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

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

CLASS PLAINTIFFS' OPPOSITION TO
(1) DEFENDANTS' MOTION TO STAY DISCOVERY PENDING RESOLUTION OF DEFENDANTS' MOTIONS TO DISMISS
AND
(2) INTERVENOR UNITED STATES' CROSS-MOTION TO EXTEND DISCOVERY STAY

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I. INTRODUCTION

Defendants and the United States Department of Justice ("DOJ") both seek a continued, lengthy stay of discovery in these actions, some of which have been pending for more than a year and a half. Defendants seek to continue the stay until decisions are rendered on their motions to dismiss in each Lead Case, which would leave many of these actions languishing well into next year. The DOJ asks that all discovery be stayed for at least six months beyond the date this Court rules on its Cross-Motion to Extend Stay of Discovery (ECF No. 516), and notes that "*it may seek to further extend the discovery stay*."[1]

The Defendants and the DOJ have not satisfied their heavy burden of showing "good cause" for a continued stay of discovery. Keeping these cases "on ice" for many more months would cause substantial prejudice to class members and would contravene the overriding purpose of the Federal Rules of Civil Procedure: "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

In their respective motions, Defendants and the DOJ overstate their legal authorities, ignore the significant public stakes in this litigation, dismiss out-of-hand the substantial prejudice that further delay will work on Class Plaintiffs and Plaintiff States (together, "Plaintiffs"), and exaggerate the supposed burden of limited discovery on Defendants and the purported interference with the DOJ's criminal investigation. The law, facts, and equities demonstrate that the tailored document discovery and limited, non-merits testimonial discovery that Plaintiffs seek in their Cross-Motion are necessary and appropriate now.

Defendants and the Government rely upon erroneous legal presumptions that this Court should reject. Contrary to Defendants' assertion of a presumption that a stay is appropriate in

[1] Intervenor United States' Mem. in Supp. of Its Cross-Motion to Extend Stay of Discovery ("DOJ Mem."), ECF No. 516-1, at 3 n.4 (emphasis added).

antitrust cases pending adjudication of dispositive motions, numerous cases have held that such stays remain disfavored. The Government's claim of a policy preference in favor of criminal actions over civil enforcement of the antitrust laws is equally unavailing. It relies on inapposite case law and disregards the reality that parallel criminal and civil antitrust actions are commonplace and complementary, with civil discovery ordinarily taking place in tandem and without prejudice to the related criminal proceeding.

For their part, Defendants greatly downplay the mounting state and federal government evidence of "pervasive and industry-wide" illegal collusion[2] underpinning these Actions, which underscore the sufficiency of Plaintiffs' Consolidated Class Action Complaints. Those Complaints are not ones where "there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint,"[3] for which a stay might otherwise be warranted. Instead, there is far more than a "reasonably founded hope that the [discovery] process will reveal relevant evidence to support a § 1 claim,"[4] thus warranting discovery prior to resolution of the motions to dismiss.

Indeed, the Class Complaints in these Actions are highly likely to survive the motions to dismiss, as they already did in the *Propranolol* Action. Another court considering the *Clobetasol*, *Desonide*, and *Fluocinonide* (the "Cortiocosteroids") Actions, now consolidated here, rejected the same arguments for a stay that Defendants have rehashed here, as did the Connecticut Court in the Plaintiff States' case.

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[2] *See* Pl. States' [Proposed] Consol. Am. Compl. ("Plaintiff States' CAC"), Civ. A. No. 17-cv-3768 (E.D. Pa. Oct. 31, 2017), ECF No. 3-1, at ¶ 11.

[3] Mem. in Supp. of Defs.' Mot. to Stay Discovery Pending Resolution of Defs.' Motions to Dismiss ("Defs.' Mem."), ECF No. 492-1, at 4 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

[4] *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007)).

The DOJ's investigation has already yielded two indictments and guilty pleas. And the on-going civil investigation by the Plaintiff States, who have obtained numerous documents by way of Connecticut AG subpoenas, recently led to their proposed Consolidated Amended Complaint involving 12 new defendants, 13 new generic drugs, and allegations of an anticompetitive conspiracy "across the generic drug industry" consisting of an "overarching understanding about how generic manufacturers fix prices and allocate markets to suppress competition," involving "executives at the highest levels in many of the Defendant companies." Plaintiff States' CAC ¶¶ 2, 10, 11.

Moreover, the robust factual and economic allegations in the Class Complaints reinforce the unlawful conduct already uncovered by DOJ and the Plaintiff States. Those Complaints each allege that, in a sharp departure from historical practices, prices of generic pharmaceuticals dramatically increased starting in 2012, if not earlier, and in most cases, in near lock-step fashion. The Class Complaints allege market factors that render the generic pharmaceutical industry unusually ripe for collusion, describe why the unprecedented price increases of this magnitude were against any individual company's self-interest, and describe the extensive contacts among executives in the industry – including direct evidence of agreements to fix prices and allocate markets and customers – as prices were soaring. Accordingly, the mere pendency of the motions to dismiss does not warrant the stay Defendants seek.

Both Defendants and the DOJ fail to acknowledge the significant public interest implicated in these actions. This MDL involves numerous generic drug companies agreeing to impose exorbitant price hikes and allocate markets for a multitude of generic drugs, many of which are essential medications on which tens of millions of Americans rely each day due to their historically low cost. Some of the Class Plaintiffs in these Actions have been awaiting

discovery for some *twenty months* since they first filed their original class complaints in March 2016. Staying discovery until well into next year would exacerbate the already substantial prejudice to these Class Plaintiffs. It would also be contrary to "the public's interest in vigorously enforcing national antitrust laws through the expeditious resolution of a private antitrust litigation." *In re Plastics Additives Antitrust Litig.*, No. Civ. A-03-2038, 2004 WL 2743591, at *8 (E.D. Pa. Nov. 29, 2004) (denying motion to stay discovery).

Defendants offer only conclusory claims of burden. However, numerous courts have consistently rejected such claims as a basis to warrant a stay, including courts in several of the generic price-fixing cases later transferred to this MDL. The DOJ's vague assertions of interference with its criminal investigation are not just conclusory, they are flatly contradicted by its prior agreement to the same discovery sought now by Class Plaintiffs, which the DOJ inexplicably reneged upon just hours before Plaintiffs were about to file their responses to Defendants' motion to stay discovery on October 13. Plaintiffs seek document discovery carefully tailored to avoid interference with DOJ's investigation, third-party discovery (which imposes no burden on Defendants and no risk to the criminal investigation), and limited, non-merits testimonial discovery. DOJ's arguments are premised on pure speculation – that Defendants "*may* be less inclined" or "*may* delay their decision to cooperate" with DOJ – but offer no evidence to back up such conjecture. DOJ Mem. at 5-6 (emphasis added). DOJ simply ignores that Plaintiffs have agreed to forgo the only type of discovery that could possibly create these risks – exactly as the DOJ previously requested.

Because many of the documents sought by Plaintiffs' targeted document requests have likely already been identified, gathered and produced by Defendants to the DOJ or to the Plaintiff States, the production of some of those documents in this MDL would not impose undue

cost or burden on the Defendants nor create the "distractions" the DOJ belatedly contends their production would cause.[5]

II. BACKGROUND

In early March 2016, the first complaint alleging anticompetitive price fixing of the generic pharmaceuticals Digoxin and Doxycycline was filed in this District.[6] After additional complaints were filed, the Judicial Panel on Multidistrict Litigation (the "Panel") ordered the transfer of those cases to this Court for centralized coordination and consolidation. *In re Generic Digoxin and Doxycycline Antitrust Litig.*, 227 F. Supp. 3d 1402 (J.P.M.L. 2016). Shortly after the *Digoxin and Doxycycline* cases were filed in this District, similar actions were filed alleging price fixing as to other generic pharmaceuticals. In April 2017, the Panel transferred these actions to this Court for centralization. *In re Generic Digoxin & Doxycycline Antitrust Litig.*, 222 F. Supp. 3d 1341 (J.P.M.L. 2017).

On May 1, 2017, DOJ filed a motion to stay discovery until 30 days following Class Plaintiffs' filing of all consolidated amended complaints for all generic drugs to "provide the United States with an opportunity to meet and confer with lead counsel about whether sequencing of and/or conditions on discovery would be adequate to protect the [DOJ's] investigation beyond [that] initial period."[7] Recognizing that courts must consider prejudice to the parties when assessing a proposed stay, DOJ asserted that Class Plaintiffs would suffer no prejudice because they would have considerable control over the length of the stay by filing their

[5] It bears emphasis that Plaintiffs' document requests do not ask Defendants to identify the documents they produced to the DOJ or Plaintiff States. *See* Plaintiff's Cross-Motion.

[6] *See* Compl., *International Union of Operating Engineers Local 30 Benefits Fund v. Lannett Company, Inc.*, No. 16-990 (E.D. Pa.) (filed on Mar. 2, 2016).

[7] Intervenor United States' Mot. to Stay Discovery at 1, No. 16-md-2724, ECF No. 279.

consolidated amended complaints at any time.[8] And, the DOJ contended, the limited stay would provide an opportunity for it to negotiate a discovery plan with Plaintiffs that would protect the DOJ's criminal investigation and relieve the Court of the burden of unnecessary motion practice.[9]

During the May 4, 2017 Status Conference, the DOJ explained that its stay request was its way of "communicating to the Court the importance of proceeding in an orderly fashion" with discovery that would not interfere with the DOJ's investigation. May 4, 2017 Hrg. Tr. 36:23-37:2 (excerpts at Ex. B). The Court, in response, expressed concern about delaying discovery, recognized the option of "split[ing] the baby" to allow document discovery to proceed, and expressed concern that the DOJ's investigation may be prolonged, leaving the MDL to descend into a "black hole." *Id.* 39:12-40:7. The Court also asked the DOJ whether the discovery that had been permitted by other courts who had previously been assigned various Actions had hampered its investigation. *Id.* 37:14-20. Rather than answer that question, DOJ contended it was "happy to try [to] work out with the parties for all sides some sort of reasonable accommodation." *Id.* 40:11-17. The DOJ also noted that if it had an opportunity to review discovery requests in advance of service, as in the *Corticosteroids* Actions previously pending in the Southern District of New York (where DOJ did not object to document discovery), it might not object to discovery in this MDL. *Id.* 45:5-10. Plaintiffs noted their amenability to a time-limited stay *but only* in light of DOJ's interest in conferring to determine a mutually agreeable approach to discovery, and the Court acknowledged the wisdom of this cooperative approach. *Id.* 41:23-42:5; 46:4-20.

