

As the Chief Justice observed, these changes were designed to “eliminate unnecessary or wasteful discovery”:

The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need.

John G. Roberts, Jr., *2015 Year-End Report on the Federal Judiciary*, 7 (2015).

### **B. Rules governing document discovery in federal civil cases**

Rule 26(b) applies to document requests through Rule 34(a), which states that “[a] party may serve on any other party a request within the scope of Rule 26(b)” to produce “any designated documents or electronically stored information.” Fed. R. Civ. P. 34(a). Such requests “must describe with reasonable particularity each item or category of items to be inspected.” Fed. R. Civ. P. 34(b)(1)(A). The responding party must answer in writing and “either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons.” Fed. R. Civ. P. 34(b)(2)(B). The responding party may withhold the documents that it objects to producing—such as irrelevant documents not “within the scope of Rule 26(b)” —provided it “state[s] whether any responsive materials are being withheld on the basis of that objection.” Fed. R. Civ. P. 34(b)(2)(C).

If a serving party believes documents are wrongly being withheld, it may move to compel production. Fed. R. Civ. P. 37(a)(3)(B)(iv). Discovery sanctions require a finding that the responding party has “fail[ed]

to obey an order to provide or permit discovery.” Fed. R. Civ. P. 37(b)(2)(A).

The Federal Rules contain no general “clawback” provision. Rule 26(b)(5)(B) provides post-disclosure remedies for inadvertently produced documents—those that are covered by “privilege” or are protected “trial-preparation material.” Upon receiving notice of such a disclosure, the party that received the information must “promptly return” it and “must not use or disclose the information until the claim is resolved[.]” Fed. R. Civ. P. 26(b)(5)(B).

Federal Rule of Evidence 502 contains related protections. But Rule 502 “does not authorize a court to require parties to engage in ‘quick peek’ and ‘make available’ productions and should not be used directly or indirectly to do so.” *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 Sedona Conf. J. 1, 137 (2016). And beyond the narrow safe harbor of Rule 26(b)(5)(B), no Rule permits the district courts to use general “clawback” provisions to justify compelled production of irrelevant material.

### **C. The underlying multi-district antitrust litigation and discovery dispute**

This multi-district litigation involves more than 50 complaints filed by multiple types of plaintiffs, including state attorneys general, direct and indirect customers of petitioners, and third-party payors. The details vary, but each complaint generally alleges that some combination of petitioners, generic pharmaceutical companies, conspired to fix prices or allocate customers for various products, in violation of the Sherman Act, 15 U.S.C. 1. Petitioners vigorously contest those allegations.

In August 2016, the Judicial Panel on Multidistrict Litigation consolidated the cases for pre-trial proceedings before the U.S. District Court for the Eastern District of Pennsylvania (Hon. Cynthia M. Rufe). Several dozen more lawsuits have since been consolidated in the MDL, with new lawsuits being filed in February 2020, even as this petition was being prepared.

By June 2019, the parties had negotiated a discovery protocol that would have followed standard discovery practices, including application of search terms followed by review for relevance before document production. But respondents abruptly abandoned their discovery requests and moved to compel petitioners to produce individual employees' full electronic files—i.e., all email or documents created over a seven-year period—regardless of responsiveness or relevance.

Respondents alternatively asked that petitioners be required to, in the words of court-appointed Special Master David Marion, “run broad search terms—not limited to drugs or defendants already in the MDL — across all agreed-upon custodial files and to produce all ‘hits,’ absent those documents withhold for privilege.” App. 28a. Respondents' original proposal listed hundreds of ubiquitous search terms, including scores of terms found in a wide array of business, strategic, and personal communications—terms such as “coffee”; “call me”; “offer”; “heads up”; “speak”; “spoke” and “in person.” C.A. Mandamus Pet. App. A357-A400. As the Special Master requested, respondents' alternative proposal likewise denied petitioners any opportunity to pre-screen documents for relevance.

Respondents' sweeping search terms would require producing:

- A recap from an employee who “spoke” to a Food and Drug Administration official about confidential regulatory matters unrelated to any product at issue in this litigation;
- Plans for “in person” discussions of confidential merger and acquisitions activity not relevant to any issue in this litigation; and
- Any employee’s invitation to discuss anything, including the most confidential and sensitive personal matters, over “coffee.”

The list could go on for pages. Even with the anticipated narrowing of respondents’ wish list through negotiations and briefing, the Special Master himself directed that the search teams be “broad.” App. 27a–28a. And although much of this commercially sensitive material has nothing to do with the investigation or resolution of respondents’ claims, disclosing it would nonetheless injure petitioners’ privacy and commercial interests, and those of their employees.

**D. The Special Master recommends, and the district court adopts, a categorical ban on withholding documents for relevance**

The parties briefed their dispute before the Special Master. Petitioners cited many authorities holding that, absent discovery misconduct, courts must permit producing parties to determine the relevance and responsiveness of their documents *before* disclosure. Respondents openly acknowledged that their proposed procedures would require producing irrelevant documents. CA3 Mandamus Pet. App. A88. This includes competitively sensitive documents that would be produced to outside counsel for all parties, including petitioners’ customers and competitors.

Nevertheless, the Special Master recommended adoption of respondents' proposal, stating in Paragraph 3(b) of the CMO:

Defendants shall apply the agreed search terms to the agreed custodial files and may review the identified documents for privilege, but *may not withhold prior to production any documents based on relevance or responsiveness.*

App. 33a (emphasis added).<sup>1</sup> The Special Master also recommended a "Confidentiality" provision directing that confidential documents be marked for "Outside Counsel Eyes Only," providing a "Clawback" deadline of "120 days from production," and stating: "Clawback disputes to be resolved promptly with assistance from Special Discovery Master Merenstein and Special Master Marion, as necessary." App. 34a. That provision, however, did not permit petitioners to withhold from production even documents that petitioners had already identified as irrelevant or nonresponsive.

In support of his decision to bar petitioners from withholding irrelevant documents, the Special Master pointed to the "extraordinarily high stakes involved" and suggested that "extensive and broad-ranging discovery" was "essential for any meaningful settlement":

Given the nature of the allegations of both overarching and specific price-fixing and market allocation antitrust conspiracies, and the extraordinarily high stakes involved, extensive and broad-ranging discovery is both necessary and

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<sup>1</sup> Although petitioners sometimes refer to Paragraph 3(b) as simply the "CMO" or the "order," they are not challenging any other provision of the CMO.

appropriate for these cases to be fairly adjudicated; and is also essential for any meaningful settlement since cases like this are usually ultimately settled, and reasonable settlements are beneficial to the Court and the parties.

App. 29a. Neither the Special Master’s Report & Recommendation, nor his later “Supplemental Summary” to the district court (App. 41a–44a), cited any Rule, case law, or other authority supporting this procedure.

Petitioners again objected before the district court, citing their right under the Rules to withhold irrelevant or nonresponsive documents. Petitioners committed to produce relevant and responsive non-privileged material in response to respondents’ requests, subject to appropriate objections and any agreements reached as to the scope of discovery—a process that would not cause undue delay.

The district court adopted the Report & Recommendation. Its lone comment was a footnote stating in conclusory terms: “the Recommended Order sufficiently balances the interests of the parties and, most importantly, provides a road map to move the litigation forward at this time.” App. 7a.

Petitioners sought a stay of Paragraph 3(b) pending appellate review. The district court denied a stay, citing the parties’ search term and custodian negotiations and the provision allowing petitioners to “claw back” documents after production. App. 24a. In support, the court cited the discovery standard abrogated by the 2015 amendments to Rule 26, stating: “the Court will continue to ensure that the discovery process proceeds in an orderly, proportional fashion that is *reasonably calculated to lead to the discovery of relevant information.*” App. 25a (emphasis added).

### **E. The Third Circuit denies mandamus relief**

Petitioners sought mandamus in the Third Circuit. Two amici, the U.S. Chamber of Commerce and Lawyers for Civil Justice, supported the petition. App. 2a. The court directed respondents to respond to the mandamus petition (App. 55a), but ultimately denied mandamus relief by a divided vote (App. 2a–4a).

The majority acknowledged that the district court had “ordered the production of documents without a manual relevance review.” App. 3a. But “even if the District Court’s order constituted an abuse of discretion (which we do not decide),” the majority reasoned, the error was not a “clear abuse of discretion” or “clear outlier[]”, as the dissent suggests.” *Ibid.* The majority further declared that “a similar approach is contemplated in Federal Rule of Evidence 502(d), by which a court may order production without a privilege review.” *Ibid.* And citing district courts’ “wide latitude in controlling discovery” and “broad parameters” to “compel the production of documents,” the majority reasoned that the clawback and confidentiality provisions would adequately protect petitioners, who could “claw back trade secrets, unrelated business information, and unrelated personal or embarrassing information.” *Ibid.*

Judge Phipps dissented. As he recognized, “[e]ven with that clawback provision, the order constitutes a serious and exceptional error that should be corrected through a writ of mandamus.” App. 4a. “There is no dispute that the order compels the production of a volume of non-responsive and irrelevant documents,” he observed, and “the rules of civil procedure allow for a review for responsiveness and relevance *before* production.” *Ibid.* (citing Fed. R. Civ. P. 26(b)(1),

34(b)(2)(C)). He then explained why a “clawback” provision does not allow courts to order parties to produce irrelevant documents:

[N]othing in the civil rules permits a court to compel production of non-responsive and irrelevant documents at any time, much less before the producing party has had an opportunity to screen those documents. But that is exactly what the discovery order in this case does. The clawback provision does not ameliorate that defect: a court does not spontaneously gain authority to compel production of non-responsive, irrelevant documents simply by establishing a period of time afterwards for the review and potential return of the documents produced.

*Ibid.* Judge Phipps thus concluded that the order is “an extraordinary outlier”: It “contravenes th[e] fundamental principle” that “[a] party has the option of objecting to the production of documents on responsiveness and relevance grounds before producing them” and is akin to a “search warrant” regime, where “production comes first, followed by objections.” *Ibid.*

Petitioners sought en banc rehearing. The petition was denied in an order noting that only six of fourteen active circuit judges, half of whom were on the panel, were eligible to hear the case. App. 56a.

### REASONS FOR GRANTING THE PETITION

The Third Circuit’s divided decision to uphold the CMO urgently warrants review. On its face, the order violates the text, structure, and history of Rule 26. Citing district courts’ general “latitude” in discovery matters and a novel conception of “clawback” orders, the Third Circuit authorized district courts to compel parties to produce highly sensitive documents without first having the opportunity to assess their “relevance or responsiveness.” App. 8a. That approach is impossible to square with the Federal Rules of Civil Procedure, which permit parties to withhold documents that are not “relevant to any party’s claim or defense” and state that district courts “must limit” proposed discovery that “is outside the scope permitted by Rule 26(b)(1).” Fed. R. Civ. P. 26(b)(1)–(b)(2)(iii), 34(b)(2)(C).

The Third Circuit’s decision squarely conflicts with this Court’s precedent holding that Rule 26(b)’s relevance requirement is to be “firmly applied.” *Lando*, 441 U.S. at 177. It flouts this Court’s repeated efforts to strengthen that requirement, and thus to lower the cost of discovery. It conflicts with five circuits’ decisions that exercise mandamus jurisdiction to enforce the relevance requirement and protect sensitive information. It sanctions an unprecedented use of “clawbacks,” which have been a means of remedying the inadvertent disclosure of privileged materials, not a justification for requiring disclosure of material that is not discoverable under the Rules. And it invites abuse of the discovery process where deemed “essential for any meaningful settlement.”

**I. The Third Circuit’s holding that courts may require parties to produce irrelevant documents conflicts with the Court’s decisions requiring strict enforcement of Rule 26.**

Review is warranted because the Third Circuit’s 2-1 decision conflicts with this Court’s decisions requiring rigorous enforcement of Rule 26’s requirement that discovery be limited to what is “relevant.”

In *Herbert v. Lando*, this Court explained that “the requirement of Rule 26(b)(1) that the material sought in discovery be ‘relevant’ should be firmly applied,” and that “the district courts should not neglect their power to restrict discovery where ‘justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense.’ Rule 26(c).” 441 U.S. at 177. “[T]he discovery provisions, like all of the Federal Rules of Civil Procedure,” the Court continued, “are subject to the injunction of Rule 1 that they ‘be construed to secure the just, speedy, and inexpensive determination of every action.’” *Ibid.* Such considerations apply in spades here.

