

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

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ACTAVIS HOLDCO US, INC. ET AL., APPLICANTS,

v.

STATE OF CONNECTICUT, ET AL, RESPONDENTS

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*ON APPLICATION TO JUSTICE ALITO FOR PARTIAL STAY OF INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA PENDING FURTHER PROCEEDINGS IN THIS COURT*

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**RESPONDENTS' OBJECTION TO APPLICATION FOR STAY PENDING CERTIORARI**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

STATEMENT OF THE CASE..... 4

REASONS FOR DENYING RELIEF..... 11

    I.    THIS COURT IS UNLIKELY TO GRANT CERTIORARI TO REVIEW AN  
          INTERLOCUTORY DENIAL OF MANDAMUS REGARDING A  
          DISCOVERY MATTER. .... 12

    II.   THERE IS NO “FAIR PROSPECT” THAT THIS COURT WILL  
          REVERSE THE THIRD CIRCUIT’S DENIAL OF MANDAMUS RELIEF.  
          ..... 20

    III.  EQUITABLE CONSIDERATIONS WEIGH IN FAVOR OF DENYING A  
          STAY..... 23

CONCLUSION..... 25

## TABLE OF AUTHORITIES

### CASES

<i>Carrillo v. Schneider Logistics, Inc.</i> , 2012 WL 4791614 (C.D. Cal. Oct. 5, 2012) .....	18
<i>Chamber of Commerce v. Legal Aid Society</i> , 423 U.S. 1309 (1975) .....	11, 25
<i>Cheney v. U.S. Dist. Ct. for D.C.</i> , 542 US 367 (2004) .....	passim
<i>Conkright v. Frommert</i> , 556 U.S. 1401 (2009).....	11, 12
<i>Consumer Fin. Prot. Bureau v. Navient Corp.</i> , 2018 WL 6729794 (M.D. Pa. Dec. 21, 2018).....	17
<i>Cunningham v. Smithkline Beecham</i> , 255 F.R.D. 474 (N.D. Ind. 2009) .....	19
<i>Dzik v. Bayer Corp.</i> , 846 F.3d 211 (7th Cir. 2017).....	16
<i>Ex parte Fahey</i> , 332 U.S. 258 (1947) .....	20
<i>Hartley Pen Co. v. U.S. District Court</i> , 287 F.2d 324 (9th Cir. 1961).....	14
<i>Hickman v. Taylor</i> , 329 U.S. 495 (1947) .....	15
<i>In re Actos (Pioglitazone-Prods. Liab. Litig.)</i> , 2013 WL 4776346 (W.D. La. Sept. 3, 2013) .....	19
<i>In re Asbestos Prods. Liab. Litig. (No. VI)</i> , 718 F.3d 236 (3rd Cir. 2013).....	16
<i>In re Auto. Refinishing Paint Antitrust Litig.</i> , MDL Docket No. 1426, 2004 WL 7200711 (E.D. Pa. Oct. 29, 2004) .....	20
<i>In re City of New York</i> , 607 F.3d 923 (2d Cir. 2010).....	25
<i>In re Ford Motor Co.</i> , 345 F.3d 1315 (11th Cir. 2003).....	14
<i>In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.</i> , 496 F.3d 863 (8th Cir. 2007) .....	16
<i>In re Lombardi</i> , 741 F.3d 888 (8th Cir. 2014).....	13
<i>In re Microcrystalline Cellulose Antitrust Litig.</i> , 221 F.R.D. 428 (E.D. Pa. 2004).....	20-21

<i>In re Mushroom Direct Purchaser Antitrust Litig.</i> , No. 06-0620, 2012 WL 298480 (E.D. Pa. Jan. 31, 2012) .....	20
<i>In re Phenylpropanolamine (PPA) Prods. Liab. Litig.</i> , 460 F.3d 1217 (9th Cir. 2006) .....	16
<i>In re Reyes</i> , 814 F.2d 168 (5th Cir. 1987).....	14
<i>In re U.S.</i> , 138 S. Ct. 371 (2017).....	12
<i>Indiana State Police Pension Tr. v. Chrysler LLC</i> , 556 U.S. 960 (2009) .....	11, 12
<i>Kerr v. U.S. Dist. Ct. for N.D. Cal.</i> , 426 U.S. 394 (1976).....	20
<i>Littlefield v. NutriBullet, L.L.C.</i> , 2017 WL 10439692 (C.D. Cal. Dec. 20, 2017).....	18
<i>Maryland v. King</i> , 567 U. S. 1301 (2012).....	12
<i>Momah v. Albert Einstein Med. Ctr.</i> , 164 F.R.D. 412 (E.D. Pa. 1996).....	19
<i>Oppenheimer Fund, Inc. v. Sanders</i> , 437 U.S. 340 (1978) .....	15
<i>Pacific Union Conference of Seventh-Day Adventists v. Marshall</i> , 434 U.S. 1305 (1977) .....	11
<i>Paycom Payroll, LLC v. Richison</i> , 758 F.3d 1198 (10th Cir. 2014) .....	25
<i>Progressive Cas. Ins. Co. v. Delaney</i> , 2014 WL 3563467 (D. Nev. July 18, 2014) .....	18
<i>Republic of Argentina v. NML Capital Co., Ltd.</i> , 573 U.S. 134 (2014).....	14
<i>Rostker v. Goldberg</i> , 448 U.S. 1306 (1980) .....	11
<i>Ruckelshaus v. Monsanto Co.</i> , 463 U.S. 1315 (1984).....	11
<i>Sanderson v. Winner</i> , 507 F.2d 477 (10th Cir. 1974) .....	14
<i>Schlagenhauf v. Holder</i> , 379 U.S. 104 (1964).....	14-15
<i>Teva Pharms. USA, Inc. v. Sandoz, Inc.</i> , 572 U.S. 1301 (2014).....	12
<i>Tulip Computers Int’l B.V. v. Dell Computer Corp.</i> , 2002 WL 818061 (D. Del. Apr. 30, 2002).....	18-19