[8] *Id.* at 3.

[9] *Id.* at 4.

Two weeks later, Class Plaintiffs and the DOJ stipulated to a stay of discovery through September 15, 2017 (the deadline for Defendants' stay motion), subject to meet and confers between the DOJ and Plaintiffs "about the timing and sequencing of appropriate document discovery directed to both parties and third parties."[10] The Court subsequently approved the stipulation and stayed discovery until September 15, 2017, with a further stay possible.[11] Class Plaintiffs had agreed to the stipulation because of the DOJ's commitment to work with them to reach a mutually agreeable discovery plan. Decl. of Paul Costa ¶ 3 (attached as Ex. A). Shortly thereafter, Class Plaintiffs and DOJ began meeting to discuss a discovery approach that would not interfere with the DOJ's ongoing investigation.

After the Panel transferred the Plaintiff States' Actions to this MDL on August 3, 2017 and Class Plaintiffs filed their consolidated amended complaints on August 15, 2017, Plaintiffs and the DOJ continued their negotiations over the scope and sequencing of discovery in the MDL. Costa Decl. ¶ 4. A mutually agreeable Proposed Pretrial Order to govern discovery appeared attainable, so Plaintiffs consented to DOJ's August 25, 2017 motion to extend the stay of discovery through resolution of the anticipated motion to stay discovery by Defendants.[12] *See* Costa Decl. ¶ 6. Significantly, in that unopposed motion, the DOJ did *not* state that discovery would interfere with its investigation, and it did *not* oppose all discovery. To the contrary, the DOJ stated that it would continue negotiations with Plaintiffs to identify areas of limited discovery that *could* proceed.[13] The Court granted the DOJ's unopposed motion on August 28, 2017 and ordered that discovery remain stayed pending a ruling from the Court on Defendants'

[10] *See* Joint Stipulation at ¶ 2.b, attached to PTO No. 23, ECF No. 347.

[11] *Id.*

[12] *See* Intervenor United States' Unopposed Mot. to Extend Stay of Discovery, ECF No. 426, at 1.

[13] *See id.* at 2.

forthcoming stay motion.[14] On September 15, 2017, Defendants filed a motion to continue the stay in its entirety until after the Court rules on motions to dismiss in each Lead Case.[15]

Throughout September, Plaintiffs and the DOJ continued their negotiations to ensure there was ample time for any agreement on a Proposed Pretrial Order regarding discovery to be internally vetted within the DOJ and approved by Department superiors. Costa Decl. ¶ 7. Plaintiffs prepared proposed document requests to be served on Defendants and provided them to the DOJ for its review, along with draft third-party discovery Plaintiffs would seek from pharmacy benefit managers, industry trade associations, and the like. Through phone calls and e-mails, Plaintiffs and the DOJ edited or eliminated document requests to which the DOJ objected, and agreed upon discovery limitations that would avoid interference with the DOJ's investigation. These include, for example, prohibitions on: (1) identifying any documents produced in this MDL as having been previously produced to the DOJ, or disclosure of what information had been provided to the DOJ; (2) any discovery related to the DOJ's investigation; and (3) any testimonial discovery on the merits (*i.e.*, merits depositions of individual and corporate witnesses), as well as requests for admission, and interrogatories. Costa Decl. ¶ 5 and Ex. 1 thereto (Initial Proposed Pretrial Order) ¶¶ 3, 4.

Plaintiffs ultimately reached agreement with DOJ on limited document discovery of Defendants concerning the topics identified in Exhibit A to Plaintiffs' Proposed Pretrial Order; third-party document discovery; and non-merits depositions only as to the following non-merits topics: jurisdiction; organizational structure; business operations; the identity of relevant document custodians, customers, and suppliers; trade association attendance; document storage systems and databases; and document preservation, retention, and similar policies. *See id.* ¶ 2.

[14] *See* PTO No. 32, ECF No. 427.

[15] *See* Motion to Stay Discovery, ECF No. 492.

All other discovery was to be stayed. In addition, Plaintiffs agreed to provide all discovery requests to the DOJ to allow it to object, and similarly agreed to notify DOJ seven days before any Rule 30(b)(6) deposition about the identity of any witness designated to testify so DOJ, if need be, could raise concerns about such designation. *Id.* ¶¶ 6, 7. Plaintiffs made each of these accommodations at the DOJ's request to avoid any interference with the criminal investigation and with the good faith belief that a compromise had been achieved that would allow Plaintiffs to finally begin discovery. Costa Decl. ¶¶ 3, 6. On September 28, 2017, DOJ confirmed that it agreed to the Proposed Pretrial Order it had negotiated with Plaintiffs. Costa Decl. ¶ 8.

Under Pretrial Order No. 32, Class Plaintiffs were to file their response to Defendants' motion to stay discovery on October 13, 2017. *See* ECF No. 427 ¶ 3. At 4:58 p.m. on October 12, just one day before Plaintiffs' brief was due, the DOJ confirmed that the following representations, to be included in Plaintiffs' brief, were accurate:

> The Agreement contemplates that discovery should proceed promptly and concurrently with the DOJ's parallel criminal investigation, while Rule 26(a)(1) disclosures and the depositions of individual witnesses will be deferred. The Agreement is a compromise that respects the interest of the many class members and States who seek the "the just, speedy, and inexpensive determination," Fed. R. Civ. P. 1, of their claims of sweeping anticompetitive conduct in the generic pharmaceutical industry. It is Plaintiffs' understanding that DOJ concurs in the relief sought here and is contemporaneously filing a memorandum urging the Court to enter the same proposed Pretrial Order submitted herewith.
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> It bears emphasis that while the DOJ had previously sought stays of discovery, it has now agreed that the particular discovery requests set forth in the Agreement will not interfere with its on-going criminal investigation and should be allowed to proceed without further delay.

Costa Decl. ¶ 9.

Then, inexplicably, the very next morning, DOJ undid the many weeks of negotiations and did an about-face, changing its position from complete support of Plaintiffs' proposed partial stay to complete opposition. Costa Decl. ¶ 10. During a teleconference on October 13, DOJ attorneys informed Plaintiffs that the DOJ would not be filing the agreed Proposed Pretrial Order, but instead would be asking for a complete stay of discovery of indefinite duration. When asked to do so, DOJ could not provide any explanation for how the same discovery to which it previously agreed would all of a sudden interfere with its criminal investigation. Costa Decl. ¶ 10.

As explained herein and in the contemporaneously-filed Joint Cross-Motion to Allow Certain Discovery, the Court should deny the stay motions by Defendants and the DOJ, and impose only the partial stay proposed by Plaintiffs, allowing critical targeted discovery to proceed now.[16]

III. DEFENDANTS HAVE NOT DEMONSTRATED "GOOD CAUSE" FOR CONTINUATION OF THE DISCOVERY STAY

A. The Proposed Tailored Discovery Is Appropriate Now

Defendants misstate the law in asserting a general presumption that discovery "should not proceed in any case unless and until the Court determines that the complaint . . . states a plausible claim for relief." Defs.' Mem. at 3. Defendants cite no authority for that sweeping proposition, nor can they since no such authority exists. In fact, "[a] stay of a civil case is an 'extraordinary remedy.'" *State Farm Mut. Auto. Ins. Co. v. Beckham-Easley*, No. 01-cv-5530,

[16] There is only one difference between the agreed-to Proposed Order accompanying Plaintiffs' Cross Motion and the agreement previously reached with the DOJ. In consideration of the DOJ's agreement to support immediate commencement of the agreed-upon targeted discovery, Plaintiffs previously agreed to a partial stay of indeterminate duration. Plaintiffs' Proposed Pretrial Order now sunsets the partial stay after three months (¶ 1). *See* Class Pls.' and the Pl. States' Mem. in Supp. of Their Joint Cross-Motion to Allow Certain Discovery, at 6 & and accompanying Ex. A.

2002 WL 31111766, at *1 (E.D. Pa. Sept. 18, 2002) (declining to stay despite parallel proceedings). Thus, the proponent of a stay of discovery during the pendency of a dispositive motion bears the burden to demonstrate that "good cause" exists. *See Spathos v. Smart Payment Plan, LLC*, No. 15-cv-8014, 2016 WL 9211648, at *1 (D.N.J. Apr. 25, 2016); *19th St. Baptist Church v. St. Peters Episcopal Church*, 190 F.R.D. 345, 350 (E.D. Pa. 2000). It is well-settled that 'the mere filing of a dispositive motion does not constitute 'good cause' for the issuance of a discovery stay.'" *Spathos*, 2016 WL 9211648, at *1 (quoting *Gerald Chamales Corp. v. Oki Data Americas, Inc.*, 247 F.R.D. 453, 454 (D.N.J. 2007)); *see also Klikus v. Cornell Iron Works, Inc.*, No. 13-cv-468, 2014 WL 496471, at *6 n.3 (M.D. Pa. Feb. 6, 2014).[17]

As a court in this District emphasized:

> A court should not automatically stay discovery pending a motion to dismiss under Rule 12(b). Had the drafters of the Federal Rules of Civil Procedure wanted an automatic stay of discovery pending a motion to dismiss they could have so provided.… *Motions to stay discovery are not favored because when discovery is delayed or prolonged it can create case management problems which impede*

[17] Courts throughout the country are in accord. *See, e.g., In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 331, 336 (N.D. Ill. 2005) (noting mere filing of a motion to dismiss does not stay discovery); *In re Currency Conversion Fee Antitrust Litig.*, No. MDL 1409, 2002 WL 88278, at *1 (S.D.N.Y. Jan 22, 2002) (finding "imposition of a stay is not appropriate simply on the basis that a motion to dismiss has been filed, as the Federal Rules make no such provision"); *In re Apple In-App Purchase Litig.*, No. 11-cv-1758, 2012 U.S. Dist. LEXIS 18970, at *3 (N.D. Cal. Feb. 15, 2012) (rejecting a stay of discovery pending a dispositive motion and finding discovery stays "are disfavored because … [they] . . . interfere with judicial efficiency . . . . [B]efore a stay can be issued, the moving party must meet a heavy burden of making a strong showing why discovery should be denied") (citation omitted); *Allstate Ins. Co. v. Levy*, No. 10-cv-1652, 2011 WL 288511, at *1 (E.D.N.Y. Jan. 27, 2011) ("The pendency of the motion to dismiss does not provide an automatic basis to stay discovery."); *Morien v. Munich Reinsurance Am., Inc.*, 270 F.R.D. 65, 66-67 (D. Conn. 2010) (noting a party seeking the stay bears the burden of showing good cause, including "a strong showing that the plaintiff's claim is unmeritorious"; "[t]he pendency of a dispositive motion is not, in itself, an automatic ground for a stay") (citations omitted); *Parker v. Stryker Corp.*, No. 08-cv-1093, 2008 WL 4457864, at *1 (D. Colo. Oct. 1, 2008) (noting a "stay of all discovery is generally disfavored in this District," and denying a stay during pendency of a motion to dismiss).