*Lando* reflects “[t]he general rule in the federal system \* \* \* that, subject to the district court’s discretion, ‘[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.’” *Republic of Arg. v. NML Capital Co., Ltd.*, 573 U.S. 134, 139 (2014) (quoting Fed. R. Civ. P. 26(b)(1)). Although “[m]utual knowledge of all the relevant facts gathered by both parties is essential,” this Court has long held that, “as Rule 26(b) provides, further limitations come into existence when the inquiry touches upon the irrelevant.” *Hickman v. Taylor*, 329 U.S. 495, 507–508 (1947). Whatever “dis-

covery device[]” is involved—“depositions,” “interrogatories,” “production of documents,” or “examinations of parties”—“[t]he scope of discovery in each instance is limited by Rule 26(b)’s provision” restricting discovery to matter “which is relevant.” *Schlagenhauf v. Holder*, 379 U.S. 104, 117 (1964).

In *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 347–354 (1978), for example, this Court held that certain plaintiffs could not seek to discover the names and addresses of absent class members as a means of avoiding the cost of obtaining that information before sending class action notices. Observing that “the key phrase in [Rule 26(b)’s] definition” of the scope of discovery was “relevant to the subject matter involved in the pending action,” the Court explained that the requested information “cannot be forced into the concept of ‘relevancy’” because “respondents do not seek this information for any bearing that it might have on issues in the case.” *Id.* at 351–352.

These decisions apply even more forcefully now that this Court has tightened Rule 26’s definition of the “scope of discovery” by replacing “relevant to the subject matter involved in the pending action” with “relevant to any party’s claim or defense.” See 8 Federal Practice & Procedure § 2008. In denying mandamus, however, the majority below blew past the recent tightening of the Rule, instead requiring production of indisputably irrelevant documents on the ground that district courts have “wide latitude in controlling discovery” and may “compel the production of documents within broad parameters.” App. 2a.

That decision squarely conflicts with this Court’s precedents. An order prohibiting a party that has engaged in no discovery misconduct to “withhold prior to

production any documents based on relevance or responsiveness” (App. 8a) cannot possibly be viewed as “firmly appl[ying]” Rule 26(b). *Lando*, 441 U.S. at 177. This Court should make that clear.

**II. The Third Circuit’s atextual exception to Rule 26 thwarts this Court’s repeated efforts to tighten the Rule’s relevance requirement.**

Review is also needed because the Third Circuit’s divided ruling threatens to undermine this Court’s efforts to tighten the relevance requirement of Rule 26. Over the past two decades, citing concerns about discovery costs and the district courts’ too-frequent failures to respect the relevance requirement, the Court has repeatedly narrowed the “scope of discovery” under that Rule. The CMO here, which the district court defended by citing an *abrogated* version of Rule 26, disregards those changes. The Third Circuit’s decision upholding that CMO thus reflects “a serious and exceptional error that should be corrected” (App. 4a (Phipps, J., dissenting)) by this Court in the exercise of its supervisory authority. S. Ct. R. 10(a).

Since 2000, this Court has twice used its rule-making authority to confirm that Rule 26(b)(1) prohibits discovery of irrelevant material. In 2000, the Court narrowed the scope of discovery that is allowed absent a separate showing of “good cause” from (1) discovery “relevant to the subject matter involved in the pending action” to (2) discovery “relevant to any party’s claim or defense.” 8 Fed. Practice & Proc. § 2008. Then, in 2015, the Court deleted from Rule 26 the “reasonably calculated to lead to the discovery of admissible evidence” phrase, mandating that all discovery be relevant to a “claim or defense.” As the Advisory Committee noted, some had used the “reasonably

calculated” phrase “incorrectly, to define the scope of discovery,” and this “misuse” continued even after this Court’s 2000 revision:

The former provision for discovery of relevant but inadmissible information that appears “reasonably calculated to lead to the discovery of admissible evidence” is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the “reasonably calculated” phrase to define the scope of discovery “might swallow any other limitation on the scope of discovery.” The 2000 amendments sought to prevent such misuse by adding the word “Relevant” at the beginning of the sentence, making clear that “‘relevant’ means within the scope of discovery as defined in this subdivision \* \* \* .” The “reasonably calculated” phrase has continued to create problems, however, and is removed by these amendments.

Fed. R. Civ. P. 26 Advisory Committee’s Notes (2015); see also Fed. R. Civ. P. 26 Advisory Committee’s Notes (2000) (citing “[c]oncerns about costs and delay” and stating that “[t]he Committee intends that the parties and the court focus on the actual claims and defenses involved”).

Remarkably, the district court’s only effort to justify the CMO relied on the pre-2015 standard: “the Court will continue to ensure that the discovery process proceeds in an orderly, proportional fashion that is *reasonably calculated to lead to the discovery of relevant information.*” App. 25a (emphasis added). That

approach is precisely what this Court sought to prevent in adopting its 2015 amendment. Yet the majority below outright ignored this problem, asserting that the district court acted within its “wide latitude” in applying an abrogated rule to “order[] the production of documents without a manual relevance review.” App. 3a. That was manifest error. See also Henry S. Noyes, *Good Cause is Bad Medicine for the New E-Discovery Rules*, 21 Harv. J. L. & Tech. 50, 66 (2007) (“As the Supreme Court stated in *Herbert [v. Lando]*, interpretations of the Rules should rely on the Rules’ language and on their express purpose, not on what they used to say or what they used to mean.”).<sup>2</sup>

Indeed, every black-letter authority of which we are aware confirms that the decisions below broke sharply from settled law. As Wright & Miller state: “Perhaps the single most important word in Rule 26(b)(1) is ‘relevant,’ for it is *only* relevant matter that may be the subject of discovery.” 8 Federal Practice & Procedure § 2008 (emphasis added). Similarly, Moore’s Federal Practice states that Rule 26(b)’s “limitation of the scope of discovery is designed to control sweeping or contentious discovery” by “[f]ocusing the attention of the parties and the court on the actual

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<sup>2</sup> Unfortunately, the district court was not alone in applying abrogated Rule 26(b) relevance standards. *E.g.*, *Performance Pulsation Control, Inc. v. Sigma Drilling Techs., LLC*, 2019 WL 277620, \*1 (E.D. Tex. 2019) (“Relevance, for the purposes of Rule 26(b)(1), is when the request is reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1).”); *United States v. All Assets Held at Bank Julius*, 234 F. Supp. 3d 115, 120 (D.D.C. 2017) (similar).

claims and defenses” at issue. 6 Moore’s Federal Practice § 26.41[2] (3d ed. 2019). And the Sedona Conference’s “best practices” guide states that “there should be no preemptive restraint placed on a responding party that chooses to proceed on its own with determining how best to fulfill its preservation and discovery obligations,” as that party “is best situated” to “meet its preservation and discovery obligations.” *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 123 (2018). In short, it is axiomatic that “[p]roducing parties review documents \* \* \* for relevance and responsiveness before they are produced.” *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 15 Sedona Conf. J. 265, 290 (2014).

The Third Circuit’s ruling and the order it upholds perpetuate a problem that this Court has repeatedly amended Rule 26 to prevent—reading the relevance requirement out of Rule 26(b). This Court should exercise its supervisory authority to end this problem, once and for all.

### **III. The Third Circuit’s decision conflicts with the decisions of five other circuits that have used mandamus review to ensure strict adherence to Rule 26’s relevance requirement.**

Review is also warranted because the decision below conflicts with decisions of the Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits granting mandamus relief and vacating discovery orders that required production of irrelevant material where there has been no misconduct finding to justify departing from ordinary discovery procedures. As these circuits have recognized, such orders are a clear abuse of discretion.

A. In *In re: Ford Motor Co.*, 345 F.3d 1315, 1316–1317 (11th Cir. 2003), the Eleventh Circuit granted mandamus to vacate an order allowing the plaintiff “access to Ford’s Master Owner Relations Systems I, II, and III (‘MORS’) and Common Quality Indicator System (‘CQIS’) databases” without conducting a relevance analysis. The court acknowledged that mandamus “[is] available only to correct a clear abuse of discretion or a usurpation of judicial power.” *Id.* at 1316. Yet the court found this standard satisfied, as “the district court made no findings—express or implied—that Ford had failed to comply properly with discovery requests,” “did not discuss its view of Ford’s objections,” and “provided no substantive explanation for [its] ruling.” *Id.* at 1317. As the Eleventh Circuit held, a party “is unentitled to this kind of discovery without—at the outset—a factual finding of some non-compliance with discovery rules by [the producing party]. By granting the sweeping order in this case, especially without such a finding, the district court clearly abused its discretion.” *Ibid.*

Similarly, in *In re Reyes*, a labor dispute, the Fifth Circuit vacated an order compelling production of documents relating to the plaintiffs’ “immigration status.” 814 F.2d 168, 169–170 (5th Cir. 1987). The court explained that such information “was completely irrelevant,” but risked “collateral wholly unrelated consequences” in the form of “embarrassment and inquiry into [the parties’] private lives which was not justified” and “open[ing] litigation issues which were not present.” *Id.* at 170–171. “[W]here there is no possible relevance and the discovery could place in jeopardy unrelated personal status matters,” the court held, mandamus review is needed “to confine [the] inferior

court to a lawful exercise of its prescribed jurisdiction.” *Id.* at 171, 170.<sup>3</sup>

Similarly, the Tenth Circuit granted mandamus in an antitrust class action to vacate an order compelling discovery of a plaintiff’s financial condition and fee arrangement, calling them “irrelevant” to “the inquiry which was then being conducted.” *Sanderson v. Winner*, 507 F.2d 477, 479–480 (10th Cir. 1974). While acknowledging that mandamus relief is available only to address “a judicial ‘usurpation of power’,” the court found that standard satisfied. *Id.* at 479.

Likewise, the Eighth Circuit has vacated an order requiring disclosure of confidential information about a State’s capital punishment protocol. *In re Lombardi*, 741 F.3d 888, 895 (8th Cir. 2014). Noting that only “a judicial usurpation of power or a clear abuse of discretion” can justify mandamus relief, the court deemed it necessary to exercise mandamus jurisdiction “to forbid discovery of irrelevant information, whether or not it is privileged, where discovery would be oppressive and interfere with important state interests.” *Id.* at 893, 895 (citations omitted).

Finally, in *Hartley Pen Co. v. United States District Court for Southern District of California*, 287 F.2d 324

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<sup>3</sup> Judge Jones dissented, disagreeing with the majority over whether the material was “completely irrelevant,” but agreeing that mandamus review is available to vacate an order that does compel production of evidence “without a shred of relevancy.” 814 F.2d at 171 (citation omitted); see *id.* at 172 (“As the information requested is relevant to material issues in the case, the district court cannot be said to have been acting beyond its lawful authority in compelling its production.”).

(9th Cir. 1961), the Ninth Circuit granted mandamus to vacate an order requiring disclosure of confidential trade secrets. There, Hartley Pen sued du Pont, alleging that du Pont's dye had rendered Hartley's ink cartridges unsaleable. Du Pont in turn sought discovery of a trade secret formula that Hartley had licensed, and the district court ordered Hartley to disclose it or have its suit dismissed. *Id.* at 329.

On mandamus review, the Ninth Circuit explained that courts must both "secure the right of one litigant to get relevant and necessary evidence" and "protect the other litigant from disclosing secrets which are not relevant and necessary." *Id.* at 328. Although du Pont asserted that the trade secrets were "purportedly relevant," it "did not sustain the burden \* \* \* of establishing that the trade secrets sought were relevant and necessary." *Id.* at 331. The court thus found an abuse of discretion and remanded for the district court to consider whether "du Pont can establish that all or some part of the information sought is relevant and necessary to its proper defense of the action." *Ibid.*

In short, other circuits have repeatedly used mandamus review to limit discovery to relevant matters, especially to protect sensitive or confidential material.

B. Ignoring these decisions, the majority below held that an order compelling production of indisputably irrelevant material was not "a clear abuse of discretion." App. 2a. In support, the majority cited *district court* decisions that "have, in some circumstances,

ordered the production of documents without a manual relevance review.” App. 3a.<sup>4</sup> But the circumstances of those cases are markedly different from those here.<sup>5</sup> And insofar as they do involve analogous facts, they simply underscore the recurring nature of the issue—as do a host of district court decisions that *reject* requests to bar a relevance review.<sup>6</sup> As one such

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<sup>4</sup> See *Consumer Fin. Prot. Bureau v. Navient Corp.*, 2018 WL 6729794, \*2 (M.D. Pa. 2018); *UPMC v. Highmark Inc.*, 2013 WL 12141530, \*1 (W.D. Pa. 2013); *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*, 2007 WL 2758571, \*18 (C.D. Cal. 2007); *Carrillo v. Schneider Logistics, Inc.*, 2012 WL 4791614, \*10 (C.D. Cal. 2012); *Tulip Computers Int’l B.V. v. Dell Computer Corp.*, 2002 WL 818061, \*7 (D. Del. 2002); *Progressive Cas. Ins. Co. v. Delaney*, 2014 WL 3563467, \*10-11 (D. Nev. 2014); *Littlefield v. NutriBullet, L.L.C.*, 2017 WL 10439692, \*4 (C.D. Cal. 2017); and *Williams v. Taser Int’l, Inc.*, 2007 WL 1630875, \*5-6 (N.D. Ga. 2007); see also *In re: Nat’l Prescription Opiate Litig.*, Case No. 1:17-MD-2804, Dkt. No. 3055, at 4-5 (N.D. Ohio Dec. 27, 2019) (ordering production of nationwide data without identifying relevance of national data to claims by two counties) (mandamus petition pending).