<i>UPMC v. Highmark, Inc.</i> , 2013 WL 12141530 (W.D. Pa. Jan. 22, 2013) .....	19
<i>Will v. United States</i> , 389 U.S. 90 (1967).....	15
<i>Wingnut Films, Ltd. v. Katja Motion Pictures Corp.</i> , 2007 WL 2758571 (C.D. Cal. Sept. 18, 2007).....	18

**RULES**

Fed. R. Civ. P. 26(b)(1).....	passim
Fed. R. Civ. P. 26(c)(1)(G) .....	25
Fed. R. Civ. P. 1 .....	16
Fed. R. Civ. P. 35 .....	14-15
Fed. R. Civ. P. 69(a)(2).....	14
Supreme Court Rule 10 .....	13
Supreme Court Rule 10(a).....	13, 17
Supreme Court Rule 14(1)(a) .....	24

## INTRODUCTION

Applicants/Defendants ask this Court to intercede in a discovery dispute in a highly complex, federal multidistrict antitrust litigation brought by 54 states, territories, commonwealths and the District of Columbia (collectively, “States”), combined in a multidistrict litigation (MDL) docket with private class actions brought by direct purchaser plaintiffs, end-payer plaintiffs and indirect reseller plaintiffs, as well as actions brought by individual plaintiffs (collectively, “private plaintiffs”). Appendix A contains a list of all State entities and the various classes of private plaintiffs. The States and private plaintiffs have sued more than 35 generic pharmaceutical manufacturers for serious violations of Section 1 of the Sherman Act in their marketing and sales of more than 175 drugs. Defendants’ collusive price-fixing and market allocation is alleged to be rampant, extensive and devastating for consumers. Whereas market forces should have lowered generic prescription drug prices for millions of Americans, defendants allegedly ensured that generic prescription drug prices increased or remained high by colluding on prices and dividing up customers and markets.

Defendants seek a writ of mandamus – appropriate only in extraordinary circumstances where there is an “indisputable right” to relief – to enjoin part of a discovery order. Defendants are not asking the Court to hold a case in abeyance pending resolution of a dispositive substantive issue. Rather, defendants ask this Court to stay discovery to review a single subparagraph of a discovery order, in the midst of ongoing district court supervision of discovery in an MDL litigation. There

is nothing so extraordinary about this matter that this Court should intercede in ongoing discovery.

This litigation is four years old. Nonetheless, until recently defendants had produced very few documents in discovery. In early 2019, however, the States produced documents they had received from defendants during the states' investigation. In ordering that production, the district court afforded defendants with a procedure whereby they could "claw back" certain kinds of documents within thirty days of production. Pretrial Order No. 70 ("PTO 70"), Dist. Ct. ECF No. 841. Using that procedure, defendants sought to "claw back" more than 150,000 documents, mostly on the ground that the documents supposedly were not relevant.

But most of the documents defendants sought to claw back on relevance grounds were, in fact, relevant and when challenged, defendants withdrew approximately two-thirds of their claw back requests. This episode confirmed what plaintiffs and the district court had known all along: that because of the nature of the antitrust collusion by and between defendants, context and timing are essential to determining whether particular documents are relevant.

In fall 2019, after extensive briefing and argument, the district court entered a case management order to maintain the orderly flow of this enormous antitrust case. Pretrial Order No. 105 ("PTO 105") (Appendix A to Application). Informed by the PTO 70 claw back experience, plaintiffs had requested production of all documents in the custody of some (but not all) document custodians whom the parties agreed possessed relevant material. The district court denied plaintiffs'

request for full-file productions. Rather, adopting the special master's recommendation, the district court ordered that documents from agreed custodians should be produced only if they are "hit" by search terms that the parties or special masters agree are likely to identify relevant documents. *See* PTO 105 ¶3(b) (hereinafter "Paragraph 3(b)"). The district court further protected defendants by imposing a claw back process similar to the process employed in PTO 70. Access to the documents is restricted to "Outside Counsels' Eyes Only" for 120 days, during which defendants may make confidentiality designations and claw back requests. Paragraph 3(b).

Nonetheless, at every possible appellate court, including this one, defendants sought interlocutory review and a stay pending review. Defendants asserted, as they do here, that two relevance screens (agreed custodians and agreed search terms), strict confidentiality, and a claw back process, were not enough. They insisted on yet another relevance screen, one in which they could unilaterally and subjectively decide whether a document is relevant, despite their demonstrated failure to be able to do so accurately. The district court, the Third Circuit panel and the Third Circuit *en banc* all properly determined that defendants did not and could not meet the extraordinarily high standards for mandamus review of a discovery order, much less the higher standard to stay discovery pending interlocutory appellate review.