> *the court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems.*

Coca-Cola Bottling Co. v. Grol, No. 92-CV-7061, 1993 WL 13139559, at *2 (E.D. Pa. Mar. 8, 1993) (emphasis added).

Importantly, the burden of showing "good cause" applies equally to the DOJ: "In a civil case, there is a strong presumption in favor of discovery, and the government must overcome that presumption in its request for a stay." *United States v. Gieger Transfer Serv., Inc.*, 174 F.R.D. 382, 385 (S.D. Miss. 1997) (citing Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 209 (1990)). Indeed, the amended Federal Rules favor *early* discovery, permitting parties to deliver document requests just 21 days following service of the summons, which are considered served at the first Rule 26(f) conference. Fed. R. Civ. P. 26(d)(2). As courts have noted, a discovery stay is directly at odds with the Rules' directive for "expeditious resolution" of the action. *Skellerup Indus. Ltd. v. City of L.A.*, 163 F.R.D. 598, 600-601 (C.D. Cal. 1995); *see also Coyle v. Hornell Brewing Co.*, No. 08-cv-2729, 2009 WL 1652399, at *3 (D.N.J. June 9, 2009) (noting stays of discovery "are not preferred").

Defendants' reliance on the unpublished decision in *Mann v. Brenner*, 375 Fed. Appx. 232 (3d Cir. 2010), is misplaced. Defs.' Mem. at 5, 6, 14. In that case, plaintiff's civil rights claim was barred by collateral estoppel, and he failed to state a claim despite being afforded multiple opportunities to amend his complaint. *See id.* at 234-38. Despite the plain legal insufficiency of his complaint, plaintiff sought full discovery, unlike the targeted discovery sought here by the Class Plaintiffs. The Third Circuit in *Mann* merely held that "*[i]n certain circumstances*, it *may* be appropriate to stay discovery while evaluating a motion to dismiss…." *Id.* at 239 (emphasis added). It thus upheld the denial of discovery in an obviously baseless lawsuit; it did *not* hold that there is a presumptive bar to discovery during the pendency of a

motion to dismiss, in every case, no matter how meritorious it may be.[18] This non-binding decision hardly supports the categorical bar to discovery that Defendants seek here, particularly in light of the strength of the very detailed Class Complaints. Indeed, the post-*Mann* decisions from district courts in this Circuit cited herein rejecting discovery stays correctly recognized that *Mann* does not require an automatic stay of discovery any time a defendant files a motion to dismiss.

Importantly, before consolidation into this MDL, courts that presided over several generic drug price-fixing actions later transferred here rejected Defendants' motions to stay discovery. *See, e.g.*, *In re Topical Corticosteroid Antitrust Litigation*, No. 16-mc-7000, ECF No. 19 (Master Case Order No. 7) (S.D.N.Y. Mar. 27, 2017) (denying defendants' motion for a discovery stay, noting that "[t]his Court sees no reason why document discovery should not proceed during the pendency of the motions"); *accord Conn. v. Aurobindo Pharma USA*, No. 16-cv-2056, ECF No. 268 (D. Conn. Apr. 18, 2017) ("Continued discovery advances the Multidistrict Litigation process. Furthermore, the actual filing of a motion to dismiss is not a basis for staying a case. . . ."). This Court should reach the same conclusion.

B. *Twombly* Does Not Shield Defendants from Discovery

Defendants' claim that *Twombly* erected a discovery bar prior to a decision on a motion to dismiss in antitrust cases is also unfounded. The Supreme Court did not even discuss stays of

[18] Other appellate cases on which Defendants rely to support their motion are similarly inapposite. In *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1368 (11th Cir. 1997) (Defs.' Mem. at 6-7), like *Mann*, plaintiff had made a "dubious claim" of "questionable validity." The complaint in *Havoco of Am. Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980) (Defs.' Mem. at 7) was similarly plainly deficient. In a subsequent Seventh Circuit decision, that Court emphasized that "[d]iscovery need *not* cease during the pendency of a motion to dismiss." *SK Hand Tool Corp. v. Dresser Industries*, 852 F.2d 936, 945 n.11 (7th Cir. 1988) (emphasis added). And *Rutman Wine Co. v. E&J Gallo Winery*, 829 F.2d 729 (9th Cir. 1987) (Defs.' Mem. at 7) involved a patently deficient complaint where the Court emphasized there was no "reasonable likelihood that plaintiffs can construct a claim." *Id*. at 738.

discovery, and courts have consistently recognized that "*Twombly* and *Iqbal* do not mandate that a motion to stay should be granted every time a motion to dismiss is filed." *New England Carpenters Health & Welfare Fund v. Abbott Labs.*, No. 12-cv-1662, 2013 WL 690613, at *3 (N.D. Ill. Feb. 20, 2013) (denying defendants' motion to stay).[19] Notably, even one of the decisions relied upon by Defendants expressly *rejected* the notion that *Twombly* supports a stay of discovery in antitrust cases during the pendency of a motion to dismiss:

> Defendants' statement that "*Twombly* stands for the proposition that antitrust plaintiffs cannot subject defendants to *any* discovery until the Court determines that the plaintiffs have articulated a 'plausible entitlement to relief' on the face of the complaint" is *incorrect….This order does not read Twombly to erect an automatic, blanket prohibition on any and all discovery before an antitrust plaintiff's complaint survives a motion to dismiss*. Defendants' argument upends the Supreme Court's holding; the decision used concerns about the breadth and expense of antitrust discovery to identify pleading standards for complaints, *it did not use pleading standards to find a reason to foreclose all discovery*.

[19] *Accord In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420, 2013 WL 2237887, at *2 (N.D. Cal. May 21, 2013) ("[T]he costs and burdens of antitrust discovery do not erect an automatic barrier to discovery in every case in which an antitrust defendant challenges the sufficiency of a complaint."); *Tamburo v. Dworkin*, No. 04-c-3317, 2010 WL 4867346, at *2 (N.D. Ill. Nov. 7, 2010) ("*Twombly* and *Iqbal* do not dictate that a motion to stay should be granted every time a motion to dismiss is placed before the Court."); *Solomon Realty Co. v. Tim Donut U.S. Ltd.*, No. 08-cv-561, 2009 WL 2485992, at *3 (S.D. Ohio Aug. 11, 2009) ("Despite the defendants' interpretation of new pleading standards in the wake of *Twombly* and *Iqbal*, the Court is not persuaded that this case presents any need for departure from the general rule that a pending motion to dismiss does not warrant a stay of discovery."); *DSM Desotech Inc. v. 3D Sys. Corp.*, No. 08-cv-1531, 2008 WL 4812440, at *3 (N.D. Ill. Oct. 28, 2008) (*Twombly's* concern with the potential costs associated with antitrust discovery "is not … tantamount to an automatic prohibition on discovery in every antitrust case where defendants challenge the sufficiency of a complaint."); *In re Flash Memory Antitrust Litig.*, No. 07-cv-0086, 2008 WL 62278, at *3 (N.D. Cal. Jan. 4, 2008) ("The Court [in *Twombly*] did not hold, implicitly or otherwise, that discovery in antitrust actions is stayed or abated until after a complaint survives a Rule 12(b)(6) challenge. Such a reading of that opinion is overbroad and unpersuasive.").

In re Graphics Processing Units Antitrust Litig., No. 06-cv-7417, 2007 WL 2127577, at *4 (N.D. Cal. July 24, 2007) ("*GPU*") (emphasis added).[20]

Where, as here, the dismissal motion does not raise a pure question of law but instead challenges the sufficiency of the facts alleged to support the claims, courts have recognized that the dismissal motion "does not militate in favor of a stay." *Currency Conversion*, 2002 WL 88278, at *2; *see also* 6 James W. Moore et al., *Moore's Federal Practice* § 26-105[3][c] (3d ed. 2017) (factors relevant to a stay include "whether it is a challenge as a matter of law or to the sufficiency of the allegations").

C. The Class Complaints Are Likely to Withstand Defendants' Motions to Dismiss, Militating Against the Requested Stays of Discovery

1. The Denial of Motions to Dismiss in *Propranolol* Is Highly Significant Here

As noted above, Defendants rely on cases where courts stayed discovery because the complaints were patently "weak" and thus "any discovery at all would be a mere fishing expedition." Defs.' Mem. at 8. In stark contrast, Class Plaintiffs' Complaints set forth detailed allegations of direct evidence of concerted action as to certain generic drugs as well as parallel pricing and plus factors demonstrating the plausibility of the Complaints.

Indeed, even before transfer by the Panel, the complaints alleging price fixing of the generic drug Propranolol and related anticompetitive conduct were upheld following multiple rounds of briefing and oral argument. *In re Propranolol Antitrust Litig.*, 249 F. Supp. 2d 712,

[20] Defendants' brief omits the foregoing passage from their discussion of *GPU*. Defs.' Mem at 8, 13. Their brief also ignores the statement in that opinion expressly recognizing that discovery should go forward in antitrust cases "where it is almost certain that the complaint is viable, such as is often true where guilty pleas have already been entered in a parallel criminal case. *Of course, in such conditions, at least some discovery should ordinarily proceed despite any pending motion to dismiss*." *GPU*, 2007 WL 2127577, at *5 (emphasis added).

718 (S.D.N.Y. 2017). In denying the motions to dismiss, the Court pointed not only to parallel price increases, but also found the following four plus factors particularly persuasive:

- Generic pharmaceutical industry-specific factors giving defendants a common motive to conspire. *See id.* at 719-20.
- Actions against self-interest in increasing generic pharmaceutical prices, especially given "the magnitude of defendants' price increases." *Id.* at 720-21.
- A high level of interfirm communications among Defendants' employees who were responsible for setting drug prices. *Id.* at 722-23.
- A plausible link between the ongoing civil and criminal government investigations into wide-spread collusion in the generic pharmaceutical industry and the class complaints. *Id.* at 723-24.