<sup>5</sup> For example, two of the cases involved *one* investigative or custodial file that was relevant in its entirety, not wholesale production of millions of irrelevant documents across dozens of companies. *Navient Corp.*, 2018 WL 6729794, \*2 (one investigatory file); *Highmark*, 2013 WL 12141530, \*1 (one custodian). Another adopted a drastic order “because the parties have been unable to cooperate in the discovery process,” *Taser Int’l*, 2007 WL 1630875, \*7, whereas the CMO here comes early in document discovery.

<sup>6</sup> See *Bancpass, Inc. v. Highway Toll Admin., LLC*, 2016 WL 4031417, \*3 (W.D. Tex. 2016) (party need not produce

court explained: “In our system of law, we allow the party responding to discovery to filter his own documents and produce 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 is no basis to make the responding party produce all information. Indeed, to do so would make a mockery of F.R.C.P. 26(b)(1).” *Wilson v. Rockline Indus., Inc.*, 2009 WL 10707835, \*1 (W.D. Ark. 2009).

Further, the CMO here is more problematic than the orders vacated in the circuit decisions cited above. In each of those cases, the circuit courts intervened to prevent production of one category of irrelevant documents. Here, the Third Circuit refused to block production of *millions* of irrelevant documents, across a host of categories. Indeed, the CMO declares that petitioners “may not withhold prior to production any documents based on relevance or responsiveness.” App. 8a. There is no dispute that this will result in a vast production of irrelevant documents. This Court should intervene.

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all documents including search terms absent “reason to believe that [the party] has withheld documents it was obligated to produce”); *Chen-Oster v. Goldman, Sachs & Co.*, 2014 WL 716521, \*1 (S.D.N.Y. 2014) (rejecting demand for production of all documents containing search terms); *Gardner v. Cont’l Cas. Co.*, 2016 WL 155002, \*3 (D. Conn. 2016) (similar); *In re eBay Seller Antitrust Litig.*, 2010 WL 2836815, \*3 (N.D. Cal. 2010) (“it is the litigant responding to discovery requests, and that litigant’s own lawyer, who searches for and identifies responsive documents”).

#### **IV. The Third Circuit’s divided decision is manifestly incorrect.**

Beyond the foregoing conflicts with precedent and the Court’s 2000 and 2015 amendments to the Rules, review is warranted to address the “serious and exceptional” error below. App. 4a (Phipps, J., dissenting); see *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517 (2017) (reversing decision denying mandamus that conflicted with precedent). A straightforward reading of the Rules confirms that the Third Circuit erred, and the other reasoning provided by the courts below is untenable.

##### **A. The decision below cannot be reconciled with the plain text of the Rules.**

Neither court below analyzed the text of Rule 26(b), much less “firmly applied” it. *Lando*, 441 U.S. at 177. The Third Circuit majority did not dispute Judge Phipps’ textual analysis of the Rules; it simply declared that “the Federal Rules of Civil Procedure permit a district court to compel the production of documents within broad parameters.” App. 2a–3a. Likewise, the district court ignored the relevance requirement, stating only that respondents’ search terms would limit production to “proportional” levels. App. 25a.

Rule 26(b)(1), however, states the relevance and proportionality requirements in the conjunctive, limiting the scope of discovery to “matter that is relevant to any party’s claim or defense *and* proportional to the needs of the case.” (Emphasis added.) The relevance requirement and proportionality requirement thus serve as independent limits on the scope of discovery.

The majority below also pointed to the CMO’s custodial and search-term limitations. App. 3a. But the fact that the custodians “possess[] potentially relevant information,” or that the search terms are “aimed at identifying relevant information” and “narrow[ing] the information produced” (*ibid.*) is not enough; discovery must be limited to what is *actually* relevant.

As various courts have recognized, identifying relevant custodians and search terms is but a first step in limiting discovery to relevant documents. *E.g.*, *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 (D. Md. 2008) (“keyword searches” are “appropriate and helpful for ESI search and retrieval,” but have “well-known limitations and risks”); see *supra* n.6 (collecting cases). That is because “[keywords] often are over-inclusive”—“they find responsive documents but also large numbers of irrelevant documents.” *Moore v. Publicis Groupe*, 287 F.R.D. 182, 191 (S.D.N.Y. 2012), adopted, 2012 WL 1446534 (S.D.N.Y. 2012). “As every law school student and law school graduate knows, when performing a computer search on WESTLAW and/or LEXIS, not every case responsive to a search command will prove to be relevant to the legal issues for which the research was performed. Searching tens of thousands, and hundreds of thousands, of electronic documents is no different.” *Gardner*, 2016 WL 155002, \*3. Because respondents’ broad search terms will indisputably capture millions of irrelevant documents, review for relevance is critical to ensuring compliance with Rule 26(b)(1).

If any doubt remained, Rule 26(b)(1) also defines the outer “scope of discovery” “[u]nless otherwise *limited by court order.*” (Emphasis added.) Nothing in the Rule, or the “wide latitude” that district courts en-

joy on many discovery matters, permits courts to *expand* the “scope of discovery” to include material that indisputably is not “relevant.” On the contrary, Rule 26(b)(2)(C)(iii) says “the court must limit the frequency or extent of discovery” if “the proposed discovery is outside the scope permitted by Rule 26(b)(1).”

That is to say nothing of Rule 34(b)(2)(C), which, as Judge Phipps explained (App. 4a), states that the producing party’s document review will serve, in the first instance, as the means for enforcing the relevance requirement. That Rule provides: “An objection must state whether any responsive materials are being withheld on the basis of that objection.” Fed. R. Civ. P. 34(b)(2)(C). In other words, parties may “object” to discovery as non-responsive, and documents may be “withheld on th[at] basis.” *Ibid.* As Judge Phipps recognized, “a court does not spontaneously gain authority to compel production of non-responsive, irrelevant documents simply by establishing a period of time afterwards for the review and potential return of the documents produced.” App. 4a–5a.

Although neither the district court nor respondents cited Federal Rule of Evidence 502(d), the majority below asserted that “a similar approach is contemplated in [that rule], by which a court may order production without a privilege review.” App. 3a. Not so. Rule 502 states that, where certain disclosures of privileged material are “inadvertent,” courts may order that “the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.” Fed. R. Evid. 502(a)–(b), (d). The court below erred in treating “clawbacks,” a remedy for already-committed and inadvertent disclosures, as a basis for compelling

prospective disclosures of materials without first allowing parties to weed out irrelevant documents.

Moreover, the only court to consider a request to order production without a privilege review (App. 3a) rejected it, stating: “[T]he rule explicitly did not abrogate privilege law.” *Winfield v. City of N.Y.*, 2018 WL 2148435, \*8 (S.D.N.Y. 2018). As the Sedona Conference explains, “Rule 502(d) does not authorize a court to require parties to engage in ‘quick peek’ and ‘make available’ productions and should not be used directly or indirectly to do so.” *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 Sedona Conf. J. 1, 137 (2016).

In sum, “nothing in the civil rules permits a court to compel production of non-responsive and irrelevant documents at any time, much less before the producing party has had an opportunity to screen those documents.” App. 4a (Phipps, J., dissenting).

**B. The other reasoning offered by the courts below does not withstand scrutiny.**

Rather than analyze the Rules’ text, the courts below offered various other reasoning in support of the CMO. None of it is convincing.

1. Both courts below relied heavily on the fact that, although the CMO required the production of a large volume of irrelevant documents, petitioners could attempt to retrieve them by invoking the CMO’s “clawback” provision. App. 3a, 22a. But this use of “clawbacks” is entirely novel, and it is untenable.

Clawback agreements followed the advent of electronic discovery, when parties first saw a need for contractual protection against waiving privilege by inad-

vertently producing privileged material stored electronically. As one early commentator explained, clawback agreements provided an agreed “procedure for the return of apparently privileged information within a reasonable time of its discovery.” Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 123 (2005); see also Fed. R. Civ. P. 26, Advis. Comm. Notes (2006 amendment) (clawback agreements are a “protocol[]” available to “minimize the risk of waiver”); Fed. R. Evid. 502, Advis. Comm. Notes (2008 amendment) (clawbacks address “privilege review”).

Until now, courts have consistently understood clawback agreements in the same way—as tools that allow parties to protect themselves from the risk of *inadvertently* producing privileged material.<sup>7</sup> But the clawback here is altogether different. It was imposed by the court as a means of *compelling* petitioners to produce irrelevant material, and it excuses that unnecessary burden on the basis that the production can later be undone via a cumbersome, months-long process of court hearings—at considerable additional expense. As Judge Phipps recognized, that “extraordi-

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<sup>7</sup> *E.g.*, *United States v. Sensient Colors, Inc.*, 2009 WL 2905474, \*2 (D.N.J. 2009) (clawbacks were “specifically mentioned in the 2006 Advisory Committee Note to Fed. R. Civ. P. 26(f) as a way to reduce discovery costs and delays and to minimize the risk of waiver”); *Sher v. Barclays Capital Inc.*, 2013 WL 3279801, \*1 (D. Md. 2013) (clawbacks “allow a producing party to retract privileged documents that have been inadvertently produced”).

nary” process inverts the ordinary sequence of discovery into one where “production comes first, followed by objections.” App. 5a.

It would be nice to think that “clawbacks” provided equivalent security for the confidentiality of sensitive documents—and that the irrelevant but sensitive information subject to the CMO here, after being disclosed to hundreds of opposing lawyers for 120 days, would be returned seamlessly to petitioners. But once the documents have been released, the horse will be out of the barn—and the odds of further dissemination, even in the face of a confidentiality order, are considerable.<sup>8</sup> Just as a prudent farmer shuts the barn door to keep the horse in, prudent parties to litigation withhold irrelevant but competitively sensitive documents from production—a course the Federal Rules of Civil Procedure unambiguously permit.

Neither court below cited any authority for its approach to clawbacks, and we are aware of none. If allowed to stand, however, this dramatic break from the settled contours of civil discovery is likely to become the norm.

2. The Special Master’s report, which the district court adopted, suggested that the “extraordinarily high stakes” of this MDL made “extensive and broad-ranging discovery \* \* \* both necessary and appropriate for these cases to be fairly adjudicated” and “essential for any meaningful settlement.” App. 29a. That reasoning is problematic on several levels.

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<sup>8</sup> This case has already seen multiple leaks of sealed filings and confidential materials. Dkt. No. 805 at 4–5, No. 2:16-md-2724-CMR (E.D. Pa. Dec. 18, 2018) (describing leak of sealed document).

First, as discussed (at 29), proportionality and relevance are independent requirements of Rule 26(b)(1); the fact that this is a large MDL does not authorize broad-ranging discovery beyond the Rule's strictures.

Second, the discovery standards are no different in MDLs, which must be administered in a way "not inconsistent with \* \* \* the Federal Rules of Civil Procedure." 28 U.S.C. 1407(f). "[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496–497 (1933).

Third, district courts may not ignore the Federal Rules to bring about what they deem a "meaningful settlement." App. 29a. On the contrary, "[j]udicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests"—including "the improper purpose of motivating settlement, rather than finding relevant and probative evidence." *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 546. Indeed, this rationale contains at least a hint of pre-judgment: unless respondents' have a legitimate case, which the Special Master had no way of knowing, they are not entitled to any settlement. The purpose of discovery is to help determine whether plaintiffs are entitled to relief; the prospect of settlement does not provide a reason to compel more "extensive and broad-ranging discovery" than the Rules permit.

In sum, the notion that cases with "extraordinarily high stakes" justify a unique approach to discovery lacks any legal support whatsoever, and should alarm every reasonable jurist. The rules are the rules. For that reason too, review is warranted.

**V. This case presents an excellent vehicle to address the question presented.**

Finally, this case presents an especially good opportunity to resolve the question presented.