Defendants have failed to satisfy this Court's standards for a stay pending disposition of a petition for certiorari, as well. This Court is highly unlikely to grant

the petition, as the Third Circuit's denial of mandamus presents no conflict with decisions of this Court or other federal appellate courts. Moreover, the question whether the district court's order is appropriate is entirely fact-bound, as PTO 105 is specifically tailored to the unique circumstances of this case and lacks any broader impact.

This Court is even more unlikely to nullify a subparagraph of an extensive discovery plan by reversing the Third Circuit's denial of mandamus relief. The standard for granting such relief is extraordinarily high, and defendants do not approach it, as the Third Circuit concluded at both the panel and *en banc* levels. District courts have broad discretion in case management and discovery; the district court here is carefully supervising the case; and the subparagraph of PTO 105 is well within the district court's discretion and perfectly tailored to this case's unique circumstances. The equities lie squarely with plaintiffs and with the orderly functioning of an MDL docket.

Plaintiffs respectfully request that the application for stay be denied.

#### **STATEMENT OF THE CASE**

1. The underlying cases, consolidated for pre-trial purposes including discovery, are complex suits alleging that defendants entered into unlawful conspiracies related to the pricing and sale of generic drugs. The complaints allege (1) the existence of a longstanding, widespread conspiracy among generic drug manufacturers to suppress competition; (2) consistent efforts to cover up the conspiracy using veiled language and code words in email and text messages; and (3) efforts to destroy or conceal evidence. This multidistrict litigation is being

conducted in parallel with federal and state investigations. The ongoing federal investigation has resulted, thus far, in criminal charges against two generic drug companies and four executives, three of whom have pleaded guilty.

The nature of the alleged conspiracy makes relevance determinations in this case more difficult than might first appear. For example, an employee of one company might have a telephone call with her counterpart at a competitor at 10:04 a.m., send an email to her boss at 10:06 a.m. with the word “done,” without reference to any specific drug or competitor, and then submit a collusive bid by 10:10 a.m. The fact that there was an email at 10:06 is critical, but the word “done” probably would slip through a relevance check without the context of the prior telephone call and the subsequent price match.

Defendants have aggressively, and narrowly, evaluated the “relevance” of documents in this litigation to date. Thus, when the States produced investigatory documents to the MDL parties in a process that employed a claw back procedure, defendants sought to claw back nearly 150,000 documents, including documents relating to anticompetitive meetings and communications with competitors, as well as collusive pricing and bidding activity.<sup>1</sup> Plaintiffs objected to the claw back requests, and faced with those objections, defendants withdrew their requests for

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<sup>1</sup> Plaintiffs’ November 21, 2019 Response to Petition for a Writ of Mandamus before the Third Circuit is accompanied by a 788-page appendix, both of which were filed under seal in compliance with the district court’s Protective Order. Plaintiffs invite the Court to review pages 4-6 of the response brief before the Third Circuit, and the pages of the appendix cited therein, for details on some of the documents defendants sought to claw back. In order to avoid having to file this Opposition under seal, plaintiffs incorporate by reference their briefing under seal with the Third Circuit.

two-thirds of the documents, meaning that the overwhelming majority of the objected-to documents remained in the case.

2. After denying motions to dismiss, the district court ordered the parties to negotiate a case management order, overseen by a special master. The parties agreed on large parts of the order but disagreed on how and when certain relevance determinations should be made, and by whom. In light of the nature of the antitrust conspiracy and the PTO 70 claw back experience, plaintiffs requested that all documents be produced from certain custodians that the parties agreed possessed relevant information. Defendants objected. After extensive briefing and argument, the district court issued a comprehensive case management order that took an intermediate approach.

Specifically, the district court established a process under which the custodians whose files are to be searched, as well as the search terms to be used, are to be negotiated between the parties or chosen by a special master after consultation with the parties. *See* Paragraph 3(b). As of this writing, the parties have agreed on custodians and search terms. Documents disclosed pursuant to Paragraph 3(b) are designated for review only by outside counsel for 120 days, during which defendants may make confidentiality designations and seek to “claw back” certain materials. *Id.*

3. After the entry of the case management order, defendants filed a motion with the district court to stay discovery while they sought a writ of mandamus from the Third Circuit to nullify Paragraph 3(b). The district court denied the motion for

stay and defended the challenged discovery subparagraph. Appendix B to Application (“App. B”). The district court noted that Paragraph 3(b) is “fully commensurate” with Rule 26(b)(1), particularly in light of “the Court’s comprehensive management of the MDL.” App. B at 5, 6. Given the identities of the targeted custodians subject to Paragraph 3(b), the court found “no dispute that these custodial files are likely to contain relevant files. 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.*” *Id.* at 4 (emphasis supplied); *see also id.* at 5 (“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.”).