Each of these factors applies with equal or greater force to each generic drug at issue here.[21]

2. Sweeping and Long-Standing Government Investigations Bolster the Allegations in the Class Complaints

Since the *Propranolol* opinion was issued in April 2017, the overlap between the DOJ and Plaintiff States' investigations and the Class Complaints has become even more apparent, thereby underscoring the plausibility of the Class Complaints' allegations. Several years ago, the DOJ empaneled a grand jury in this District which, based on publicly available information, is known to have issued subpoenas to many generic pharmaceutical companies, including more than half of the Defendants in this MDL. Additionally, two high-level Heritage executives (including a member of the board of directors of the leading generic pharmaceutical trade association) entered guilty pleas, and admitted they engaged in price fixing, bid rigging, and customer and market allocation with their competitors. They are currently cooperating with the

[21] Until transfer, discovery was proceeding in the *Propranolol* action, and defendants and several non-parties produced substantial documents. One non-party that made only a partial production is ready to complete its production but is waiting until this Court lifts the stay.

DOJ and the Plaintiff States, and it has also been reported that at least one corporate Defendant in this MDL is providing cooperation to DOJ in its ongoing investigation.[22] Present and former employees from several generic pharmaceutical companies have been separately subpoenaed (including employees of Defendants Impax, Heritage, Lannett, and Mylan), and search warrants have been executed on at least Defendants Citron, Mylan, and Perrigo.[23] The DOJ has repeatedly asserted that "[e]vidence uncovered during the criminal investigation implicates other companies and individuals (including a significant number of the Defendants here and individual employees) in collusion with respect to doxycycline hyclate, glyburide, and other drugs (including a significant number of the drugs at issue here)." ECF No. 516-1 at 2; *see also* ECF No. 279 at 1-2.

In addition to the federal criminal investigation, the Plaintiff States have gathered extensive evidence of illegal collusion during their multi-year investigation. On October 31, 2017, the Plaintiff States filed a motion for leave to amend their Complaint, adding 13 additional drugs, a dozen new defendants, and alleging "an overarching conspiracy, the effect of which was to minimize if not thwart competition across the generic drug industry." Plaintiff States' CAC ¶ 2. The Plaintiff States also alleged that they "continue to investigate additional conspiracies, involving these and other generic manufacturers, regarding the sale of other drugs not identified in this Complaint, and will likely bring additional actions based on those conspiracies at the appropriate time in the future." Plaintiff States' CAC ¶ 3.

The scale and scope of the conspiracy (or conspiracies) that is coming to light in these on-going government investigations and their substantial overlap with the Class Complaints,

[22] *See* End-Payer Plaintiffs' Consol. Am. Class Action Compl., No. 16-DX-27242, ECF No. 122, at ¶¶ 16-20, 26.

[23] *Id.* at ¶¶ 23-24.

"including a significant number of the drugs at issue here" in this MDL (ECF No. 516-1 at 2), further demonstrate the legal sufficiency of the Class Complaints.[24] Because the Class Complaints are likely to survive Defendants' motions to dismiss entirely or at least substantially, this weighs heavily in favor of discovery proceeding now without further protracted delay.[25]

D. Defendants Will Not Be Prejudiced If the Court Enters the Proposed Pretrial Order, Which Allows Targeted Discovery to Proceed

As explained in the Cross-Motion, there is ample reason for the Court to enter the Proposed Pretrial Order permitting tailored discovery as agreed among the Class Plaintiffs, the Plaintiff States (and, until few weeks ago, the DOJ). This Proposed Pretrial Order was extensively negotiated by those parties and will allow discovery to proceed without interfering with the on-going federal and state government investigations.

Defendants balk at *any* discovery being allowed to proceed prior to resolution of the motions to dismiss, claiming that discovery would be "particularly prejudicial to Defendants in light of the nature and structure of this particular MDL." Defs.' Mem. at 14. Not so.

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[24] *See, e.g.*, *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 632 (E.D. Pa. 2010) (noting the existence of a "parallel criminal investigation," even without guilty pleas, is "an allegation demonstrating that the government believes a crime may have occurred" and weighs in favor of denying a motion to dismiss); *Propranolol*, 249 F. Supp. 2d at 724 (denying motions to dismiss because of, *inter alia*, plausible link between parallel government investigations and complaints); *In re SRAM Antitrust Litig.*, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008) (denying motions to dismiss and holding that allegations regarding guilty pleas to price-fixing charges in the DRAM industry supported an inference of conspiracy in the related SRAM industry); *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1149 (N.D. Cal. 2009) (guilty pleas to price-fixing charges in the DRAM industry supported inference of conspiracy in the related NAND flash memory industry).

[25] *See Coca-Cola Bottling Co.*, 1993 WL 13139559, at *2 ("Requests to stay discovery are rarely appropriate where resolution of the motion to dismiss will not dispose of the entire case."); *see also Martinez v. MXI Corp.*, No. 15-cv-00243, 2015 WL 8328275, at *6 (D. Nev. Dec. 8, 2015) ("[T]he court is not convinced at this time that plaintiffs will be unable to state any claim for relief. Proceeding with discovery while defendants' motion to dismiss is pending will further the just and speedy determination of this case"); *Alford v. City of New York*, No. 2011-cv-0622, 2012 WL 947498, at *1 (E.D.N.Y. Mar. 20, 2012) (denying discovery stay where court was "doubtful that defendants will succeed in dismissing all of the claims against them").

First, as discussed extensively below, Class Plaintiffs' and the Plaintiff States' proposed discovery was carefully drafted not only to prevent interference with the DOJ's criminal investigation, but also to limit the discovery to which Defendants would be subjected. For example, merits depositions would be stayed, relieving Defendants from deposition preparation and business disruption. The requests for production of documents that Class Plaintiffs would serve on Defendants would not impose undue hardship, expense or burden on them, as many of those documents were likely already identified and produced by Defendants to DOJ or the Plaintiff States.

Second, Defendants have not demonstrated that they would suffer hardship or that they have a particular need for protection. Instead, Defendants' brief repeatedly asserts that discovery in antitrust cases can be expensive and that discovery is likely to be broad. Defs.' Mem. at 4, 7, 12-14. Yet courts in this Circuit and elsewhere have consistently held that similar arguments about the general burden of discovery are insufficient to warrant highly disfavored discovery stays. *See, e.g.*, *Adriana Castro, M.D., P.A. v. Sanofi Pasteur Inc.*, No. 11-cv-7178, 2012 WL 12918261, at *2 n.2 (D.N.J. July 18, 2012) (concluding that the defendant had not "ma[d]e out a clear case of hardship or inequity in being required to go forward" and noting that producing parties can still seek protection from overbroad and unduly burdensome discovery requests under Fed. R. Civ. P. 26(b).); *Gerald Chamales Corp.*, 247 F.R.D. at 454-55 (same).

Third, the "nature and structure of this particular MDL" (Defs.' Mem. at 14) weigh in favor of discovery proceeding apace. Defendants ignore a key reason why this MDL was expanded to include many generic pharmaceuticals and the Plaintiff States' lawsuit: coordination of common discovery. Each action shares a broad common nucleus of operative facts—facts that should be jointly developed in discovery. *See In re Generic Pharm. Pricing Antitrust Litig.*,

2017 WL 4582710, at *1 (J.P.M.L. Aug. 3, 2017) ("As all [the actions currently in the MDL and the Plaintiff States' Action] arise from the same factual core, they will involve common discovery of defendants and third parties."). Indeed, in expanding this MDL, the Panel explicitly recognized that:

> Although separate conspiracies are alleged, they may overlap significantly. Thus, the same witnesses are likely to be subject to discovery across all actions. Coordination of this common discovery will be essential to avoiding duplication and inconvenience to the parties, witnesses, and the courts. Such coordination also is necessary because the allegations in these actions (as well as those in the MDL) stem from the same government investigation into price fixing, market allocation, and other anticompetitive conduct in the generic pharmaceuticals industry.

In re Generic Digoxin & Doxycycline Antitrust Litig., 222 F. Supp. 3d 1341, 1343 (J.P.M.L. 2017). Denying Defendants' motion to stay and entering Plaintiffs' Proposed Pretrial Order is consistent with the coordination of discovery envisioned by the Panel and will promote the efficiencies the Panel sought to achieve.

Finally, the Defendants' list of the 30 Defendants currently in the MDL (before the Plaintiff States' new Amended Complaint) exaggerates the complexity and breadth of discovery here. Defs.' Mem. Ex. A. Several of the Defendants listed on the chart have the same parent company. Defendants also place great emphasis on the fact that four of the 30 Defendants are not named in any Group 1 Action. Of course, the more important point is that the remaining 26 out of the 30 Defendants *are* in Group 1. Of the four other Defendants, Breckenridge and Upsher-Smith are defendants in cases involving Propranolol, which, as noted above, were sustained upon motions to dismiss and they have already been subject to document discovery. Similarly, Aurobindo and Citron are both defendants in cases involving Glyburide, a drug as to

which Heritage's senior executives pleaded guilty and DOJ and the Plaintiff States have uncovered substantial direct evidence of conspiratorial behavior.

In sum, Defendants have not carried their heavy burden of showing that allowing discovery to proceed now would cause them to suffer prejudice. Nor have they demonstrated any need to postpone or silo discovery by waiting for decisions on motions to dismiss on a drug-by-drug basis. Thus, there is no "good cause" for their requested stay.

IV. PLAINTIFFS' PROPOSED DISCOVERY WILL NOT INTERFERE WITH THE CRIMINAL INVESTIGATION

As most clearly evidenced by the DOJ's original agreement to the targeted discovery it negotiated with Plaintiffs, and as it expressly acknowledged just hours prior to its last-minute reversal of position, Plaintiffs' proposed discovery will *not* interfere with DOJ's criminal investigation. In its motion, DOJ offers no contrary evidence whatsoever, instead relying solely on speculation, untethered to the discovery actually proposed by Plaintiffs. Plaintiffs are not seeking any merits testimony, any discovery about the DOJ's investigation, or any information that would disclose DOJ's investigation targets, methods, or theories. Like Defendants, DOJ also has failed to demonstrate the requisite "good cause" for a stay of discovery, and its motion likewise should be denied.