First, the question presented was fully briefed below and is presented cleanly. As Judge Phipps' dissent noted, "[t]here is no dispute that the order compels the production of a volume of non-responsive and irrelevant documents." App. 4a. Likewise, there has been no finding of discovery-related misconduct.

Second, although discovery is among the costliest phases of litigation, the challenge of obtaining interlocutory review of discovery orders deters parties from trying to obtain mandamus relief, let alone certiorari. Often, the parties lack the resources to challenge such orders. Other times, the volume of documents, relative importance of the disclosures vis-à-vis other issues, or extent of prejudice involved in the disclosures, leads the party to conclude the game is not worth the candle. And still other times, the discovery deadlines run before one could realistically obtain review.

Here, in contrast, the stakes are high. Producing and "clawing back" millions of petitioners' irrelevant documents imposes needless costs and risks disclosing highly sensitive business information to competitors. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011–1012 (1984) ("The economic value of [trade secrets] lies in the competitive advantage over others that [their owner] enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge."). Further, complaints continue to be filed, so the litigation is in the early stages and the issues are not yet fully defined.

Thus, the Court should take the opportunity to address an important and recurring question that, for practical reasons, cannot easily reach this Court.

That the Third Circuit’s decision is unpublished is not a reason to deny review here. Discovery decisions are typically unpublished. And where, as here, the question presented is exceptionally important, the unpublished nature of the ruling below may “carr[y] no weight in [the] decision to review the case.” *Comm’r v. McCoy*, 484 U.S. 3, 7 (1987) (reviewing unpublished ruling where circuit court “exceeded its jurisdiction”); see S. Shapiro et al., *Supreme Court Practice* 4–34 (11th ed. 2019). Indeed, the Court has reviewed unpublished decisions in most every area, including civil procedure; and as unpublished decisions have become more significant, the Court has reviewed them more frequently.<sup>9</sup> Indeed, since 2007, when the appellate

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<sup>9</sup> *E.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (arbitration); *Hall v. Hall*, 138 S. Ct. 1118 (2018) (Rule 42(a)); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (takings); *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (2016) (copyright); *Mata v. Lynch*, 135 S. Ct. 2150 (2015) (immigration); *Holt v. Hobbs*, 574 U.S. 352 (2015) (RLUIPA); *Law v. Siegel*, 571 U.S. 415 (2014) (bankruptcy); *United States v. Clarke*, 573 U.S. 248 (2014) (tax); *Millbrook v. United States*, 569 U.S. 50 (2013) (FTCA); *Martel v. Clair*, 565 U.S. 648 (2012) (habeas); *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011) (ERISA); *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538 (2010) (Rule 15); *Nelson v. United States*, 555 U.S. 350 (2009) (criminal); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) (patent); *United States v. Georgia*, 546 U.S. 151 (2006) (ADA/sovereign immunity); *Wisconsin Right to Life, Inc. v. F.E.C.*, 546 U.S. 410 (2006) (elections);

rules were amended to prohibit circuit courts from “restrict[ing] the citation of [unpublished, post-2006] federal judicial opinions” (Fed. R. App. P. 32.1(a)(1)), the Court has reviewed at least 96 unpublished rulings—7.4 per Term, or about 10 percent of the docket.<sup>10</sup>

Given the importance of the question presented, this Court should not hesitate to review the unpublished ruling here. Indeed, most unpublished circuit rulings are unanimous. This one prompted a substantial dissent that recognized this decision as “a serious and exceptional error that should be corrected.” App. 4a.

### CONCLUSION

The petition for certiorari should be granted and the judgment below either summarily reversed or set for full consideration on the merits.

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*Dye v. Hofbauer*, 546 U.S. 1 (2005) (prosecutorial misconduct); *Illinois v. Fisher*, 540 U.S. 1174 (2004) (due process); *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004) (FOIA); *Ewing v. California*, 538 U.S. 11 (2003) (Eighth Amendment); *Kaupp v. Texas*, 538 U.S. 626 (2003) (Fourth Amendment); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002) (employment/Rule 8); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001) (punitive damages); *Johnson v. United States*, 529 U.S. 694 (2000) (sentencing); *Hetzl v. Prince William Cty., Va.*, 523 U.S. 208 (1998) (Seventh Amendment); *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (telecommunications).

<sup>10</sup> These numbers are based on a Westlaw search of this Court’s decisions containing “unpublished,” “Fed.Appx,” or “Fed. Appx,” which we reviewed individually to determine which ones arose from unpublished decisions.

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## **APPENDIX**

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**APPENDIX A**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

[Filed 12/06/2019]

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No. 19-3549

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IN RE: ACTAVIS HOLDCO U.S., INC., ET AL.,  
*Petitioners*  
(Related to E.D. Pa. No. 2-16-md-02724)

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November 22, 2019

ECO-012]

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Present: SHWARTZ, RESTREPO and PHIPPS,  
*Circuit Judges*

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1. Petition for Writ of Mandamus;
2. Motion by Respondent to Seal Response;
3. Response by Respondent to Petition for Writ of Mandamus;
4. Motion by Respondent Non-Petitioner Defendants MDL 2724 to Stay Discovery Pending Petition for Writ of Mandamus;
5. Response in opposition by Respondent Direct Purchaser Plaintiffs MDL 2724 to Motion to Stay Discovery;
6. Reply by Petitioners to Motion to Stay Discovery;

7. Motion with Expedited Treatment Requested by Petitioners to Stay the portion of the District Court Case Management Order that is the subject of the Petition for a Writ filed on October 31, 2019;
8. Motion by Petitioners for leave to file a Reply to Petition for a Writ of Mandamus with Reply attached;
9. Response in opposition by Respondent End Payer Plaintiffs MDL 2724 to motion for leave to file a Reply to Petition for Writ of Mandamus;
10. Amicus Brief by Chamber of Commerce of the United States of America in support of the Petition for Writ of Mandamus;
11. Amicus Brief by Lawyers for Civil Justice in support of the Petition for Writ of Mandamus.

Respectfully,  
Clerk/lmr

#### ORDER

The foregoing petition for a writ of mandamus is denied because, among other reasons, (1) the ordered disclosure does not “amount[] to a judicial usurpation of power,” *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted); (2) Petitioners have not established a “clear and indisputable” right to relief, *id.* at 381 (quoting *Kerr v. U.S. Dist. Ct. for N. Dist. Of Cal.*, 426 U.S. 394, 403 (1976)); *see also In re Diet Drugs Prods. Liab. Litig.*, 418 F.3d 372, 378-79 (3d Cir. 2005); (3) there is no showing that the order was the result of a “clear abuse of discretion,” *Cheney*, 542 U.S. at 380, given that (i) the District Court has wide latitude in controlling discovery, (ii) the Federal Rules of Civil Procedure permit a

district court to compel the production of documents within broad parameters, *see, e.g.*, Fed. R. Civ. P. 16(b), 26(b)(1), (iii) the discovery is being produced from custodians identified as possessing potentially relevant information, and search terms aimed at identifying relevant information that will be applied are likely to narrow the information produced, (iv) district courts have, in some circumstances, ordered the production of documents without a manual relevance review, *see, e.g.*, *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-CV-101, 2018 WL 6729794, at \*2 (M.D. Pa. Dec. 21, 2018); *UPMC v. Highmark Inc.*, No. 2:12-CV-00692 JFC, 2013 WL 12141530, at \*2 (W.D. Pa. Jan. 22, 2013); *Williams v. Taser Int'l, Inc.*, No. CIV 106CV-0051-RWS, 2007 WL 1630875, at \*6 (N.D. Ga. June 4, 2007), and these orders are neither tantamount to “search warrants” nor clear outliers, as the dissent suggests, (v) a similar approach is contemplated in Federal Rule of Evidence 502(d), by which a court may order production without a privilege review, (vi) the District Court provided reasons for its approach in its orders, (vii) the District Court provided avenues: (a) to allow the Petitioners to review for privilege before production and (b) to protect the produced information by way of an “outside counsel eyes only designation” for a period of 120 days, during which Petitioners may claw back trade secrets, unrelated business information, and unrelated personal or embarrassing information; (viii) even if the District Court’s order constituted an abuse of discretion (which we do not decide), such an error would not support mandamus relief, *see Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir 1995) (noting that “[m]andamus is not available for [an] abuse of discretion” without a showing that “the district court committed a clear error of law”); *Cipollone v. Liggett*

*Grp., Inc.*, 822 F.2d 335, 339 (3d Cir. 1987) (similar); and (4) mandamus is not otherwise necessary “to prevent grave injustice,” *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984), as there is no showing that the ordered disclosure, when paired with the protections and limitations that the District Court imposed, will cause great injury.

Because we have denied the mandamus petition, we deny as moot the motions to stay discovery pending resolution of the mandamus petition and to expedite consideration of the petition. We grant the motion to seal and Petitioners’ motion for leave to file a reply to the petition for a writ of mandamus.<sup>1</sup>

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<sup>1</sup> Judge Phipps would have granted the petition for a writ of mandamus based on the explanation below.

Under the discovery order in this case, documents from certain custodians containing certain broad search terms must be produced without the producing party having the ability beforehand to review the documents for responsiveness or relevance. There is no dispute that the order compels the production of a volume of non-responsive and irrelevant documents. But the discovery order contains a clawback provision that affords the parties producing documents 120 days to request return of non-responsive, irrelevant documents that meet at least one of three criteria. Even with that clawback provision, the order constitutes a serious and exceptional error that should be corrected through a writ of mandamus.

The sequence of events in discovery is important, and the rules of civil procedure allow for a review for responsiveness and relevance *before* production. *See* Fed. R. Civ. P. 26(b)(1), 34(b)(2)(C). While parties may agree to dispense with that sequence, nothing in the civil rules permits a court to compel production of non-responsive and irrelevant documents at any time, much less before the producing party has had an opportunity to screen those documents. But that is exactly what the discovery order in this case does. The clawback provision does not ameliorate that defect: a court does not spontaneously gain authority to compel produc-

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By the Court,

s/Patty Shwartz  
Circuit Judge

Dated: December 6, 2019

Lmr/cc: All Counsel of Record

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tion of non-responsive, irrelevant documents simply by establishing a period of time afterwards for the review and potential return of the documents produced.

There is, of course, another regime in which production comes first, followed by objections to the documents produced. That is the search warrant. While search warrants have other characteristics, such as a probable cause showing and the dispatching of law enforcement officers to enter private premises, civil discovery is distinct and does not incorporate those central features. By cloaking the document requests in this case with a core attribute of search warrants – production before review and objection – the discovery order is an extraordinary outlier.

In sum, sequence is important in civil discovery. A party has the option of objecting to the production of documents on responsiveness and relevance grounds *before* producing them. Because the discovery order here contravenes that fundamental principle and operates with enhanced potency, akin in one key respect to a search warrant, Judge Phipps dissents and would grant the writ of mandamus.

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**APPENDIX B**

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

[Filed 10/24/19]

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MDL 2724

16-MD-2724

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IN RE: GENERIC PHARMACEUTICALS PRICING  
ANTITRUST LITIGATION

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HON. CYNTHIA M. RUFÉ

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THIS DOCUMENT RELATES TO:  
*ALL ACTIONS*

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PRETRIAL ORDER NO. 105  
(CASE MANAGEMENT ORDER  
AND DISCOVERY SCHEDULE)

AND NOW, this 24th day of October 2019, upon consideration of the Report and Recommended Order of David Marion and the Objections thereto, and after oral argument, it is hereby ORDERED that the Objections are OVERRULED, the Report and Recommended Order is APPROVED as follows, and the Case Management Order is ENTERED with regard to the management and schedule for discovery, class certification, summary judgment, and *Daubert* motions, applicable to all cases pending in the MDL as of September

1, 2019; subject to modifications that may be set forth in future Pretrial Orders.<sup>1</sup> When responding to discovery requests under this Case Management Order, a producing party shall adhere to paragraphs 6 and 7 of PTO 96 or substantially similar provisions contained in any future Pretrial Order.