Relying on its long and detailed experience with the multidistrict proceedings, the district court explained that it would be inappropriate to allow defendants to employ an additional – and unilateral — relevance screen with respect to these particular documents held by these specific custodians. In the course of the conspiracy, defendants’ employees had regularly used coded language – codes, acronyms, slang terms, and cryptic notes – that could on the face of any individual document mistakenly appear not to be relevant. Defendants’ previous, misguided claw back attempts confirm as much.

Against that backdrop, the district court reasoned: “As the Court explained [in a prior discovery order], ‘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.” App. B at 6; *see also id.* at 5 (“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 parties’ claims and defenses.”); *id.* at 6-7 (“the determination of whether information is potentially relevant requires the context of the information within the files”).

The district court balanced the interests of all parties in arriving at its decision. While the district court ordered the production of documents from certain agreed-upon custodians containing certain agreed-upon search terms without further subjective review, it provided defendants with three kinds of protection for those documents: (1) defendants may remove privileged documents *ex ante*, (2) defendants may make confidentiality designations under the case’s Protective Order, which generally prohibits the use of documents outside the case, and (3) defendants may seek to claw back certain categories of documents. PTO 105. The claw back procedure will allow defendants to remove certain irrelevant documents from the case, while at the same time allowing plaintiffs and the Court to keep relevant documents in the case (such as those discussed in detail in plaintiffs’ sealed mandamus response before the Third Circuit). Defendants’ “relevance” determinations will thus be subject to judicial review, rather than being made unilaterally and in secret.

Further, the district court explained that it would be attentive to the form and content of discovery pursuant to Paragraph 3(b) as the case progresses. In this “ever-evolving and complex MDL,” the Court “maintains a detailed awareness” of the nature and burdens of discovery “through regular status conferences with counsel, through reports of the Special Masters, and through extensive motions practice.” App. B at 7. The district court also found that prohibiting the enforcement of Paragraph 3(b) pending appellate review “would work against the interests of the parties and run counter to the public interest.” *Id.* at 7. The court viewed defendants’ invocation of “the extraordinary remedy of mandamus” as an “attempt to halt the progress the Court has made and disrupt the pace and content of the administration of the MDL, issues within the sound discretion of the Court.” *Id.*

3. After the district court refused to stay discovery pending review, defendants sought mandamus relief from the discovery order in the Third Circuit. Defendants requested expedited treatment of their petition and moved to stay discovery pending the disposition of the petition for a writ of mandamus. In opposition, plaintiffs submitted hundreds of pages of briefing and exhibits, most of it under seal. After reviewing the voluminous record, the Third Circuit held that defendants had failed to satisfy the high standards necessary for mandamus on a discovery dispute in the middle of MDL litigation, and denied the writ. Appendix D to Application (App. D). The motion to stay was denied as moot. *Id.*

The Third Circuit held that defendants had not “established a clear and indisputable right to relief.” App. D at 3 (internal quotes and citations omitted).

Consistent with *Cheney v. U.S. Dist. Ct. for D.C.*, 542 US 367 (2004), the Third Circuit acknowledged the district court’s “wide latitude” and “broad parameters” in controlling discovery. App. D at 3. The circuit court noted and relied upon the extensive protections afforded to defendants through the claw back provision, and the provision for an “outside counsel eyes only designation” for 120 days after production. *Id.* Consistent with Rule 26(b)(1), “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.” *Id.* Thus, the most defendants could attempt to prove was that the particular relevance screens adopted by the district court were “an abuse of discretion (which we do not decide),” and which, even if proven, “would not support mandamus relief.” *Id.*

In a footnote to the panel’s order, one judge dissented. App. D at 4 n.1. The dissent took issue with the fact that nonresponsive documents might initially be produced under the parameters of Paragraph 3(b) and concluded that “the producing party” must always “hav[e] the ability beforehand to review the documents for responsiveness or relevance.” *Id.* Nonetheless, the dissent did not identify any provision of the Rules or any decision interpreting the Rules adopting such a categorical approach.

4. Defendants then sought rehearing *en banc*. Without any noted dissent or discussion, the Third Circuit denied *en banc* review. Appendix E to Application.

Defendants then sought a stay pending a petition for a writ of certiorari, which the original Third Circuit panel denied without dissent. Appendix F to Application.

5. The identities of the custodians whose files are to be searched pursuant to Paragraph 3(b) have been agreed by the parties. During the pendency of the mandamus proceedings, negotiations between the parties and consultations with the Special Masters regarding the search terms have continued. Some defendants have begun production. As of this writing, the parties have reached agreement on search terms.

### **REASONS FOR DENYING RELIEF**

“Denial of such in-chambers stay applications is the norm; relief is granted only in ‘extraordinary cases.’” *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers), quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980). “A stay is not a matter of right, even if irreparable injury might otherwise result.” *Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (internal quotation omitted). Further, “a district court’s conclusion that a stay is unwarranted is entitled to considerable deference.” *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1984) (Blackmun, J.).

Stays of discovery orders are particularly disfavored. *See, e.g., Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305, 1305-1308 (1977) (denied application for stay of enforcement of three discovery orders in accord with policy against piecemeal interlocutory review); *Chamber of Commerce v. Legal Aid Society*, 423 U.S. 1309 (1975) (denied stay of discovery order requiring production of privileged documents where protective order will ensure no irreparable injury). The

Court's only recent decision staying discovery was issued in connection with an order contemplating the production of documents from the White House, including a memorandum from the White House Counsel's Office to the President: a very different and readily distinguishable circumstance. *See In re U.S.*, 138 S. Ct. 371 (2017).