A. The Proposed Targeted Discovery Will Not Impede Defendants' Cooperation with the DOJ

The DOJ claims that Defendants may decline to cooperate with it for fear that information they may reveal to it will be disclosed in the civil matter. This argument rests on pure speculation, without any factual support to demonstrate that Defendants "may delay" or "may be less inclined" to cooperate. DOJ Mem. at 4-5.[26] Indeed, Defendants' own brief did not

[26] The DOJ suggests that the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat 661 (2004) ("ACPERA"), recognizes that civil liability can

state that a continuation of the stay is necessary for them to cooperate with the DOJ and its investigation.

At the DOJ's request, Plaintiffs' proposed document requests do not seek identification of or copies of documents produced by Defendants to the Department of Justice. *See* Proposed Pretrial Order, Ex. A. Similarly, under that proposal, when Defendants participate in discovery of any kind, they are prohibited from identifying any documents or information as having been previously provided to the DOJ. *See id.* ¶ 4. Moreover, Plaintiffs' proposed discovery forgoes, at this stage, discovery *of any kind* regarding the DOJ's criminal investigation—nothing regarding its scope, nature, drugs at issue, investigational targets, or anything else. *Id.* ¶ 3. Plaintiffs are also forgoing all testimonial discovery on the merits, *id.* ¶ 2(c) & (d), eliminating the risk that depositions would reveal anything about the investigation. Under Plaintiffs'

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impact a Defendant's decision to cooperate. DOJ Mem. at 5 n.5. To be sure, the benefits that inure to a DOJ ACPERA leniency applicant—relief from treble damages in a civil case—encourage wrong-doers to cooperate with DOJ. But it is the civil litigation that *encourages* rather than discourages cooperation with the Government by providing a carrot to cooperators. And ACPERA inherently expects that civil litigation will proceed concurrently with a Government investigation because the civil cooperation requirements apply whether the leniency agreement is conditional (i.e., cooperation with the government is ongoing) or final (after full cooperation with the DOJ has been provided). *See* U.S. Dep't of Justice, Model Corporate Conditional Leniency Letter (Jan. 26, 2017), *available at* https://www.justice.gov/atr/file/891286/download. ACPERA likewise recognizes the value of civil antitrust litigation in enforcing the antitrust laws by *requiring* an applicant's cooperation in the civil matter. Congress anticipated that ACPERA cooperation provided to civil plaintiffs would be so beneficial "that the total compensation to victims of antitrust conspiracies will be increased." 150 Cong. Rec. S3610, 2004 WL 714783 (daily ed. Apr. 2, 2004) (statement of Sen. Hatch). The discovery stay proposed by both Defendants and the DOJ defeats the purpose of ACPERA. Under ACPERA, affirmative cooperation must be provided to civil plaintiffs in a timely manner. ACPERA § 213(c); *see also* 150 Cong. Rec. S36210 ("[T]he legislation requires the amnesty applicant to provide full cooperation to the victims *as they prepare* and pursue their civil lawsuit.") (emphasis added). It requires, *inter alia*, that the applicant provide to the claimant "a full account" of all potentially relevant facts known to the applicant and all potentially relevant documents. ACPERA § 213(b). The Defendants' and DOJ's proposed stay prevents that timely cooperation, thus undermining Congressional intent.

discovery proposal, which was extensively negotiated with DOJ, Plaintiffs will be unable to discern from discovery whether a producing Defendant is even the target of a DOJ investigation, much less what information, if any, it has provided. Given these significant limitations, there is no basis for the DOJ's claim that the proposed discovery would discourage cooperation with it.

Second, the DOJ asserts that Defendants' efforts to respond to the discovery sought by Plaintiffs will distract them and divert resources needed to cooperate with the DOJ because Defendants must "collect[], review[], and produ[e] documents, respond[] to written interrogatories, and prepare[] for and attend[] depositions." DOJ Mem. at 7. This presumes that companies involved in a criminal investigation would choose to push criminal investigators to the side to focus on civil claims—again, a notion unsupported by any evidence. Moreover, DOJ ignores the fact that Plaintiffs do not propose to serve *any* interrogatories or requests for admissions during the period of the limited stay, and, as noted above, the only depositions sought are confined to routine, non-merits topics (organizational structure, etc.) that normally require little preparation by corporate officials involved with the DOJ investigation. *See* Proposed Pretrial Order ¶ 2. Courts have rejected comparable "burden" arguments when made by defendants. *See, e.g.*, *In re Scrap Metal Antitrust Litig.*, No. 02-cv-0844, 2002 WL 31988168, at *5 (N.D. Ohio Nov. 7, 2002).

Significantly, even the Defendants did not argue in their brief that civil discovery would prevent them from responding to the DOJ's investigation. Defendants are major companies with ample resources, highly skilled and reputable counsel, and extensive litigation experience of all kinds. They surely can respond to targeted discovery while also dealing with the DOJ and its investigation.

For those Defendants and generic drugs that are the subject of the DOJ's investigation, Plaintiffs' document requests likely encompass many of the same documents sought by DOJ's subpoenas. Thus, many Defendants will likely have already collected and searched for those same documents and prepared them for production to the DOJ as well as for use in their own defense in these civil actions, obviating any burden.

B. Civil Discovery Will Not Provide Defendants Early Access to Discovery in the Criminal Matter

Relying on inapposite case law, the DOJ vaguely asserts that the limited discovery Plaintiffs seek "might" somehow provide Defendants with early access to discovery in the criminal matter. DOJ Mem. at 7. The Court should reject that red herring, just as other courts have. *See Scrap Metal*, 2002 WL 31988168, at *7 (denying proposed stay, noting the government failed to explain precise nature of its concern that defendants may use discovery to obtain information in the criminal matter); *United States v. All Funds on Deposit*, 767 F. Supp. 36, 42 (E.D.N.Y. 1991) ("[M]ere conclusory allegations of *potential* abuse or simply the *opportunity* . . . to exploit civil discovery . . . will not avail on a motion for a stay.") (emphasis in original) (internal quotation marks and citation omitted). Federal Rule of Criminal Procedure 16(a)(1) limits what discovery a defendant may obtain *from the government* – not from other parties or entities. As the DOJ itself is aware, nothing prevents Defendants in these Actions or in the criminal action from voluntarily sharing documents and information among themselves as part of a joint defense agreement to advance their own defenses. Staying document discovery would not change that practical reality.[27]

[27] *See, e.g.*, Robert Bloch & Gary Winters, *How to Respond to a Criminal Antitrust Investigation: A Practical Approach in Today's Enforcement Environment*, ABA Section Antitrust, Sixth Annual Int'l Cartel Workshop (Apr. 4, 2006) ("Sharing information [among joint defense counsel whose clients have been subpoenaed] allows counsel to assess the strength and substance of the government's case at an early stage, and enables counsel to monitor and

As noted above, Plaintiffs propose that discovery relating to the Government's criminal investigation remain stayed such that investigative reports, witness statements, grand jury transcripts, DOJ subpoenas and the like may *not* be requested or produced by *any* party. *See* Proposed Pretrial Order ¶¶ 3-4. Thus, Defendants, who will obtain access to these materials in the criminal matter only after indictment,[28] will not be able to gain access to these materials through discovery here. And even if Defendants were to seek document discovery of other Defendants or the Plaintiff States, under Plaintiffs' proposed limitations, Defendants will have no way of knowing whether such documents were produced to the DOJ or whether the producing party is even a target of that investigation.

Moreover, none of the cases relied upon by the DOJ suggests that discovery stays are appropriate in related civil actions in which the government is not itself a litigant. DOJ Mem. at 7-8. Instead, each case pertained to parallel criminal and civil actions in which the government (or one of its branches) was a party in *both* actions.[29] In such cases, either the private party or the government has the opportunity to use discovery in the civil matter to seek documents it

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evaluate the government's case as it develops."), *available at* http://www.mondaq.com/article.asp?article_id=38876.

[28] *See* Fed. R. Crim. P. 16(a)(1) and 18 U.S.C. § 3500.

[29] *Saunders v. City of Philadelphia*, No. 97-cv-3251, 1997 WL 400034, *6 (E.D. Pa. July 11, 1997) (involving arrestee's Section 1983 civil claim against the City, finding it would be "inequitable" to allow the civil plaintiff to obtain discovery from the City while the City would be unable to obtain similar discovery from the plaintiff in the criminal case); *SEC v. Mersky*, No. 93-cv-5200, 1994 WL 22305, at *4 (E.D. Pa. Jan. 25, 1994) (involving a civil SEC action parallel with DOJ's criminal investigation in which private defendant in both cases sought the investigative reports turned over by the SEC to the DOJ; the court merely held that the defendant in the civil and criminal actions could not circumvent the limitations on discovery in criminal matter by seeking those documents in the civil matter); *United States v. One 1967 Buick Hardtop Electra 225*, 304 F. Supp. 1402 (W.D. Pa. 1969) (involving a civil claim by the government for forfeiture of an asset that was the subject of the criminal action in which private defendant in both cases sought a deposition of a witness in the criminal case).

would not have access to in the criminal matter or use discovery in a manner that creates inequities. Such risks are minimized where, as here, the government is not a party in the parallel civil action. *See Scrap Metal*, 2002 WL 31988168, at *7 ("As the Government is not a party to this litigation, any concern that either the Government or the Defendants will abuse the discovery process is minimized."); *Alcala v. Texas Webb Cty.*, 625 F. Supp. 2d 391, 402 (S.D. Tex. 2009) (noting the strongest case for a stay "occurs when the federal government has initiated both the civil and criminal proceedings" but rejecting stay where civil case was brought by private parties).

C. Much of the Targeted Discovery Plaintiffs Seek Is Entirely Unrelated to the Criminal Investigation and Cannot Interfere with It

The DOJ does not attempt to explain, nor could it, why *all* discovery, including non-merits discovery and discovery of third parties, should be stayed in this MDL. Such discovery is irrelevant to and would not be produced in the criminal investigation. And it imposes little or no burden on Defendants. *See Golden Quality Ice Cream Co. v. Deerfield Speciality Papers, Inc.*, 87 F.R.D. 53 (E.D. Pa. 1980) (noting interest in proceeding with criminal matter should not militate against proceeding with that part of the civil case that is not intrusive to the criminal matter).