1. With respect to any new complaint or amended complaint filed after September 1, 2019, responsive pleadings and/or motions shall be filed as normally required or agreed. Discovery from new defendants may be guided by but will not be governed by this CMO. Discovery with respect to those defendants shall be governed by separate agreement(s) to be negotiated by the parties or separate order(s), recommended by the Special Master and/or as decided by the Court. However, discovery involving pre-existing parties may be expanded as appropriate to include newly added defendants and/or drugs.
2. All parties are required to preserve any and all communications in any potentially relevant custodial file including, but not limited to, (i) communications pertaining to any generic prescription drug with any other seller or manufacturer of any other generic prescription drug, or (ii) internal communications concerning (i).
3. **DISCOVERY OF DEFENDANTS' CUSTODIAL FILES:** Production from the files of all Defendants' Agreed Custodians (as defined in PTO 95, ¶ 1.5), or

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<sup>1</sup> The Court has considered the Objections carefully, and has determined that the Recommended Order sufficiently balances the interests of the parties and, most importantly, provides a road map to move the litigation forward at this time.

other Defendant custodian(s) as ordered, using search terms, established as follows:

- a. Search terms shall be established either by agreement reached among the parties in negotiations supervised by Special Master Marion and ESI Master Regard or as ordered by Special Master Marion or ESI Master Regard if not agreed to within 21 days from entry of this Order.
  - i. Such terms shall include, but are not limited to, all drugs named in any complaint and all Defendants named in any complaint as of the date of September 1, 2019.
  - ii. Any drug or drug manufacturer or seller defendant added hereafter in any new or amended complaint, shall be added to the search terms and searched on a reasonable schedule to be established by the parties with the assistance of Special Master Marion and ESI Master Regard, as necessary.
- b. Defendants shall apply the agreed search terms to the agreed custodial files and may review the identified documents for privilege, but may not withhold prior to production any documents based on relevance or responsiveness.
- c. The deadline for meeting and conferring on the proposed search terms is ten (10) days from entry of this Order.
  - i. Any dispute arising out of the above provisions shall be brought to Special Master Marion and ESI Master Regard via simultaneous letter briefs within 30 days from the date of this Order, to be promptly resolved by them.

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- ii. The briefs should include “hit” counts and suggested alternatives to the disputed search term(s).
  - iii. Special Master Marion and/or ESI Master Regard will then meet and confer with the parties together or ex parte to discuss the proposals and will propose search terms to all parties for testing.
  - iv. The parties shall have 14 days to test the search terms and submit objections to them.
  - v. To the extent the parties do not reach agreement, any disputes shall be resolved pursuant to the Special Master Protocol, PTO 68.
- d. Production deadline: December 20, 2019; Privilege log deadline: January 15, 2020.
- e. Confidentiality:
- i. All documents shall be stamped “Outside Counsel Eyes Only” for 120 days (as set forth in PTO 70).
  - ii. Confidentiality re-designation deadline: 120 days after production (as set forth in PTO 70).
  - iii. Request for Clawback: 120 days from production (as guided by PTO 70).
  - iv. Clawback disputes to be resolved promptly with assistance from Special Discovery Master Merenstein and Special Master Marion, as necessary.
4. DISCOVERY OF DEFENDANTS’ TARGETED DOCUMENTS relevant to the claims regarding all drugs and all Defendants in the MDL.

- a. Targeted documents include, but are not limited to:
  - i. Defendants' documents responsive to Plaintiffs' document requests that are regularly maintained in a known location, or in a location that is knowable upon reasonable inquiry of those with knowledge about Defendants' document management systems, departmental practices with respect to filing documents, and similar information, such that they do not require search terms. Such documents, which have previously been referred to as "go get" documents, may be found in custodial or non-custodial sources and include but are not limited to: e.g. calendars, travel and expense records, telephone records, board of directors' materials, forecasts, strategic sales databases, financial statements, accounting documents.
  - ii. Defendants' documents relevant to class certification, experts, and other economic or data-related issues, which may or may not require targeted search terms; and
  - iii. Additional targeted search terms based on review of documents and samples.
- b. Deadline to complete meet and confers with respect to such documents:
  - i. Paragraph 4(a)(i): November 8, 2019.
  - ii. Paragraph 4(a)(ii) and (iii): February 7, 2020.
- c. Any dispute arising out of these meet and confers shall be brought to Special Master Marion via simultaneous letter briefs on or before

November 22, 2019 (for ¶ 4(a)(i)), or February 17, 2020 (for ¶ 4(a)(ii) and (iii)).

d. Complete production of documents: December 1, 2019 (for ¶ 4(a)(i) and March 13, 2020 (for ¶ 4(a)(ii) and (iii)); Privilege log deadline December 16, 2019 (for ¶ 4(a)(i) and April 16, 2020 (for ¶ 4(a)(ii) and (iii)).

e. Confidentiality:

i. All documents stamped Outside Counsel Eyes Only for 120 days (as outlined in PTO 70).

ii. Confidentiality re-designation deadline 120 days after production (as outlined in PTO 70).

iii. Request for Clawback: January 16, 2020 (for ¶ 4(a)(i)), March 16, 2020 (for ¶ 4(a)(ii) and (iii)) (as guided by PTO 70).

iv. Clawback disputes to be resolved promptly with assistance from Special Discovery Master Merenstein and/or Special Master Marion, as necessary.

5. DEFENDANTS' TRANSACTIONAL DATA, COST INFORMATION, AND RELATED DOCUMENTS

a. No later than ten days after entry of this Order, samples of each Defendant's transaction-level sales data and cost information covering at least one year for one drug must be produced. Disputes concerning these samples shall be brought to Special Master Marion promptly.

b. Meet and confers concerning transaction-level sales data, cost information, and related documents shall be completed within 45 days of the entry of this Order. Any dispute shall be

brought to Special Master Marion via simultaneous letter briefs no later than December 13, 2019.

- c. Deadline to produce Defendants' complete transaction-level sales data and cost information:
  - i. Drugs in the MDL as of September 1, 2019: January 16, 2020.
  - ii. For any new drugs involving an existing Defendant already in the MDL, added as of September 1, 2019: January 16, 2020 or within 60 days of a new or amended complaint, whichever is later.
6. WRITTEN DISCOVERY: On or before November 8, 2019, all outstanding signature(s) and/or verifications required by Rule 33 of the Federal Rules of Civil Procedure shall be produced by either party.
7. PLAINTIFFS' DOCUMENT PRODUCTIONS AND TRANSACTIONAL DATA
  - a. The parties shall meet and confer regarding Plaintiffs'<sup>2</sup> custodians, ESI sources, outstanding discovery requests, search terms and methodology for unstructured data, shall be completed no later than November 22, 2019 (for Private Plaintiffs) and January 15, 2020 (for the States).
  - b. Any dispute arising out of this provision shall be brought to Special Master Marion, Special Master Merenstein and/or ESI Master Regard via letter briefs within 14 days of the applicable meet and confer deadlines.

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<sup>2</sup> "Plaintiffs" here refers to Plaintiffs in operative complaints and already served with discovery as of September 1, 2019.

- c. Production deadline: December 20, 2019 (for Private Plaintiffs); March 2, 2020 (for the States); Privilege log deadline: 30 days thereafter.
  - d. 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.
8. FACT DEPOSITIONS
- a. Depositions in all cases shall begin March 16, 2020 and continue through September 16, 2021.
  - b. Witnesses associated with bellwether case(s) or claims are to take priority.
  - c. Starting February 6, 2020, the parties shall meet and confer regarding the scheduling of depositions. Any dispute arising out of these meet and confers shall be submitted promptly to Special Master Marion via simultaneous letter briefs.
9. BELLWETHER SELECTIONS
- a. Within 45 days of the entry of this Order, the parties shall meet and confer with the assistance of Special Master Marion to identify criteria for selecting bellwether claims or case(s) for class certification, expert discovery, summary judgment, *Daubert* motions, and/or trial(s).
  - b. Upon identification of the bellwether criteria, bellwether claims or case(s) shall be established either by agreement reached among the parties in negotiations supervised by Special Master Marion or as ordered by Special Master Marion if not agreed to within 30 days after the meet and confer.

- c. The paragraphs below apply only to such cases.

10. MERITS EXPERT DEPOSITIONS<sup>3</sup>

- a. Plaintiffs shall serve expert reports no later than April 30, 2021. Plaintiffs' experts shall be made available for depositions no later than June 14, 2021.
- b. Defendants shall serve expert reports no later than July 30, 2021. Defendants' experts shall be made available for depositions no later than August 16, 2021.
- c. Plaintiffs shall serve rebuttal expert reports no later than October 15, 2021.
- d. Unless good cause can be shown, each expert providing a merits report is to be deposed only one time. Any dispute arising from the scheduling of expert depositions shall be brought to Special Master Marion via simultaneous letter briefs.

11. CLASS CERTIFICATION AND RELATED *DAUBERT* MOTIONS

- a. Motions for class certification for the bellwether case(s) or claims, if required, shall be filed by October 7, 2020. Plaintiffs in such cases shall simultaneously serve expert reports on which they rely for class certification.
- b. Depositions of Plaintiffs class certification experts shall be completed by November 6, 2020. Unless good cause can be shown, each of Plaintiffs' class certification expert is to be deposed only one time.

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<sup>3</sup> Dates hereafter may be modified either by agreement or by Order of the Court, dependent on the selection of bellwether criteria.

- c. Opposition to class certification and related *Daubert* motions for the bellwether case(s) or claims shall be filed by December 18, 2020. Defendants in such cases shall simultaneously serve expert reports on which they rely in opposition.
- d. Depositions of Defendants' class certification experts shall be completed by January 8, 2021. Unless good cause can be shown, each of Defendants' class certification expert is to be deposed only one time.
- e. Replies in support of class certification and related *Daubert* motions for the bellwether case(s) or claims shall be filed, and supporting expert reports served, by January 18, 2021.
- f. The hearing on class certification shall be set on a date to be determined by the Court.

12. SUMMARY JUDGMENT MOTIONS AND MERITS *DAUBERT* MOTIONS shall proceed as follows:

- a. Motions and supporting briefs for bellwether case(s) or claims shall be filed no later than 60 days after the later of close of merits expert discovery and disposition of motions for class certification.
- b. Oppositions shall be filed 60 days thereafter.
- c. Replies shall be filed 45 days after the filing of oppositions.

It is so ORDERED.

BY THE COURT:

/s/ Cynthia M. Rufe  
CYNTHIA M. RUFÉ, J.

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**APPENDIX C**

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

[Filed 11/14/2019]

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MDL 2724

16-MD-2724

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IN RE: GENERIC PHARMACEUTICALS PRICING  
ANTITRUST LITIGATION

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THIS DOCUMENT RELATES TO:  
*ALL ACTIONS*

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HON. CYNTHIA M. RUFE

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MEMORANDUM OPINION

Rufe, J.

November 14, 2019

On October 24, 2019, the Court entered a Case Management Order as Pretrial Order No. 105 (“PTO 105” or “CMO”), substantially approving the Report and Recommended Order of Special Master David Marion and setting an initial schedule for discovery, class certification, summary judgment, and *Daubert* motions applicable to all cases pending in the Multi-District Litigation as of September 1, 2019. Moving Defendants objected to certain provisions of the CMO and have filed a motion in this Court to stay discovery while they seek a writ of mandamus from the Court of Appeals to argue that the CMO does not comply with

the Federal Rules of Civil Procedure. Plaintiffs oppose the stay. Because the provisions of the CMO are appropriate in the context of this exceedingly large and complex antitrust MDL, the motion for a stay will be denied.

#### I. Procedural Background of the MDL

This MDL concerns allegations that numerous pharmaceutical companies engaged in an unlawful scheme or schemes to fix, maintain, and stabilize prices, rig bids, and engage in market and customer allocations of certain generic pharmaceutical products. There are five distinct sets of Plaintiffs: The State Attorneys General, three proposed class-action Plaintiff groups (the Direct Purchaser Plaintiffs (“DPPs”), the End-Payer Plaintiffs (“EPPs”), and the Indirect Reseller Plaintiffs (“IRPs”)), and the Direct Action Plaintiffs, who have opted not to proceed as part of one of the class actions. More than two dozen corporations and individuals have been named as Defendants. The MDL initially involved allegations of individual conspiracies as to 18 separate generic drugs, but has expanded to encompass allegations of overarching conspiracies that include dozens of pharmaceuticals. The Court has ruled on numerous motions to dismiss, and has determined that federal and state claims can proceed both as to individual drugs<sup>1</sup> and as to the alleged

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<sup>1</sup> Specifically, the Court denied motions to dismiss (except as to one Defendant), the Sherman Act claims asserted by the DPPs, EPPs, and IRPs and the state-law claims asserted by the EPPs and the IRPs as to six individual drugs, clobetasol, digoxin, divalproex ER, doxycycline, econazole, and pravastatin (the “Group One” drugs). *See* MDL Doc. Nos. 857, 858 (entered October 16, 2018) and MDL Doc. Nos. 721, 722 (entered February 15, 2019).

existence of an overarching multi-drug conspiracy in separate complaints brought by the Plaintiff groups.<sup>2</sup>

A particular challenge in this MDL has been the need to balance the conduct of discovery in an orderly, proportional fashion in accordance with the Federal Rules of Civil Procedure with due regard for the investigations conducted by the State Attorneys General and the United States Department of Justice, which is an Intervenor in the MDL. Discovery thus has proceeded in gradual, targeted stages.<sup>3</sup>

In recognition of the scope of the MDL, the Court has appointed three highly-qualified Special Masters to assist the Court and to work with the parties to resolve disputes informally, where possible, and to provide the Court with recommendations when agreement cannot be reached. Special Master Marion, Special Discovery Master Bruce Merenstein, and a specialist in electronically stored information, Special Discovery Master for ESI Daniel Regard, have many years of experience in cases with complex discovery.