The issuance of a stay is an exercise of judicial discretion, and the "party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Indiana State Police Pension*, 556 U.S. at 960. When the Court considers whether to grant a stay, it determines whether the

applicant has demonstrated (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay. In addition, in a close case it may be appropriate to balance the equities, to assess the relative harms to the parties, as well as the interests of the public at large.

*Id.* (internal citations omitted). *See also Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1302 (2014); *Maryland v. King*, 567 U. S. 1301, 1302 (2012) (Roberts, C. J., in chambers); *Conkright*, 556 U.S. at 1402. Each of these factors militates strongly against a stay of discovery here.

**I. THIS COURT IS UNLIKELY TO GRANT CERTIORARI TO REVIEW AN INTERLOCUTORY DENIAL OF MANDAMUS REGARDING A DISCOVERY MATTER.**

This case satisfies none of the criteria for granting a writ of certiorari. The Third Circuit's denial of mandamus presents no conflict with the decisions of this Court, or with decisions of other federal appellate courts or state courts of last

resort. *See* this Court’s Rule 10. Nor have the lower courts “so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court’s supervisory power.” *Id.* Rule 10(a). To the contrary, the prospects for a grant of certiorari to review an interlocutory denial of mandamus concerning a discovery matter are vanishingly slim because (1) the district court has broad latitude in discovery, (2) the subparagraph of PTO 105 is well within the district court’s discretion and tailored to the particular circumstances of this case, (3) the MDL district court’s order is in accord with the precedent of this Court and not unique, and (4) there is no split in circuit authority.

Defendants’ claim that the Third Circuit’s unpublished denial of mandamus conflicts with other appellate court decisions does not survive even cursory scrutiny. In each of those cases, the court concluded that the discovery *sought* irrelevant material. Here, in contrast, there is no dispute that the agreed-upon custodians have relevant documents, and that searches based on the agreed-upon keywords are likely to identify them. The only dispute is whether the possibility that some irrelevant documents might *also* be produced – subject to the district court’s extensive protective procedures as described above – constitutes such a flagrant violation of the rule that the extraordinary remedy of mandamus is warranted. The cited appellate decisions offer no support for defendants’ arguments on that issue.

In *In re Lombardi*, 741 F.3d 888 (8<sup>th</sup> Cir. 2014), the Eighth Circuit held that the name of the administering doctor, pharmacist or laboratory for lethal injection was not relevant to a habeas Eighth Amendment or ex post facto challenge. In *In re*

*Ford Motor Co.*, 345 F.3d 1315 (11<sup>th</sup> Cir. 2003), the district court had ordered discovery of trade secrets without giving the defendant an opportunity to object and without any guidelines or processes. In *In re Reyes*, 814 F.2d 168 (5<sup>th</sup> Cir. 1987), the court ruled that immigration status was not discoverable in a federal statutory wage case; inquiry into the documentation of alien petitioners for purposes of determining coverage under the FLSA and AWPAA was unwarranted because the statute applied to employed individuals without regard to immigration status.

In *Sanderson v. Winner*, 507 F.2d 477 (10<sup>th</sup> Cir. 1974), discovery on the plaintiffs' lawyers tax returns and fee agreements was barred. And in *Hartley Pen Co. v. U.S. District Court*, 287 F.2d 324 (9<sup>th</sup> Cir. 1961), the Ninth Circuit stepped in when a competitor was using discovery to learn a competitor's trade secrets. None of those cases says anything about whether a discovery order that all parties agree will produce relevant documents is so egregious as to justify mandamus simply because of the possibility that some irrelevant documents might also emerge.

Similarly, none of the four cases from this Court upon which defendants rely addresses the merits of Rule 26 or relevance objections. See Application 15-16. Rather, the cited cases address different rules and drastically different issues than the present case. In *Republic of Argentina v. NML Capital Co., Ltd.*, “[t]he single, narrow question before [the Court] is whether the Foreign Sovereign Immunities Act specifies a different rule [other than Fed R. Civ. P. 69(a)(2)] when the judgment debtor is a foreign state.” *Republic*, 573 U.S. 134, 140 (2014). In *Schlagenhauf v. Holder*, this Court ruled upon the scope of Federal Rule of Civil Procedure 35.

*Schlagenhauf*, 379 U.S. 104, 109 (1964) (“We granted certiorari to review undecided questions concerning the validity and construction of Rule 35.”)

In *Hickman v. Taylor*, the Court concluded that “[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney,” 329 U.S. 495, 510 (1947)—and thus Rule 26 simply did not enter the analysis, *id.* at 504. Nonetheless, the *Hickman* Court also affirmed that the discovery rules “are to be accorded a broad and liberal treatment. No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.” *Id.*, 329 U.S. at 507. Finally, in *Oppenheimer Fund, Inc. v. Sanders*, this Court held that “Rule 23(d), not the discovery rules, is the appropriate source of authority” for “a district court to order a defendant to help identify the members of a plaintiff class so that individual notice can be sent.” *Oppenheimer*, 437 U.S. 340, 342 (1978).