For example, Class Plaintiffs seek transaction and cost data necessary to preparation of the expert opinions for both class certification (to demonstrate that the impact of the conspiracy can be proven by evidence common to the class) and on the merits (to prove damages based on common evidence). *See* Fed. R. Civ. P. 23(b)(3). Such data is rarely, if ever, sought in criminal antitrust cases and cannot intrude on a criminal investigation. Similarly, Plaintiffs seek non-merits information, such as documents showing, and depositions regarding, Defendants' organizational structure, their electronic information systems and document retention policies,

and how they preserve and store electronic information, none of which goes to the merits and all of which are critical both to ensuring the preservation of ephemeral documents (*e.g.*, text messages routinely deleted), and to building Plaintiffs' general understanding of Defendants and the industry. The DOJ cannot claim such discovery would interfere with its investigation.

Similarly, Plaintiffs seek third-party document discovery (such as from pharmacy benefit managers and Defendants' predecessors who hold pricing data important to this case) to ensure such documents are preserved and to better understand the industry. None of this production poses burdens on Defendants or has anything to do with DOJ's investigation. Yet, inexplicably, the DOJ now would indiscriminately block all of it.

As Judge Milton Pollack noted:

> [A] general stay of all civil discovery is not by any means the best option available to the court or to the litigants. *Stays can and should be tailored to avoid undue prejudice.* By limiting both the time and subject matter covered in temporary deferrals of particular discovery, a Court can allow civil proceedings to progress as much as possible without prejudicing the relative interests of the litigants.

Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 211 (1990) (emphasis added).

That careful tailoring is precisely what Plaintiffs propose: document and limited non-merits testimonial discovery crafted through good faith negotiations with the DOJ to avoid any interference with the criminal investigation. The DOJ's failure to even acknowledge in its own papers the strict limitations on the proposed discovery that resulted from Plaintiffs' negotiations with it and accommodations to it speaks volumes.

V. THE DOJ'S PROPOSED STAY CONFLICTS WITH ITS PRIOR POSITIONS IN THIS CASE AND NUMEROUS OTHER CIVIL MATTERS

The DOJ's current position is wholly inconsistent not only with its position in this MDL up until October 13, it is also inconsistent with positions it has taken in other antitrust matters of equal importance, and in discovery proceedings in individual generic drug price-fixing actions prior to the formation of this MDL.

In the *Propranolol* actions (before transfer), the DOJ initially sought only a limited stay of requests for documents regarding the criminal investigation and drugs other than Propranolol, and depositions of Defendants' current and former employees involved in the pricing of generic drugs.[30] The DOJ later dropped its request for any stay of document production.[31] Nevertheless, the court denied even the stay of depositions except for two individuals who had pleaded guilty and were likely to invoke their Fifth Amendment rights. *Id.* (ECF No. 107) at 1-2.

Similarly, in the *Corticosteroids* matters (before transfer), the DOJ only sought to stay discovery of a single defendant's production of a DOJ subpoena and related communications and non-merits depositions.[32] DOJ entered into an agreement with Plaintiffs providing that all other discovery could proceed subject to notice to the DOJ when discovery was served. *Id.* The DOJ does not and cannot explain why comparable discovery in these matters prior to transfer to the MDL posed no risk to its investigation but the same (and indeed more limited) discovery sought now purportedly would.

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[30] *See* Mem. in Supp. United States' Motion for Recons. of Mot. for Limited Stay of Certain Discovery, *FWK Holdings LLC v. Actavis Elizabeth, LLC*, No. 16-cv-9901 (S.D.N.Y. Feb. 24, 2017), ECF No. 102 (attached as Ex. C).

[31] Order at 1, *FWK Holdings*, No. 16-cv-9901 (S.D.N.Y. Feb. 28, 2017) (ECF No. 107) (attached as Ex. D).

[32] *See* Endorsed Letter Agreement, *In re Topical Corticosteroid Antitrust Litigation*, No. 16-mc-7000 (S.D.N.Y. Mar. 22, 2017), ECF No. 68 (attached as Ex. E).

The DOJ's stay motion is also inconsistent with positions it has taken in other civil antitrust matters with parallel criminal matters, where DOJ has generally not objected to limited discovery comparable to that which Plaintiffs seek here and, in fact, has stipulated to it.[33]

In *In re Parking Heaters Antitrust Litigation*, the DOJ stated that "the United States has no objection to early document production beginning in civil actions" despite parallel criminal cases.[34] There, the DOJ merely objected to the wording of the plaintiffs' stipulation with defendants to produce documents "as agreed by the parties" because it understood such agreement to include the defendants' productions to DOJ and sought to prevent the Parties from deducing which documents had been produced in the criminal action and other information about that investigation.[35] It did not object to document production generally. Nor did DOJ object to defendants' production of documents already produced to the DOJ in *In re Liquid Aluminum Sulfate Antitrust Litigation*.[36] Likewise, in *In re Municipal Derivatives Antitrust Litigation*, despite the pendency of grand jury proceedings, DOJ agreed that document discovery could proceed and did not object even to interrogatories directed at identifying those with knowledge

[33] *See, e.g.*, Order Granting Stipulation and Order to Stay All Deposition and Interrogatory Discovery, *In re SRAM Antitrust Litig.*, No. 07-md-1819 (N.D. Cal, June 12, 2007), ECF No. 208 (agreeing to stay of depositions and interrogatories) (attached as Ex. F); Stipulation and Order Limiting Scope of Discovery, *In re DRAM Antitrust Litig.*, No. 02-md-1486 (N.D. Cal. Apr. 16, 2003), ECF No. 166 (permitting production of documents produced to the DOJ and third-party depositions, but postponing depositions, interrogatories, and requests to admit except such requests pertaining to statistical data, products sold, and distribution channels (attached as Ex. G); *Scrap Metal*, 2002 WL 31988168, at *3, *5 (denying motion to stay even though the government sought only a stay of depositions and interrogatories).

[34] Letter Br. by U.S. Dep't of Justice, No. 15-mc-940 (E.D.N.Y. Jan. 29, 2016), ECF No. 75 (attached as Ex. H).

[35] *Id.* The court rejected the DOJ's position and permitted the parties to proceed with document production. Minute Order (E.D.N.Y. Feb. 1, 2016) (excerpted docket report attached as Ex. I).

[36] *See* Letter Order at 3, 6, No. 16-md-2687 (D.N.J. July 5, 2016) (ordering production of government productions), ECF No. 209 (attached as Ex. J).

of, and information relevant to, the subject matter of the action (including those with knowledge of the conspiratorial deals) as well as the existence, custodian location, and descriptions of relevant documents.[37]

Until October 13, the DOJ had agreed that "the particular discovery requests set forth in the [the Proposed Pretrial Order] will not interfere with its on-going criminal investigation and should be allowed to proceed without further delay." Costa Decl. ¶ 9. Despite DOJ's unexplained eleventh hour flip-flop, the fact remains that the agreed-upon discovery would neither burden Defendants nor cause harm to the DOJ investigation.

VI. NUMEROUS COURTS HAVE REJECTED UNREASONABLE REQUESTS FOR A STAY BY THE DOJ

When the DOJ overreaches, as it has here, courts have not hesitated to reject its requests for unreasonable stays. For example, in *In re Optical Disk Drive Prods. Antitrust Litigation* ("*ODDs*"), the DOJ sought a blanket stay of discovery, advancing many of the same arguments it rehashes here.[38] The *ODDs* court nonetheless denied the blanket stay, ordered the parties to provide Rule 26 disclosures, and permitted plaintiffs to propound discovery after filing their consolidated amended complaints.[39] The Court subsequently permitted document discovery to

[37] *See* May 27, 2010 Hrg. Tr. 3:19-23; 5:25-8:2, *Municipal Derivatives*, No. 08-cv-2516 (S.D.N.Y.) (excerpted transcript attached as Ex. K).

[38] *See* United States' Mem. in Supp. of Mot. to Stay Order, *ODDs*, No. 10-md-2143 (N.D. Cal. May 20, 2010), ECF No. 68 (making similar arguments) (attached as Ex. L). Even in *ODDs*, the DOJ agreed to much of the discovery it insists must be stayed here: discovery of the defendants' sales, production capacity, capacity utilization, production costs, inventory levels, sales volumes, products, profitability, market share, costs, prices, shipments, customers; the identity of key employees; electronic storage, retention, and destruction systems; and relating to class certification. *See id.* at 4-5.

[39] *See* Order, *ODDs*, No. 10-md-2143 (N.D. Cal. June 24, 2010), ECF No. 119 (denying DOJ's motion for blanket stay of document and testimonial discovery, rejecting many arguments made here) (attached as Ex. M); *see also* Hrg. Tr. at 52:10-53:24, *ODDs* (N.D. Cal. June 24, 2010) (attached as Ex. N).

go forward prior to resolution of the motions to dismiss the complaints.[40] Allowance of the discovery did not interfere with the criminal investigation, which subsequently resulted in multiple guilty pleas.[41]

Similarly, in *In re Municipal Derivatives Antitrust Litigation*, the court rejected DOJ's request for a stay of most testimonial discovery as well as production of hundreds of thousands of audio recordings containing conspiratorial communications in a case that (much like this one) had been pending for nearly two years and coincided with a sweeping criminal investigation in which the DOJ had, as yet, issued only one criminal indictment against any of the corporate defendants during that entire time. The Court rejected, in part, the DOJ's request, permitting discovery of all documents and audio tapes and some testimonial discovery to learn the names of witnesses with knowledge of the subject matter.[42]

This Court should similarly reject the DOJ's unreasonable motion for a blanket stay of all discovery for six more months, if not longer.

VII. CLASS PLAINTIFFS AND THE PUBLIC INTEREST WILL BE PREJUDICED BY THE LENGTHY DISCOVERY STAYS PROPOSED BY THE DOJ AND DEFENDANTS

As Defendants acknowledge, briefing on the 38 motions to dismiss for Group 1 drugs will not be complete until January 2018. Assuming that a decision on those motions will not be immediate, Defendants' stay proposal likely would delay *all* discovery from proceeding in some

[40] *See* Joint Letter Br. re Discovery Dispute, *ODDs* (N.D. Cal. Mar. 11, 2011); Minute Order, *ODDs* (N.D. Cal. Apr. 7, 2011), ECF Nos. 370 and 379 (attached as Exs. O & P).