The Court has entered orders designed to protect the parties' interests with regard to sensitive information. PTO 45<sup>4</sup> set forth the procedure for designating information as confidential or highly confidential and also set forth a separate category of non-privileged material generated or disclosed in connection with

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<sup>2</sup> MDL Doc. Nos. 1070, 1071 (entered August 19, 2019).

<sup>3</sup> See PTO 44 [MDL Doc. No. 560, entered February 9, 2018]; PTO 47 [MDL Doc. No. 582, entered April 19, 2018]; PTO 60 [MDL Doc. No. 774, entered November 20, 2018]; PTO 73 [MDL Doc. No. 853, entered February 14, 2019]; PTO 96 [MDL Doc. No. 1046, entered July 12, 2019]; PTO 108 [MDL Doc. No. 1151, entered November 8, 2019].

<sup>4</sup> [MDL Doc. No. 561, entered February 13, 2018].

investigations by State Attorneys General. As different needs for protecting information were identified, PTO 45 was modified by PTO 53, to permit highly competitive or highly sensitive information likely to have a significant effect on business strategies or decisions, product plans or development, or pricing to be designated for “outside counsel eyes only.”<sup>5</sup>

Before and after filing suit, several State Attorneys General, and in particular the Connecticut State Attorney General, conducted investigations pursuant to state law. The other Plaintiff groups sought access to the material obtained through such investigations, and by Order dated November 14, 2018<sup>6</sup>, the Court explained at length why such access was warranted as long as there were procedures to protect confidentiality and comply with Connecticut state law. As a result of this Order, and under the auspices of Special Master Marion, the parties agreed to a stipulated protocol implementing the Court’s Order, which the Court entered as PTO 70.<sup>7</sup> PTO 70 provided for a “claw back” procedure, whereby:

if Defendants believe the procedures outlined [in PTO 70 and 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

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<sup>5</sup> [MDL Doc. No. 697, entered September 4, 2018], at ¶ 1.7.

<sup>6</sup> [MDL Doc. No. 758].

<sup>7</sup> [MDL Doc. No. 841, entered January 31, 2019]. PTO 70 has been modified with the agreement of the parties, but this provision was not affected. *See* PTO 106 [MDL Doc. No. 1142, entered October 25, 2019].

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.<sup>8</sup>

II. The CMO is Consistent with the Federal Rules of Civil Procedure and the Court’s Earlier Orders

The protections established in PTO 70, as just explained, have been expressly incorporated into the CMO, including Paragraph 3, to which Defendants particularly object. Paragraph 3 of PTO 105 governs the production of custodial files, and provides that search terms for the files shall be established, after which

Defendants shall apply the agreed search terms to the agreed custodial files and may review the identified documents for privilege, but may not withhold prior to production any documents based on relevance or responsiveness.<sup>9</sup>

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<sup>8</sup> PTO 70, ¶¶6-7.

<sup>9</sup> CMO ¶ 3(b).

Defendants contend that they should be permitted to withhold documents they determine to be irrelevant or nonresponsive before production.

The agreed custodial files are defined in the ESI Protocol as the files of “any individual of a Producing Party as identified and agreed by the parties during a meet and confer as having possession, custody, or control of potentially relevant information, Documents, or ESI.”<sup>10</sup> Thus, there is no dispute that these custodial files are likely to contain relevant information. Importantly, the agreed custodial files are not produced wholesale; instead, the files are to be searched for specific terms. These search terms provide the initial screen for relevance. Once the information has been produced it is not irretrievable; the “claw back” procedures established in PTO 70 for confidential information are expressly incorporated into the CMO: documents are stamped “Outside Counsel Eyes Only” for 120 days, with requests to claw back made within 120 days of production.<sup>11</sup> Claw back disputes are to be “resolved promptly with assistance from Special Discovery Master Merenstein and Special Master Marion, as necessary.”<sup>12</sup>

The procedures outlined above establish a path forward fully commensurate with Federal Rule of Civil Procedure 26, which provides that

Parties may obtain discovery of nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues

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<sup>10</sup> PTO 95 at ¶ 1.5.

<sup>11</sup> CMO ¶ 3(e).

<sup>12</sup> CMO ¶ 3(e).

at stake in the action, 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.<sup>13</sup>

There is no question that the issues at stake in this action are of considerable importance to the parties, to the shareholders of those Defendants that are publicly-traded corporations, and to the public at large. The agreed custodial files are by their terms those likely to have relevant information, the files will be searched for specific relevant terms, and Defendants have the opportunity to claw back confidential information. In the context of this litigation, where the relevance of the documents must be determined in part by context, these procedures best serve the purpose of the Federal Rules to secure a just determination of the merits of the parties' claims and defenses.

The CMO also comports with the earlier rulings of the Court with regard to the search for and production of discovery material (the "ESI Protocol").<sup>14</sup> The parties thoroughly briefed and argued several disputed issues before the ESI Protocol was entered. The highly technical disputes were resolved with the benefit of a recommendation from Special Discovery Master for ESI Regard. The Court separately ruled on a disputed legal question, holding that a party may redact or withhold responsive documents only when covered by attorney-client privilege or the work-product doctrine or when the documents contain sensitive

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<sup>13</sup> Fed. R. Civ. P. 26(b).

<sup>14</sup> See PTO 95 [MDL Doc. No. 1045, entered July 12, 2019].

personally identifying information.<sup>15</sup> As the Court explained, “the particular nature of the antitrust 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.”<sup>16</sup> The CMO thus does not depart from, but instead forms the latest chapter in, the Court’s comprehensive management of the MDL.

### III. A Stay Is Not Warranted

The factors in determining whether to grant a stay are:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
- (2) whether the applicant will be irreparably injured absent a stay;
- (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding;
- and (4) where the public interest lies.<sup>17</sup>

For the reasons discussed above, Moving Defendants have not made a strong showing of likelihood of success on the merits. The CMO was not issued in a vacuum. Instead, as the intricate procedural history of this complex MDL illustrates, the CMO is the latest in a series of rulings designed to advance discovery with due consideration of the ongoing federal and state

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<sup>15</sup> Order on Proposed ESI Protocol [MDL Doc. No. 938, entered April 10, 2019].

<sup>16</sup> *Id.* at 1. The Court also cited the protective order, and the parties’ ability to raise appropriate objections to discovery, which the Special Masters may assist the Court in resolving. *Id.* at 1-2.

<sup>17</sup> *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991) (citing *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987)).

investigations and the parties' legitimate interests. The Court understands the burdens that large volumes of discovery place on the parties, but Defendants have not shown that reviewing information for relevance before production, instead of through the claw back procedures established in PTO 70 and incorporated in the CMO, is appropriate in this litigation, where the determination of whether information is potentially relevant requires the context of the information within the files. Nor have Defendants shown that they would be irreparably injured in the absence of a stay. To the contrary, the complexity of the MDL, and the balancing of interests of all concerned, has resulted in a deliberate, gradual expansion of discovery, and now that the groundwork has been laid, a stay would work against the interests of the parties and run counter to the public interest.

Now the MDL has been brought to the stage where comprehensive discovery is proceeding, Moving Defendants attempt to halt the progress the Court has made and disrupt the pace and the content of the administration of the MDL, issues within the sound discretion of the Court, by invoking the extraordinary remedy of mandamus. There is no basis for such an action. The question of whether there has been a widespread conspiracy to artificially inflate the cost of many generic pharmaceuticals is an issue that directly affects many Americans, and it is time for discovery to show whether or not that has occurred. The Court determined that Plaintiffs have plausibly alleged an overarching antitrust conspiracy; now Plaintiffs must marshal evidence to prove their claims and Defendants must prepare their defenses, and the CMO provides a reasonable way forward for all parties.

During the past three years, the Court has entered orders that balance the competing interests at stake in an ever-evolving and complex MDL. The Court maintains a detailed awareness of these developments and acts with the benefit of input received through regular status conferences with counsel, through reports of the Special Masters, and through extensive motions practice, and makes rulings based upon all of this acquired knowledge. As discovery expands, the Court will continue to ensure that the discovery process proceeds in an orderly, proportional fashion that is reasonably calculated to lead to the discovery of relevant information. The Court therefore will not stay proceedings. An appropriate order will be entered.

**APPENDIX D**

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

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MDL NO. 2724

16-MD-2724

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IN RE: GENERIC PHARMACEUTICALS  
PRICING ANTITRUST LITIGATION

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HON. CYNTHIA M. RUFÉ

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*ALL ACTIONS*

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Report and Recommended Order from  
Special Master David H. Marion  
Setting Forth a Case Management  
Order and Discovery Schedule

This report and recommended order is respectfully submitted by Special Master David H. Marion to accompany a recommended Case Management Order and Discovery Schedule.

I. BACKGROUND

As of the status conference before Judge Rufe held on July 12, 2019, the parties had yet to agree on a Case Management Order or Discovery Schedule. After several meet and confers and ex parte meetings requested by the parties, on July 17, I asked the Plaintiffs and Defendants to each submit a letter brief and a pro-

posed Case Management Order including a Discovery Schedule (collectively herein, “CMO”). In response to that request, on July 29, I received written submissions from both sides. A joint meeting was held on August 1, prior to which I issued an “informal recommendation” in an effort to accelerate progress in moving this MDL forward. Following the August 1, joint meeting, I asked the parties to submit supplemental edits, including proposed deadlines, to my informal recommendation. After receiving the parties’ edits on August 6, ex parte meetings were held on August 7.

## II. DISCUSSION

Because I have already received four well-drafted proposals and letter briefs fully setting forth the opposing positions on a CMO, and have conducted several rounds of ex parte and joint meetings on the subject, I think it is reasonable to require the simultaneous submission of objections to the recommended Order attached hereto on or before September 13. If suitable and convenient to the Court, that schedule would allow Judge Rufe six business days for review prior to the September 24 status conference.

It appears unlikely that there will be mutual agreement on this subject, and therefore I am now recommending entry of the attached CMO, which I believe is a fair and workable compromise between the two sides’ positions.

Plaintiffs initially presented two options to proceed. The first would require Defendants to produce full custodial files for a subset of key custodians selected by Plaintiffs from the much larger list of custodians of which the parties had already agreed. Although Plaintiffs presented a strong case in support of their “full custodial file” option, at my request they also put for-

ward a second option which they could live with but did not prefer (and could later move for reconsideration), under which Defendants would run broad search terms – not limited to drugs or defendants already in the MDL – across all agreed-upon custodial files and to produce all “hits,” absent those documents withheld for privilege, to Plaintiffs as the custodial documents. Plaintiffs further suggested the parties should meet and confer as to how to deal with any additional new or amended complaints which might be included in this MDL. Plaintiffs later amended their proposal to include a timeframe for the selection of bellwether criteria and segmented out various components of discovery by party and document type.

Defendants favored a phased approach, setting a cutoff date after which any new or amended complaints would be placed in a “Suspense Docket.” The first phase of discovery would be limited to drugs and defendants in cases pending as of March 20, 2019 and would proceed though a fairly customary discovery schedule. They vigorously resisted access to any custodian’s complete records without limitation by search terms. Other variations between the two sides’ proposals included the order of summary judgment motions as compared to class certification and the determination of a “bellwether” case or cases. Following a joint meeting, Defendants amended their proposal to include a full schedule with definitive dates through and including motions for class certification and motions for summary judgment. Defendants further proposed a detailed outline on the selection of search terms to be used on the suggested custodial files, and the production of documents as a result of those search terms after a privilege and responsiveness review. Plaintiffs strenuously opposed Defendants’ withholding docu-

ments based on their unilateral determination of irrelevance or non-responsiveness.