None of these cases even addresses relevance objections in discovery, let alone establishes that a case management order that will lead to the production of relevant documents could be a “judicial ‘usurpation of power,’” *Cheney*, 542 U.S. at 390 (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)), warranting mandamus simply because it might result in the incidental production of irrelevant documents.

There is no merit to defendants’ attempt to cast this case as presenting an important interpretive question of Rule 26(b)(1). The issue here is simply a fact-bound inquiry into whether a district court properly employed its exceedingly broad discretion within well-established legal parameters. The district court has broad

authority to “construe[], administer[], and employ[]” the Rules “to secure the just, speedy, and inexpensive determination of every action....” Fed. Rule Civ. Pro. 1. Further, “administering cases in multidistrict litigation is different from administering cases on a routine docket.” *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, 496 F.3d 863, 867 (8th Cir. 2007) (internal citations omitted). District courts handling complex, multidistrict litigation “must be given wide latitude with regard to case management” in order to achieve efficiency. *Dzik v. Bayer Corp.*, 846 F.3d 211, 216 (7th Cir. 2017), citing *In re Asbestos Prods. Liab. Litig. (No. VI)*, 718 F.3d 236, 243, 246–48 (3rd Cir. 2013). See also *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1252–53 (9th Cir. 2006). Indeed, Congress established MDL protocols to encourage efficiency. *Id.* In order to do so, an MDL court has “greater discretion to organize, coordinate and adjudicate its proceedings.” *Id.*

There can thus be no dispute about the breadth of the district court’s discretion, nor is there any dispute about the terms of Rule 26(b)(1). The Rule provides for the discovery of material “that is relevant.” Fed. R. Civ. P. 26(b)(1). The Rule does not specify any procedures for determining relevance. Of particular note here, it does *not* grant the producing party the right to determine relevance unilaterally, in a manner that essentially is unreviewable by the district court. Thus, as the Third Circuit recognized, neither the text of Rule 26(b)(1) nor decisions applying the Rule forbid a district court from exercising its broad discretion to frame the contours of discovery based on the facts of the case before it. Here, with

respect to some discovery, the district court's order allows defendants to make an initial, subjective determination that materials are irrelevant. See PTO 105 ¶¶3-4. But for another particular subset of discovery, Paragraph 3(b) specifies an objective set of documents that are to be produced without prior subjective review: those held by certain specific custodians that the parties agree possess relevant documents and that are "hit" by certain agreed-upon search terms designed to identify relevant documents. Even with respect to these documents, defendants are entitled to undertake a subjective review. But that review is to occur after production, so that outside counsel and the court will know what documents defendants seek to withhold. Given the nature of the conduct at issue in this case, defendants' demonstrated inability to make accurate relevance determinations on their own, and the district court's intimate familiarity with this four-year-old case, the district court was well within its discretion to adopt this procedure as the best way to ensure that relevant documents are produced.

Finally, there is no merit to defendants' claim that the lower courts here have "so far departed from the accepted and usual course of judicial proceedings" as to require this Court to exercise its supervisory power, Sup. Ct. R. 10(a). The district court's discovery order is not unique. Since the 2015 Amendments to Rule 26, other courts similarly have ordered the production of documents hitting on search terms without subjective review for relevance. *See Consumer Fin. Prot. Bureau v. Navient Corp.*, 2018 WL 6729794, at \*2 (M.D. Pa. Dec. 21, 2018) (court ordered production of all non-privileged documents mentioning "Navient" or "Pioneer" without review for

relevance and with no showing of misconduct); *Littlefield v. NutriBullet, L.L.C.*, 2017 WL 10439692, at \*4 (C.D. Cal. Dec. 20, 2017) (“Plaintiffs shall submit a set of keywords... Defendant shall ... produce all resulting hits except those protected from disclosure by a privilege. Defendant may not withhold documents from the production based on relevance.”).

These post-2015 cases are in line with prior cases addressing production of documents that hit on search terms. *See Progressive Cas. Ins. Co. v. Delaney*, 2014 WL 3563467, at \*12 (D. Nev. July 18, 2014) (ordering production of all documents “hit” by search terms, subject to claw back provisions of Federal Rules and ESI protocol in case); *Carrillo v. Schneider Logistics, Inc.*, 2012 WL 4791614, at \*11 (C.D. Cal. Oct. 5, 2012) (ordering retention of outside vendor to collect electronically stored documents and conduct keyword searches; “All documents and emails collected by the vendor may be reviewed by Schneider for privilege and confidentiality.... However, no documents identified by the vendor may be withheld on relevance grounds.”); *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*, 2007 WL 2758571, at \*19 (C.D. Cal. Sept. 18, 2007) (ordering retention of outside vendor to collect electronic documents and conduct keyword searches; “All documents and emails collected by the outside vendor may be reviewed by New Line for privilege and confidentiality designations; however, no documents identified by the vendor may be withheld on relevance grounds.”); *Tulip Computers Int’l B.V. v. Dell Computer Corp.*, 2002 WL 818061, at \*7 (D. Del. Apr. 30, 2002) (“Dell shall provide the e-mails from the hard disks of the identified executives in electronic form to

Ontrack [Tulip's consultant]. Ontrack will search the e-mails based on an agreed upon list of search terms. Tulip will give Dell a list of the e-mails that contain those search terms. Dell will then produce those e-mails to Tulip, subject to its own review for privilege and confidentiality designations.”).