[41] *See* DOJ Press Release dated April 30, 2012, *available at* https://www.justice.gov/opa/pr/hitachi-lg-data-storage-inc-executive-agrees-plead-guilty-participating-bid-rigging

[42] Order, *Municipal Derivatives*, No. 08-cv-2516 (S.D.N.Y. May 27, 2010), ECF No. 755 (attached as Ex. Q); *see also* Third Am. Compl. ¶ 3, *Municipal Derivatives*, No. 08-cv-2516 (S.D.N.Y. Mar. 8, 2013) (noting indictment of only one named corporate defendant as of May 2010), ECF No. 1764 (attached as Ex. R).

Actions for well over two years from the filing of the first complaint in March 2016 (and even later for the generic pharmaceuticals in Groups 2 and 3).[43] The DOJ's proposed six-month stay could result in even longer delays, particularly if it seeks repeated renewals as it suggests in its brief. *See* DOJ Mem. at 3 n.4.

Notably, the stay sought by the DOJ dramatically exceeds the limited stay in *Golden Quality*, on which the DOJ principally relies. There, the stay entered lasted only a few months. *Golden Quality*, 87 F.R.D. at 60 (entering stay in April 1980 but permitting additional requests for further discovery by June 1980). The stay in this MDL already far exceeds that duration; the DOJ and Defendants would more than double it. Moreover, *Golden Quality* permitted discovery of documents produced to the grand jury and discovery related to class certification. *Id.*at 58 (noting that, while the Court would not allow unfettered discovery, it would permit discovery that was not intrusive with respect to the criminal case and plaintiffs "are entitled to begin to educate themselves about the factual circumstances" surrounding the conduct).

Contrary to the DOJ's argument (DOJ Mem. at 8), the law does not favor criminal over civil enforcement of the antitrust laws, and the cases on which the DOJ relies say nothing of the sort.[44] In fact, the Supreme Court has repeatedly recognized the importance of private

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[43] *See Moore v. Samsung Elec. Am.*, 2017 U.S. Dist. LEXIS 122017, at *7 (D.N.J. July 28, 2017) (a stay would be inappropriate where the case had already been pending for nearly a year); *S.E.C. v. Chakrapani*, No. 09 CIV 1043, 2010 WL 2605819, at *11 (S.D.N.Y. June 29, 2010) (denying DOJ request for a stay because the court "supports expeditious discovery in the civil action").

[44] The DOJ badly misrepresents *United States v. Borden*, 347 U.S. 514, 518 (1954). There, the Supreme Court merely held that the government was not barred from seeking an injunction for conduct already enjoined by a decree in a private civil action. *Id*. at 518-519. The government is entitled to enjoin anticompetitive conduct already prohibited by a prior private injunction because (1) the government otherwise had no right to enforce a private decree itself; and (2) the burden of protecting the public interest should not be solely on the shoulders of the private plaintiff. *Id.* Far from suggesting that private actions are subordinate, *Borden* noted that "[t]hese private and public actions were designed to be cumulative, not mutually exclusive. . . .

enforcement of antitrust laws: "By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'" *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972). Private actions, such as this, serve as "a chief tool in the antitrust enforcement scheme [by creating] a crucial deterrent to potential violators." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).[45] Courts have also similarly recognized that class actions play a critical role in that enforcement. *See In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 258 (D.D.C. 2002). Accordingly, courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." *Radovich v. Nat'l Football League*, 352 U.S. 445, 453-54 (1957).

Stays that impede the progress of civil antitrust actions, as the DOJ and Defendants seek here, create new hurdles and undermine "[t]he public's [great] interest in vigorously enforcing national anti-trust laws through the expeditious resolution of a private antitrust litigation." *Plastics Additives*, 2004 WL 2743591, at *8.[46]

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they may proceed simultaneously or in disregard of each other." *Id.* (internal quotation marks and citation omitted). *Howard Hess Dental Labs. Inc. v. Dentsply International, Inc.*, 602 F.3d 237 (3d Cir. 2010), is no more instructive as the Third Circuit found, unremarkably, that a private litigant seeking injunctive relief already obtained by the government must still show antitrust injury. *Id*. at 249. And *Goldlawr, Inc. v. Shubert*, 169 F. Supp. 677 (E.D. Pa. 1958), merely found that the private plaintiff had not alleged any private business injury from anticompetitive conduct alleged (*i.e.*, it lacked standing) and that to the extent such conduct resulted in injury to the *general public* (as opposed to the plaintiff), the government is the appropriate party to protect *that* interest. *Id*. at 691.

[45] *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) (noting Congressional intent to create "an important means of enforcing the law"); *Zenith Radio Corp. v. Hazeltine Research, Inc.* 395 U.S. 100, 130-31 (1969) (noting treble damages and injunctive relief for private actions "serve . . . the high purpose of enforcing the antitrust laws").

[46] *See also In re Blood Reagents*, 756 F. Supp. 2d at 636 ("[T]he public's interest in the enforcement of the antitrust laws is furthered by the expeditious resolution of this class-action lawsuit"); *In re Residential Doors Antitrust Litig.*, 900 F. Supp. 749, 756 (E.D. Pa. 1995) (refusing to stay discovery in part because public interest would be prejudiced by delay in

In fact, civil actions often provide greater benefits and achieve more significant results than federal criminal prosecutions, which face higher burdens of proof. *See, e.g.*, *In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156 (D. Kan. July 29, 2016) (DOJ investigation led to no indictments; more than $970 million in total settlements were achieved in the private class action); *In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476 (S.D.N.Y.) (DOJ investigation led to no indictments; nearly $2 billion in settlements were achieved in the private class action); *In re Flat Glass Antitrust Litig.*, No. 97-mc-550 (W.D. Pa.) (DOJ investigation led to no indictments, but $120 million in total settlements were achieved); *In re High Fructose Corn Syrup Antitrust Litig.*, Master Case No. 95-cv-1477 (C.D. Ill.) (DOJ investigation led to no indictments, but $530 million in total settlements were achieved); *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 573-74 (E.D. Pa. 2003) and 321 F. Supp. 2d 619, 623-24 (E.D. Pa. 2004) (nearly $200 million in settlements achieved in a case where DOJ sued only one of the twelve defendants named in the class action). As these and many other cases demonstrate, criminal actions do not determine "the boundaries for civil litigation." *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 1475705 at *18 (D.D.C. May 9, 2000) (noting plaintiffs may pursue a theory broader than the criminal matter).

Timely discovery is critical to achieving excellent results such as the foregoing. As demonstrated by the Plaintiff States' latest complaint, their civil investigative powers – similar to discovery in many ways – has enabled them to allege at least 15 express price-fixing and customer- and market-allocation agreements as part of "an overarching conspiracy, the effect of which was to minimize if not thwart competition across the generic drug industry." Plaintiff

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discovery proceedings); *Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.*, 269 F. Supp. 540, 542 (E.D. Pa. 1967) (noting that stays of discovery in antitrust cases undermine the incentive to act as private attorneys general, which is critical to enforcement of the antitrust laws).

States' CAC ¶ 2. There is no valid reason to stymie civil efforts to combat widespread collusion in the generic pharmaceutical industry, which would occur if the lengthy discovery stays sought by Defendants and DOJ are granted.

A continued discovery stay may also cause intractable case management problems as the Plaintiff States proceed with their cases and investigation relying on the many documents they already have obtained from their subpoenas. As the Panel noted, "[c]oordination of this common discovery will be *essential*" in this MDL. *In re Generic Digoxin & Doxycycline Antitrust Litig.*, 222 F. Supp. 3d at 1343 (emphasis added). To place the Class Plaintiffs on hold while the Plaintiff States move forward with their investigation would prevent such coordination. *See Idan Computer, Ltd. v. Intelepix, LLC*, No. 09-4849, 2010 WL 3516167, at *4 (E.D.N.Y. Aug. 27, 2010) (denying motion for partial stay where "piecemeal discovery will only lead to delay and unnecessary discovery disputes").

Further, if the Court were to grant a continued, lengthy stay of discovery, there will be an increased risk that evidence will disappear, particularly evidence from third parties, and that witnesses' memories will erode over time. *See, e.g.*, *Coyle v. Hornell Brewing Co.*, 2009 WL 1652399, at *3 (citing cases); *Shim v. Kikkoman Int'l Corp.*, 509 F. Supp. 736, 740 (D.N.J. 1981), *aff'd*, 673 F.2d 1304 (3d Cir. 1981).

The stays Defendants and the DOJ seek here are particularly prejudicial given Defendants' intractable position that they would not (and indeed, are not required to) voluntarily disclose any information from which Plaintiffs might identify appropriate custodians and data sources for preservation purposes. During their negotiations over the proposed Preservation Order in this MDL, Plaintiffs asked Defendants to agree to disclose their potential custodians and organizational charts to assess the sufficiency of those custodial designations as well as

electronically stored information (ESI) systems and other data sources so that the parties might agree on the presumptive limitations on the scope of preservation early in the case. Defendants have so far declined to provide such necessary and customary information, necessitating some of the document discovery sought now.

In sum, neither Defendants nor the DOJ have satisfied their heavy burden of showing "good cause" for a continued, lengthy stay of all discovery, and such a stay would cause substantial prejudice to Class Plaintiffs and the overriding public interest in enforcement of the antitrust laws. Their motions should be denied and the targeted discovery sought in Plaintiffs' Cross-Motion should be allowed.

VIII. CONCLUSION

Plaintiffs respectfully request that this Court deny both the DOJ's and Defendants' motions to stay discovery.

Dated: November 9, 2017

Respectfully submitted,

/s/ Roberta D. Liebenberg
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EXHIBIT A

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

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

DECLARATION OF PAUL COSTA

I, Paul Costa, hereby declare as follows:

1. I am a member of the law firm of Fine, Kaplan and Black, R.P.C., in Philadelphia, Pennsylvania. I have personal knowledge of the facts set forth in this Declaration, and, if called as a witness, I could and would testify to them. I make this declaration pursuant to 28 U.S.C. § 1746.

2. Roberta D. Liebenberg and my law firm have been appointed as Lead and Liaison Counsel for the End-Payer Plaintiffs in the above-referenced action. *See* Pretrial Order No. 21 at 2, ECF No. 342.

3. During 2017, I participated in extensive discussions and correspondence with attorneys for the Antitrust Division of the United States Department of Justice ("DOJ") concerning the timing and sequencing of discovery in MDL 2724.