### III. RECOMMENDED ORDER

Based on the multiple and lengthy meetings with the parties both *ex parte* and jointly, and review of their conflicting briefs and proposed CMO's, I now recommend the Court's entry of the attached CMO based in part on the following considerations:

1. Given the nature of the allegations of both overarching and specific price-fixing and market allocation antitrust conspiracies, and the extraordinarily high stakes involved, extensive and broad-ranging discovery is both necessary and appropriate for these cases to be fairly adjudicated; and is also essential for any meaningful settlement discussions, since cases like this are usually ultimately settled, and reasonable settlements are beneficial to the Court and the parties.
2. The phased approach proposed by the Defendants may risk redundancy, multiple depositions of witnesses, and confusion; but Defendants reasonably contend they need some fixed date and time period for application of agreed-upon or Court-ordered search terms.
3. The proposed Order attempts to protect Defendants' asserted rights, in that there would be agreed-upon or Court-ordered search terms, a definite cut-off date, and Defendants could perform a privilege review prior to production of the "hits" generated from the custodial files. Moreover, the procedures set forth in PTO 70 regarding confidentiality designations and the "claw-back" of highly sensitive personal matters not relevant to the litigation would be utilized within an extended schedule.

4. By proceeding with discovery, class certification and then summary judgment motions – with a defined universe (unaffected by newly filed complaints or amendments) and a process for selection of “bell-wether” cases, defendants, and drugs, it is probable that the issues for the parties will be narrowed, even as to new drugs, cases or parties that may be added, as they were after the Court decided the first tranche of motions to dismiss.

5. By involving ESI Master Regard to assist me in resolving and ultimately recommending appropriate search terms within a tight schedule, and Special Discovery Master Merenstein to assist with respect to disputes that may arise within the “clawback” process (and of course all three of us will be available to deal with whatever other non-dispositive disputes may arise going forward), I believe discovery can proceed promptly, efficiently and in accordance with the Federal Rules.

6. Attached hereto as Exhibit “A” is my Recommended Order. The above summary does not attempt to cover all the contentions made on each side or indeed all the considerations behind the proposed Order.

Respectfully submitted,

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

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EXHIBIT "A"

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

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MDL NO. 2724

16-MD-2724

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IN RE: GENERIC PHARMACEUTICALS PRICING  
ANTITRUST LITIGATION

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HON. CYNTHIA M. RUFÉ

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*ALL ACTIONS*

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PROPOSED CASE MANAGEMENT ORDER  
AND DISCOVERY SCHEDULE

The Special Master recommends: (1) the following shall control the management and schedule for discovery, class certification, summary judgment, and *Daubert* motions, applicable to all cases pending in the MDL as of September 1, 2019; (2) objections thereto by any party or parties be submitted to the Court on or before September 13, 2019.

1. With respect to any new complaint or amended complaint thereto filed after September 1, 2019, responsive pleadings and/or motions shall be filed as normally required or agreed. Discovery from new defendants may be guided by but will not be governed by this CMO. Discovery with respect to

those defendants shall be governed by separate agreement(s) to be negotiated by the parties or separate order(s), recommended by the Special Master and/or as decided by the Court. However, discovery involving pre-existing parties may be expanded as appropriate to include newly added defendants and/or drugs.

2. All parties are required to preserve any and all communications in any potentially relevant custodial file including, but not limited to, (i) communications pertaining to any generic prescription drug with any other seller or manufacturer of any other generic prescription drug, or (ii) internal communications concerning (i).
3. **DISCOVERY OF DEFENDANTS' CUSTODIAL FILES:** Production from the files of all Defendants' Agreed Custodians (as defined in PTO 95, ¶ 1.5), or other Defendant custodian(s) as ordered, using search terms, established as follows:
  - a. Search terms shall be established either by agreement reached among the parties in negotiations supervised by Special Master Marion and ESI Master Regard or as ordered by Special Master Marion or ESI Master Regard if not agreed to within twenty (20) days from entry of this Order.
    - i. Such terms shall include, but are not limited to, all drugs named in any complaint and all Defendants named in any complaint as of the date of September 1, 2019.
    - ii. Any drug or drug manufacturer or seller defendant added hereafter in any new or amended complaint, shall be added to the search terms and searched on a reasonable

schedule to be established by the parties with the assistance of Special Master Marion and ESI Master Regard, as necessary.

- b. Defendants shall apply the agreed search terms to the agreed custodial files and may review the identified documents for privilege, but may not withhold prior to production any documents based on relevance or responsiveness.
- c. The deadline for meeting and conferring on the proposed search terms is ten (10) days from entry of this Order.
  - i. Any dispute arising out of the above provisions shall be brought to Special Master Marion and ESI Master Regard via simultaneous letter briefs within thirty (30) days from the date of this Order, to be promptly resolved by them.
  - ii. The briefs should include “hit” counts and suggested alternatives to the disputed search term(s).
  - iii. Special Master Marion and/or ESI Master Regard will then meet and confer with the parties together or ex parte to discuss the proposals and will propose search terms to all parties for testing.
  - iv. The parties shall have fourteen (14) days to test the search terms and submit objections to them.
  - v. To the extent the parties do not reach agreement, any disputes shall be resolved pursuant to the Special Master Protocol, PTO 68.

- d. Production deadline: December 20, 2019;  
Privilege log deadline: January 15, 2020.
  - e. Confidentiality:
    - i. All documents shall be stamped “Outside Counsel Eyes Only” for 120 days (as set forth in PTO 70).
    - ii. Confidentiality re-designation deadline: 120 days after production (as set forth in PTO 70).
    - iii. Request for Clawback: 120 days from production (as guided by PTO 70).
    - iv. Clawback disputes to be resolved promptly with assistance from Special Discovery Master Merenstein and Special Master Marion, as necessary.
4. DISCOVERY OF DEFENDANTS’ TARGETED DOCUMENTS relevant to the claims regarding all drugs and all Defendants in the MDL.
- a. Targeted documents include, but are not limited to:
    - i. Defendants’ documents responsive to Plaintiffs’ document requests that are regularly maintained in a known location, or in a location that is knowable upon reasonable inquiry of those with knowledge about Defendants’ document management systems, departmental practices with respect to filing documents, and similar information, such that they do not require search terms. Such documents, which have previously been referred to as “go get” documents, may be found in custodial or non-custodial sources and include but are not limited to: e.g. calen-

dars, travel and expense records, telephone records, board of directors' materials, forecasts, strategic sales databases, financial statements, accounting documents.

- ii. Defendants' documents relevant to class certification, experts, and other economic or data-related issues, which may or may not require targeted search terms; and
  - iii. Additional targeted search terms based on review of documents and samples.
- b. Deadline to complete meet and confers with respect to such documents:
- i. Paragraph 4(a)(i): October 16, 2019.
  - ii. Paragraph 4(a)(ii) and (iii): February 7, 2020.
- c. Any dispute arising out of these meet and confers shall be brought to Special Master Marion via simultaneous letter briefs on or before October 30, 2019 (for ¶ 4(a)(i)), or February 17, 2020 (for ¶ 4(a)(ii) and (iii)).
- d. Complete production of documents: November 15, 2019 (for ¶ 4(a)(i)) and March 13, 2020 (for ¶ 4(a)(ii) and (iii)); Privilege log deadline December 16, 2019 (for ¶ 4(a)(i)) and April 16, 2020 (for ¶ 4(a)(ii) and (iii)).
- e. Confidentiality:
- i. All documents stamped Outside Counsel Eyes Only for 120 days (as outlined in PTO 70).
  - ii. Confidentiality re-designation deadline 120 days after production (as outlined in PTO 70).

- iii. Request for Clawback: January 16, 2019 (for ¶ 4(a)(i)), March 16, 2020 (for ¶ 4(a)(ii) and (iii)) (as guided by PTO 70).
  - iv. Clawback disputes to be resolved promptly with assistance from Special Discovery Master Merenstein and/or Special Master Marion, as necessary.
5. DEFENDANTS' TRANSACTIONAL DATA, COST INFORMATION, AND RELATED DOCUMENTS
- a. No later than ten days after entry of this Order, samples of each Defendant's transaction-level sales data and cost information covering at least one year for one drug must be produced. Disputes concerning these samples shall be brought to Special Master Marion promptly.
  - b. Meet and confers concerning transaction-level sales data, cost information, and related documents shall be completed within forty-five (45) days of the entry of this Order. Any dispute shall be brought to Special Master Marion via simultaneous letter briefs no later than December 13, 2019.
  - c. Deadline to produce Defendants' complete transaction-level sales data and cost information:
    - i. Drugs in the MDL as of September 1, 2019: January 16, 2019.
    - ii. For any new drugs involving an existing Defendant already in the MDL, added as of September 1, 2019: January 16, 2019 or within 60 days of a new or amended complaint, whichever is later.

6. WRITTEN DISCOVERY: On or before October 11, 2019, all outstanding signature(s) and/or verifications required by Rule 33 of the Federal Rules of Civil Procedure shall be produced by either party.
7. PLAINTIFFS' DOCUMENT PRODUCTIONS AND TRANSACTIONAL DATA
  - a. The parties shall meet and confer regarding Plaintiffs'<sup>1</sup> custodians, ESI sources, outstanding discovery requests, search terms and methodology for unstructured data, shall be completed no later than October 14, 2019 (for Private Plaintiffs) and January 15, 2020 (for the States).
  - b. Any dispute arising out of this provision shall be brought to Special Master Marion, Special Master Merenstien and/or ESI Master Regard via letter briefs within ten (10) days of the applicable meet and confer deadlines.
  - c. Production deadline: December 20, 2019 (for Private Plaintiffs); March 2, 2020 (for the States); Privilege log deadline: 30 days thereafter.
  - d. 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.
8. FACT DEPOSITIONS
  - a. Depositions in all cases shall begin March 16, 2020 and continue through September 16, 2021.

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<sup>1</sup> "Plaintiffs" here refers to Plaintiffs in operative complaints and already served with discovery as of September 1, 2019.

- b. Witnesses associated with bellwether case(s) or claims are to take priority.
- c. Starting February 6, 2019, the parties shall meet and confer regarding the scheduling of depositions. Any dispute arising out of these meet and confers shall be submitted promptly to Special Master Marion via simultaneous letter briefs.

9. BELLWETHER SELECTIONS

- a. Within 45 days of the entry of this Order, the parties shall meet and confer with the assistance of Special Master Marion to identify criteria for selecting bellwether claims or case(s) for class certification, expert discovery, summary judgment, *Daubert* motions, and/or trial(s).
- b. Upon identification of the bellwether criteria, bellwether claims or case(s) shall be established either by agreement reached among the parties in negotiations supervised by Special Master Marion or as ordered by Special Master Marion if not agreed to within thirty (30) days after the meet and confer.
- c. The paragraphs below apply only to such cases.

10. MERITS EXPERT DEPOSITIONS<sup>2</sup>

- a. Plaintiffs shall serve expert reports no later than April 30, 2021. Plaintiffs' experts shall be made available for depositions no later than June 14, 2021.

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<sup>2</sup> Dates hereafter may be modified either by agreement or by Order of the Court, dependent on the selection of bellwether criteria.

- b. Defendants shall serve expert reports no later than July 30, 2021. Defendants' experts shall be made available for depositions no later than August 16, 2021.
- c. Plaintiffs shall serve rebuttal expert reports no later than October 15, 2021.
- d. Unless good cause can be shown, each expert providing a merits report is to be deposed only one time. Any dispute arising from the scheduling of expert depositions shall be brought to Special Master Marion via simultaneous letter briefs.

11. CLASS CERTIFICATION AND RELATED *DAUBERT* MOTIONS

- a. Motions for class certification for the bellwether case(s) or claims, if required, shall be filed by October 7, 2020. Plaintiffs in such cases shall simultaneously serve expert reports on which they rely for class certification.
- b. Depositions of Plaintiffs class certification experts shall be completed by November 6, 2020. Unless good cause can be shown, each of Plaintiffs' class certification expert is to be deposed only one time.
- c. Opposition to class certification and related *Daubert* motions for the bellwether case(s) or claims shall be filed by December 18, 2020. Defendants in such cases shall simultaneously serve expert reports on which they rely in opposition.
- d. Depositions of Defendants' class certification experts shall be completed by January 8, 2021. Unless good cause can be shown, each of

Defendants' class certification expert is to be deposed only one time.

- e. Replies in support of class certification and related *Daubert* motions for the bellwether case(s) or claims shall be filed, and supporting expert reports served, by January 18, 2021.
- f. The hearing on class certification shall be set on a date to be determined by the Court.

12. SUMMARY JUDGMENT MOTIONS AND MERITS *DAUBERT* MOTIONS shall proceed as follows:

- a. Motions and supporting briefs for bellwether case(s) or claims shall be filed no later than sixty (60) days after the later of close of merits expert discovery and disposition of motions for class certification.
- b. Oppositions shall be filed sixty (60) days thereafter.
- c. Replies shall be filed forty-five (45) days after the filing of oppositions.