Some courts even have ordered the production of full custodial files without the application of search terms *or* subjective relevance review. *See, e.g., UPMC v. Highmark, Inc.*, 2013 WL 12141530 (W.D. Pa. Jan. 22, 2013) (ordering production of all files concerning participant in antitrust conspiracy over objection that irrelevant documents would be included); *In re Actos (Pioglitazone-Prods. Liab. Litig.)*, 2013 WL 4776346 (W.D. La. Sept. 3, 2013) (ordering production of 23 full custodial files); *Cunningham v. Smithkline Beecham*, 255 F.R.D. 474, 479 (N.D. Ind. 2009) (ordering production of “complete sales files” of a sales representative); *Momah v. Albert Einstein Med. Ctr.*, 164 F.R.D. 412, 417 (E.D. Pa. 1996) (ordering production of complete personnel records; finding insufficient defendants’ production of documents they unilaterally deemed relevant).

In sum, the MDL district court’s discretionary discovery order is grounded in the facts of this case, will lead to the production of relevant documents, and currently is being actively managed by the MDL district court, which has adopted a process to address defendants’ objections. This interlocutory discovery issue thus presents a fact-bound application of settled law. It presents no issue on which this Court is likely to grant certiorari.

**II. THERE IS NO “FAIR PROSPECT” THAT THIS COURT WILL REVERSE THE THIRD CIRCUIT’S DENIAL OF MANDAMUS RELIEF.**

A writ of mandamus is “a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes.’” *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259–260 (1947)). Thus, in order to reverse the Third Circuit, this Court would need to conclude not only that the district court’s order was in error, but that Defendants have surmounted the higher bar of a “clear and indisputable” right to relief. *Id.* at 381 (quoting *Kerr v. U.S. Dist. Ct. for N.D. Cal.*, 426 U.S. 394, 403 (1976)). There is no fair prospect that this Court would do so. To the contrary, here the district court properly exercised its discretion in fashioning an appropriate balancing of interests in light of the nature of the claims and the prior discovery history. As the Third Circuit properly found, there is nothing extraordinary about the district court’s discovery order. This Court is unlikely to reach a different conclusion and reverse one subparagraph in one among many discovery orders in this case.

“Discovery in an antitrust case is necessarily broad because allegations involve improper business conduct. Such conduct is generally covert and must be gleaned from records, conduct, and business relationships.” *In re Auto. Refinishing Paint Antitrust Litig.*, MDL Docket No. 1426, 2004 WL 7200711, at \*3 (E.D. Pa. Oct. 29, 2004) (citation omitted); *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 06-0620, 2012 WL 298480, at \*4 (E.D. Pa. Jan. 31, 2012) (“conduct is generally covert and must be gleaned from records, conduct, and business relationships.”) As a result, “a broad scope of discovery is particularly appropriate in antitrust

litigation.” *In re Microcrystalline Cellulose Antitrust Litig.*, 221 F.R.D. 428, 429 (E.D. Pa. 2004).

When managing the pre-trial proceedings in multidistrict litigation, a district court’s discretion is at its apex. The MDL district court here had specific bases for adopting the procedures of Paragraph 3(b). When the States produced documents from their investigation into the MDL, defendants attempted to claw back more than 150,000 of those documents, many of which turned out to be highly relevant. Some even revealed precisely the types of collusive behavior that are central to the MDL, including documents relating to anticompetitive meetings and communications with competitors, as well as collusive pricing and bidding activity.

Defendants withdrew two-thirds of their claw back requests after plaintiffs’ challenges. But plaintiffs only knew about these documents, and were able to keep them in the case, because of the claw back procedure. Had defendants been permitted to withhold these documents from production *ex ante*, plaintiffs and the court never would have learned of their existence. It was only because the States already had obtained and reviewed those documents during their investigation that plaintiffs became aware of what defendants had attempted to do. Had defendants had the unilateral right to determine relevance, large swathes of centrally relevant documents would have been excluded from the case. Plaintiffs would have had no ability to challenge defendants’ decisions because plaintiffs never would have known the documents existed.

Furthermore, the search terms (on which the parties have now reached agreement) are informed by the allegations in the case. In the course of effectuating their secret conspiracy, defendants' agents used heavily coded language and terms of art. Terms like "fair share," "GNO", "sandbox," "responsible," "FS," "cautious" and "strategic" had meanings to the conspirators that a document reviewer might not know. *See* States' 2019 Amended Complaint, ¶¶ 1, 111, 138, 139, 159, 548, 781. In light of the above-described claw back experience, and recognizing that important materials would escape production if defendants' attorneys reviewed them for subjective "relevance," the district court ordered that documents held by a limited number of custodians containing certain terms should be produced, subject to certain claw back rights, so that all parties and the court – not just defendants – would be able to participate in relevance determinations. Under the broad discretion accorded to the district court to shape discovery to the requirements of a case, the district court properly weighed the competing factors and arrived at an appropriate resolution.

Given all of the foregoing, the Third Circuit was plainly correct to conclude that defendants had failed to demonstrate such an egregious abuse of discretion that they had a clear and indisputable right to relief. There is no fair prospect that five Justices of this Court will conclude that the Third Circuit erred in that determination and that mandamus should have issued. Mandamus is a discretionary remedy even when clear error is shown. *See Cheney*, 542 U.S. at 381 ("[E]ven if the first two prerequisites have been met, the issuing court, in the

exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.”) (citation omitted). As already discussed, it is undisputed that Paragraph 3(b) will lead to the production of relevant documents, as Rule 26(b)(1) requires, and the particular procedures the district court adopted were well within its discretion given the complexities and history of this case – matters uniquely within the district court’s purview.

### **III.       EQUITABLE CONSIDERATIONS WEIGH IN FAVOR OF DENYING A STAY.**

Interim relief would be especially inappropriate here. A stay would be extremely prejudicial to the plaintiffs. The parties have reached total agreement on the search terms and thus, presumably all parties agree that the terms are appropriate for catching relevant documents. This case already is nearly four years old, and substantive discovery finally has begun. In the intervening years, witnesses have died, documents have been lost and memories have faded.

Although some discovery could continue if Paragraph 3(b) were stayed, as a practical matter discovery would grind to a halt. Plaintiffs expect the Paragraph 3(b) documents to be at the core of the case because the Paragraph 3(b) custodians are the most likely to have relevant information. Obviously, plaintiffs would not be able to take the depositions of the Paragraph 3(b) witnesses, who are the most important witnesses in the case, until their documents have been produced. That, in turn, would hold everything else back as well.

Paragraph 3(b) imposes no undue burden. The process of producing these materials is, by definition, automated. The fact that defendants would turn over

larger computer files than they might prefer is not a burden necessitating this Court's intervention. Further still, as Rule 26(b)(1) contemplates, the district court's order accounts for the peculiar public and private interests at stake in this litigation. The allegations of the complaints – as well as the parallel state and federal investigations – relate to the availability of critical drugs for tens of millions of Americans. It is thus imperative that defendants broadly produce all the material necessary to evaluate these claims and the corresponding defenses.

Finally, defendants miss the mark in suggesting that they will be irreparably injured by the disclosure of confidential information, notwithstanding the claw back provision of the district court's discovery order and the Protective Order in place in this case. Whether the documents that are produced are "relevant" is a separate and distinct question from whether those documents contain confidential information that could be inappropriately disclosed, and the petition for certiorari neither raises nor fairly includes any question relating to improper disclosure of confidential information. *See* Pet. for Cert. in No. 19-1010, at I; Sup. Ct. R. 14(1)(a).

Moreover, the district court's order provides that defendants will produce documents for review only by outside counsel under a protective order – the highest level of protection – for a 120-day period during which defendants may make final confidentiality designations and seek to claw back documents that contain (a) competitively sensitive or trade secret information, (b) business information unrelated to the allegations in any MDL pleading, or (c) personal or embarrassing information unrelated to any allegation in the MDL. Protective orders are the

ordinary and common vehicle for parties to maintain the confidentiality of trade secrets, and “[t]he disclosure of confidential information on an ‘attorneys’ eyes only’ basis is a routine feature of civil litigation involving trade secrets.” *Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1202 (10th Cir. 2014) (quoting *In re City of New York*, 607 F.3d 923, 935 (2d Cir. 2010)) (citing Fed. R. Civ. P. 26(c)(1)(G)). *See also Chamber of Commerce*, 423 U.S. at 1309 (1975) (stay of discovery order not necessary where protective order was in place).

### CONCLUSION

The application for a stay should be denied.

Respectfully submitted,



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# Appendix A

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  
State of Wyoming

**Direct Purchaser Respondents (Named Plaintiffs):**

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

**End-Payor Respondents (Named Plaintiffs):**

1199SEIU Greater New York Benefit Fund  
1199SEIU Licensed Practical Nurses Welfare Fund  
1199SEIU National Benefit Fund  
1199SEIU National Benefit Fund for Home Care Workers  
American Federation of State, County and Municipal Employees District Council 37  
Health & Security Plan  
American Federation of State, County and Municipal Employees District Council 47  
Health & Welfare Fund  
City of Providence, Rhode Island  
Detectives Endowment Association of the City of New York  
Nina Diamond  
Hennepin County International Union of Operating Engineers Local 30 Benefits  
Fund  
Robby Johnson  
Louisiana Health Service & Indemnity Company d/b/a Blue Cross and Blue Shield  
of Louisiana  
Ottis McCrary  
Philadelphia Federation of Teachers Health and Welfare Fund  
Self-Insured Schools of California

Sergeants Benevolent Association of the Police Department of the City of New York  
Health and Welfare Fund  
David Sherman  
UFCW Local 1500 Welfare Fund  
Uniformed Fire Officers Association Family Production Plan Local 854  
Unite Here Health  
United Food & Commercial Workers and Employers Arizona Health & Welfare  
Trust  
Valerie Velardi

**Indirect-Reseller Respondents (Named Plaintiffs):**

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

**Direct Action Respondents:**

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