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**APPENDIX E**

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

---

MDL NO. 2724

16-MD-2724

---

IN RE: GENERIC PHARMACEUTICALS PRICING  
ANTITRUST LITIGATION

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HON. CYNTHIA M. RUFÉ

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THIS DOCUMENT RELATES TO  
*ALL ACTIONS*

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I. INTRODUCTORY STATEMENT

In light of the massive amount of paper submitted in response to my Report and Recommended Order (“R&R”) setting forth a Case Management Order and Discovery Schedule (“CMO”), I am hereby submitting this summary and outline of the issues which may be of assistance to the Court. This is not intended to argue or respond on the merits to any disputed issues.

I do want to note that I take full responsibility for my R&R, but I should acknowledge three points:

1. The “meet and confers,” as well as a number of both joint and ex parte meetings I held with counsel, along with exchanges of proposals, were becoming

endless and dragging on for months. Therefore, I hastily put together an R&R recommending a CMO in mid-August. Plaintiffs' response has noted several typo's and omissions for which I apologize, but knowing the Court's busy schedule for late August and September, I wanted to allow sufficient time for the anticipated objections of the parties to be submitted prior to the scheduled Status Conference on September 24. (Certain unexpected family medical emergencies occurred at the same time.) What is most important is to get this MDL on track toward resolution with deadlines, subject to adjustment if necessary, in order to meet the objectives set forth by the Court during the last Status Conference on July 12.

2. I did consult with and receive input from both Discovery Master Merenstein and ESI Master Regard prior to submitting my R&R and CMO, but any errors of law that may appear therein are mine, not theirs.

3. I would like to note and recognize the substantial and valuable assistance of my White and Williams colleague Ms. Morgan Birch in this effort.

## II. MAIN ISSUES

### A. PRODUCTION OF FULL CUSTODIAL FILES

Plaintiffs wanted a complete turnover of all documents from a select few of Defendants' key employees/custodians. Defendants wanted search terms that would limit the scope of the production to a limited number of issues, drugs and parties.

My compromise – With the help of ESI Master Regard, we will meet and hopefully agree on the use of broad search terms that would cover all drugs and

contacts with and about all makers and sellers of drugs. If there is no agreement on search terms, ESI Master Regard and I would provide an R&R to the Court on search terms. Similarly, Plaintiffs would have an opportunity to argue for all files for cause shown.

## B. SCOPE OF DISCOVERY

Defendants sought to limit “phase one” of discovery to roughly 30 drugs at issue as of May 20, 2019; all other discovery would be stayed until that initial phase of discovery is completed and a selection of bellwether case(s) was made, so that precedential class certification and summary judgment motions could be resolved. Under Defendants proposal, proposed discovery would start over for additional drugs and parties in what Plaintiffs feared would be the distant future. Plaintiffs sought to proceed with all discovery on all drugs and makers and sellers, and additional drugs and defendants would be added as new or amended complaints are filed; to avoid repeated depositions and/or massive delays; and to make settlements possible at an earlier stage, since Defendants will want to cover all drugs and parties in any settlements and releases, and Plaintiffs would only get limited discovery in the near future under Defendants’ phased plan.

## C. OTHER ISSUES

1. My order includes deadlines that can be changed and modified, but it is my belief there must be tight deadlines to achieve the Court’s expressed objective of moving these cases toward resolution as promptly as possible.

2. Clawbacks: My R&R allows Defendants to withhold documents for privilege, but not to unilaterally withhold documents as either unresponsive or

irrelevant. Such a clawback process as set forth in PTO 70, worked well as it pertained to the Attorney General documents. Moreover, Discovery Master Merenstein and I are committed to be available to rapidly resolve any such disputes.

3. My Recommended Order also provides a process to select bellwether case(s), and deal with fact and expert depositions, class certification motions, summary judgment motions, a bellwether trial(s).

### III. CONCLUSION

I have told all parties that I expected objections and would take no offense thereto, since our relations have been cordial and respectful throughout. These are difficult issues, and all counsel have been understandably attentive to their duties to their clients. Respectfully and with apologies, I also recognize that the Court may not be able to simply sign my recommended Order as is; but I hope it will at least provide a convenient structure to move these cases forward expeditiously.

Respectfully submitted,

/s/ David H. Marion

David H. Marion

DHM:msb

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**APPENDIX F**

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

[Filed 12/26/19]

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MDL 2724 16-MD-2724  
\_\_\_\_\_

IN RE: GENERIC PHARMACEUTICALS PRICING  
ANTITRUST LITIGATION  
\_\_\_\_\_

HON. CYNTHIA M. RUFÉ  
\_\_\_\_\_

THIS DOCUMENT RELATES TO:  
*ALL ACTIONS*  
\_\_\_\_\_

PRETRIAL ORDER NO. 110  
(AMENDING CERTAIN DATES IN  
PRETRIAL ORDER NO. 105)

AND NOW, this 26th day of December 2019, upon consideration of the attached stipulation of counsel, submitted on behalf of their respective parties in the MDL to Extend Certain Pretrial Discovery Deadlines (“Stipulation”), it is hereby ORDERED that the Stipulation is APPROVED. The deadlines previously provided in Pretrial Order No. 105 are hereby AMENDED as set forth in the Stipulation.

It is so ORDERED.

BY THE COURT:

/s/ Cynthia M. Rufe  
CYNTHIA M. RUFÉ, J.

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

[Filed 12/26/19]

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MDL 2724

16-MD-2724

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IN RE: GENERIC PHARMACEUTICALS PRICING  
ANTITRUST LITIGATION

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HON. CYNTHIA M. RUFÉ

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THIS DOCUMENT RELATES TO:  
*ALL ACTIONS*

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JOINT STIPULATION TO EXTEND CERTAIN  
PRETRIAL DISCOVERY DEADLINES

WHEREAS the Court entered a Case Management Order and Discovery Schedule on October 24, 2019 (Pretrial Order No. 105, ECF 1135) setting forth certain deadlines for the management of and discovery schedule for cases pending in the MDL as of September 1, 2019 (the “CMO”);

WHEREAS the parties in the MDL have engaged in substantial ongoing efforts since the CMO’s entry to complete discovery within the deadlines provided therein;

WHEREAS the parties have discussed, in light of the large number of parties involved in the MDL, the complexity of the issues and discovery process, and the

parties' substantial and ongoing efforts to complete discovery, that an extension to certain deadlines provided in the CMO is warranted;

NOW, THEREFORE, it is jointly stipulated and agreed by and among the parties, through their undersigned liaison counsel, to extend certain deadlines set forth in the CMO as follows:

**3. DISCOVERY OF DEFENDANTS' CUSTODIAL FILES**

Section 3(c)(i): The deadline provided herein shall be extended to December 20, 2019.

Section 3(d): The deadline provided herein for substantial completion of custodial document productions shall be extended to March 9, 2020. The deadline for service of privilege logs shall be extended to April 6, 2020.

**4. DISCOVERY OF DEFENDANTS' TARGETED DOCUMENTS** 4(b)(i): The deadline provided herein shall be extended to January 20, 2020. 4(b)(ii): The deadline provided herein shall be extended to April 27, 2020.

4(c): The deadline provided for raising disputes about documents identified in ¶ 4(a)(i) of the CMO with the Special Masters shall be extended to February 3, 2020. The deadline provided for raising disputes about documents identified in ¶¶ 4(a)(ii) and (iii) of the CMO with the Special Masters shall be extended to May 7, 2020.

4(d): The deadline provided herein for substantial completion of the production of documents identified in ¶ 4(a)(i) of the CMO (otherwise known as "go get" documents) shall be extend-

ed to February 6, 2020. The deadline to produce privilege logs related to those documents identified in ¶ 4(a)(i) of the CMO shall be extended to February 21, 2020. The deadline provided herein for substantial completion of the production of documents identified in ¶¶ 4(a)(ii) and (iii) of the CMO shall be extended to June 2, 2020. The deadline to produce privilege logs related to those documents identified in ¶¶ 4(a)(ii) and (iii) of the CMO shall be extended to July 7, 2020.

4(e)(iii): The deadlines provided herein shall be extended to March 23, 2020 for requests for clawbacks related to those documents identified in ¶ 4(a)(i) of the CMO and May 28, 2020 for requests for clawbacks related to those documents identified in ¶ 4(a)(ii) and (iii) of the CMO.

#### 5. DEFENDANTS' TRANSACTIONAL DATA, COST INFORMATION AND RELATED DOCUMENTS

5(b): The deadline provided herein to complete meet and confers concerning transaction-level sales data, cost information, and related documents shall be extended to February 19, 2020. The deadline provided herein to bring any disputes to Special Master Marion shall be extended to February 25, 2020.

5(c): The deadline provided herein for Section 5(c)(i) shall be extended to March 30, 2020. The deadline provided herein for Section 5(c)(ii) shall be extended to March 30, 2020 or within 60 days of a new or amended complaint, whichever is later.

7. PLAINTIFFS' DOCUMENT PRODUCTIONS AND TRANSACTIONAL DATA

- 7(a): The deadline provided herein to meet and confer with the States shall be extended to March 30, 2020.
- 7(b): The deadlines provided shall be extended to December 13, 2019 for the Private Plaintiffs and April 13, 2020 for the States.
- 7(c): The deadlines provided herein shall be extended to March 9, 2020 for the Private Plaintiffs and May 21, 2020 for the States. Privilege logs shall be produced 30 days thereafter from each respective deadline.

8. FACT DEPOSITIONS

- 8(a): The deadline provided herein shall be extended to June 4, 2020 and continue through December 6, 2021.
- 8(c): The deadline provided herein shall be extended to April 27, 2020.

9. BELLWETHER SELECTIONS

- 9(b): The deadline provided herein shall be extended by agreement of the parties after consultation with the Special Master, or if no agreement is achieved, by later Order of the Court.

10. MERITS EXPERT DEPOSITIONS

- 10(a): The deadline provided herein for Plaintiffs to serve expert reports shall be extended to July 19, 2021. The deadline provided herein for Plaintiffs' experts to be made available for depositions shall be extended to September 2, 2021.

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10(b): The deadline provided herein for Defendants to serve expert reports shall be extended to October 18, 2021. The deadline provided herein for Defendants' experts to be made available for depositions shall be extended to November 4, 2021.

10(c): The deadline provided herein shall be extended to December 27, 2021.

11. CLASS CERTIFICATION AND RELATED *DAUBERT* MOTIONS

11(a): The deadline provided herein shall be extended to January 4, 2021.

11(b): The deadline provided herein shall be extended to February 3, 2021.

11(c): The deadline provided herein shall be extended to March 17, 2021.

11(d): The deadline provided herein shall be extended to April 7, 2021.

11(e): The deadline provided herein shall be extended to April 19, 2021.

It is further jointly stipulated and agreed by and among the parties, through their undersigned liaison counsel, that all other deadlines and/or obligations imposed by the CMO that are not extended herein shall remain in effect.

It is so STIPULATED.

Dated: December 23, 2019

[SIGNATURES ON THE NEXT TWO PAGES]

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**APPENDIX G**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

[Filed 11/07/2019]

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No. 19-3549

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IN RE: ACTAVIS HOLDCO US, ET AL.,

*Petitioners*

(E.D. Pa. No. 2-16-md-02724)

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November 7, 2019

ECO-012

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Present: SHWARTZ, RESTREPO, and PHIPPS,  
*Circuit Judges*

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1. Petition for Writ of Mandamus

Respectfully,  
Clerk/CJG

**ORDER**

The Plaintiffs are directed to respond to the foregoing mandamus petition. *See* Fed. R. App. P. 21(b)(1). Within fourteen days of this order, the Plaintiffs shall provide a single joint response not to exceed 2500 words and the response shall be limited to addressing the following issues:

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1. What reasons were given to direct the production of potentially responsive discovery from the custodians without permitting the responding party to review the material for relevance?
2. What is the legal authority for a court to require a party to produce discovery without permitting the producing party to review whether the potentially responsive information is relevant when there is no evidence of a past failure to produce responsive discovery?

By the Court,

s/ Patty Shwartz  
Circuit Judge

Dated: November 7, 2019

CJG/cc: All Counsel  
Honorable Cynthia M. Rufe

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**APPENDIX H**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

[Filed: 01/06/2020]

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No. 19-3549

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IN RE: ACTAVIS HOLDCO US, ET AL.,

*Petitioners*

(Related to E.D. Pa. No. 2-16-md-02724)

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SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, CHAGARES, SHWARTZ,  
RESTREPO, BIBAS, and PHIPPS, *Circuit Judges*

The petition for rehearing filed by Petitioners in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz  
Circuit Judge

Dated: January 6, 2020

Lmr/cc: All Counsel of Record