4. On May 15, 2017, End-Payer Plaintiffs, together with Direct Purchaser Plaintiffs and Indirect-Reseller Plaintiffs (collectively, "Class Plaintiffs"), entered into a stipulation with the DOJ agreeing to a stay of discovery through September 15, 2017, subject to meet and confers between the DOJ and all Class Plaintiffs "about the timing and sequencing of appropriate

document discovery directed to both parties and third parties." Joint Stipulation at ¶ 2.b, attached to PTO No. 23, ECF No. 347. The stipulation mooted the DOJ's then-pending Motion to Stay Discovery (ECF No. 279), which the Court dismissed without prejudice. *See* PTO 23 ¶ 4 (ECF No. 347). Class Plaintiffs only agreed to the May 15, 2017 stipulation because of the DOJ's commitment to work with them to reach a mutually agreeable proposal regarding the timing and sequencing of targeted party and non-party document discovery.

5. During the summer of 2017, Class Plaintiffs and the DOJ began meeting to discuss the scope and sequencing of discovery in the MDL. The Plaintiff States joined those discussions after their actions were transferred to this MDL in August 2017. Plaintiffs prepared proposed document requests to be served on Defendants and provided them to the DOJ for its review and input, along with draft discovery they would seek from pharmacy benefit managers, industry trade associations, and other third parties. Through numerous phone calls and e-mails, Plaintiffs and the DOJ edited or eliminated document requests to which the DOJ objected, and wrote in constraints to avoid interference with the DOJ's investigation. These include, for example, prohibitions on: (1) identifying any documents as having been previously produced to the DOJ, or disclosure of what information had been provided to the DOJ; (2) any discovery related to the DOJ's investigation; and (3) any testimonial discovery on the merits (i.e., merits depositions of individual and corporate witnesses), as well as requests for admissions and interrogatories.

6. By the time Class Plaintiffs filed consolidated amended complaints on August 15, 2017, an agreement with DOJ on a Proposed Pretrial Order to govern discovery appeared attainable. However, DOJ requested that Plaintiffs consent to a further stay of discovery beyond September 15, 2017 (the deadline for Defendants' motion to stay discovery) so as to allow for additional time to finalize the contemplated agreement regarding the timing and sequencing of

discovery and obtain the consent of DOJ superiors. Because an agreement appeared likely at that time, Plaintiffs acquiesced to DOJ's request. On August 25, 2017, DOJ filed its Unopposed Motion to Extend Stay of Discovery, ECF No. 426, until resolution of Defendants' anticipated motion to stay, which the Court granted on August 28, 2017. *See* Pretrial Order No. 32, ECF No. 427. The Court also established an October 13, 2017 deadline for Plaintiffs' response to Defendants' anticipated motion to stay discovery. *See id*. ¶ 3.

7. Thereafter, Plaintiffs and the DOJ continued their negotiations and worked diligently to ensure there was ample time for any agreement on a Proposed Pretrial Order to be internally vetted within the DOJ and approved by DOJ superiors prior to Plaintiffs' October 13, 2017 deadline.

8. On September 28, 2017, DOJ confirmed via e-mail that the parties had achieved an agreement on a Proposed Pretrial Order that would provide for only a limited discovery stay and would enable certain categories of discovery to proceed immediately, and that DOJ would ask the Court to enter it. A true and correct copy of the Proposed Pretrial Order agreed upon as of September 28, 2017 is attached as Exhibit 1 to this Declaration.

9. On October 12, 2017, just one day before Plaintiffs' brief in opposition to Defendants' Stay Motion was due, I provided DOJ with limited excerpts from Plaintiffs' draft brief that characterized DOJ's position as to the Proposed Pretrial Order that Plaintiffs and DOJ had agreed upon and intended to submit to the Court the next day. These statements included the following:

> Class Plaintiffs and the Attorneys General of 44 states and the District of Columbia ("State Plaintiffs") (collectively, "Plaintiffs") respectfully cross-move to permit them to conduct certain limited discovery as set forth in the attached proposed Pretrial Order, which they negotiated with the United States Department of Justice Antitrust Division ("DOJ") (the "Agreement"). The Agreement

> contemplates that discovery should proceed promptly and concurrently with the DOJ's parallel criminal investigation, while Rule 26(a)(1) disclosures and the depositions of individual witnesses will be deferred. The Agreement is a compromise that respects the interest of the many class members and States who seek the "the just, speedy, and inexpensive determination," Fed. R. Civ. P. 1, of their claims of sweeping anticompetitive conduct in the generic pharmaceutical industry. It is Plaintiffs' understanding that DOJ concurs in the relief sought here and is contemporaneously filing a memorandum urging the Court to enter the same proposed Pretrial Order submitted herewith.

I also provided this excerpt to DOJ:

> It bears emphasis that while the DOJ had previously sought stays of discovery, it has now agreed that the particular discovery requests set forth in the Agreement will not interfere with its on-going criminal investigation and should be allowed to proceed without further delay.

At 4:58 pm that same day, DOJ responded to my email. Its complete response was: "Thank you for sharing this language with us. We do not think it is inaccurate." A true and correct copy of this email exchange is attached as Exhibit 2 to this Declaration.

10. The next day, October 13, 2017 – the same day that Plaintiffs' response to Defendants' Motion to Stay was due – a teleconference was convened among Lead Counsel for the End-Payer Plaintiffs, Direct Purchaser Plaintiffs, Indirect-Reseller Plaintiffs, Liaison Counsel for the Plaintiff States, and DOJ. During that teleconference, DOJ attorneys informed Plaintiffs that the DOJ would not be filing the previously agreed-upon Proposed Pretrial Order, but instead would be asking for a complete stay of discovery of indefinite duration. When asked to do so, DOJ could not provide any explanation for how the same discovery to which it previously agreed would now interfere with its investigation.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 9th day of November, 2017 in Philadelphia, Pennsylvania.

PAUL COSTA

Exhibit 1

Paul Costa

From: Ewalt, Andrew <Andrew.Ewalt@usdoj.gov>
Sent: Thursday, October 12, 2017 4:58 PM
To: Paul Costa
Cc: Owen, Jay
Subject: RE: Generics briefing

Hi Paul,

Thank you for sharing this language with us. We do not think it is inaccurate.

Andy

From: Paul Costa [mailto:pcosta@finekaplan.com]
Sent: Thursday, October 12, 2017 4:09 PM
To: Ewalt, Andrew <Andrew.Ewalt@ATR.USDOJ.gov>
Subject: Generics briefing

Hi Andy,

As we discussed yesterday, I'm sharing with you some of the text of our motion seeking discovery, specifically, the text that characterizes DOJ's position. I've also included statements of the relief we are seeking, since we aver in the brief that DOJ "concurs in the relief sought." Please let me know if you think any of the below is inaccurate. Thanks.

Class Plaintiffs and the Attorneys General of 44 states and the District of Columbia ("State Plaintiffs") (collectively, "Plaintiffs") respectfully cross-move to permit them to conduct certain limited discovery as set forth in the attached proposed Pretrial Order, which they negotiated with the United States Department of Justice Antitrust Division ("DOJ") (the "Agreement").[1] The Agreement contemplates that discovery should proceed promptly and concurrently with the DOJ's parallel criminal investigation, while Rule 26(a)(1) disclosures and the depositions of individual witnesses will be deferred. The Agreement is a compromise that respects the interest of the many class members and States who seek the "the just, speedy, and inexpensive determination," Fed. R. Civ. P. 1, of their claims of sweeping anticompetitive conduct in the generic pharmaceutical industry. It is Plaintiffs' understanding that DOJ concurs in the relief sought here and is contemporaneously filing a memorandum urging the Court to enter the same proposed Pretrial Order submitted herewith.

And:

DOJ HAS AGREED THAT CERTAIN LIMITED DISCOVERY SHOULD NOW BE ALLOWED TO PROCEED

It bears emphasis that while the DOJ had previously sought stays of discovery, it has now agreed that the particular discovery requests set forth in the Agreement will not interfere with its on-going criminal investigation and should be allowed to proceed without further delay.

Here's the conclusion, summarizing the relief sought:

Plaintiffs respectfully request that this Court approve the proposed Order setting forth the Agreement between the Class Plaintiffs, State Plaintiffs and the DOJ, and allow the immediate commencement of discovery pursuant to its terms.

Paul Costa
Fine, Kaplan and Black, R.P.C.
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Philadelphia PA 19107
215.567.6565

This e-mail, including attachments, may include confidential and/or proprietary information, and may be used only by the person or entity to which it is addressed. If the reader of this e-mail is not the intended recipient or his or her authorized agent, the reader is hereby notified that any dissemination, distribution or copying of this e-mail is prohibited. If you have received this e-mail in error, please notify the sender by replying to this message and delete this e-mail immediately. Thank you.

[1] The Agreement is memorialized in a proposed Pretrial Order and is attached here as Exhibit A. Today, Class Plaintiffs and the State Plaintiffs each have also contemporaneously filed oppositions to Defendants' blanket motion to stay discovery. Those filings are incorporated by reference. *See* Class Plaintiffs' Opp. to Defs.' Mot. to Stay Discovery; State Plaintiffs' Opp. to Defs.' Mot. to Stay Discovery.

Exhibit 2

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

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	MDL No. 2724 Case No. 2:16-MD-02724
THIS DOCUMENT RELATES TO: *ALL ACTIONS*	Hon. Cynthia M. Rufe

[PROPOSED] PRETRIAL ORDER NO. ___
(PARTIAL STAY OF DISCOVERY)

AND NOW, this ____ day of _____, 20____, upon consideration of the briefing filed in connection with Defendants' Motion to Stay Discovery, it is hereby **ORDERED** that:

1. Except as provided in paragraph 2 of this Order, all discovery (including initial disclosures) in all actions is stayed pending further order of the Court;

2. Subject to paragraphs 3 and 4 of this Order, the following types of discovery may proceed:

   a. Subpoenas to non-parties (other than current or former employees of parties) calling for only the production of documents and/or data;

   b. Requests for the production of documents and/or data listed in Exhibit A to this Order;

   c. Depositions under Federal Rule of Civil Procedure 30(b)(6) of non-parties, provided that such depositions are directed solely to one or more of the following issues: (i) a non-party's corporate structure, including the identities of its parents, subsidiaries, and affiliates; (ii) the structure of a

non-party's business operations; (iii) how a non-party maintains and/or preserves documents and electronically stored information, including how the non-party utilizes and understands any transaction data it maintains; and (iv) if the non-party is a pharmacy benefits manager ("PBM"), (A) a PBM's own policies and practices; and (B) a PBM's understanding of general industry practices; and

d. Depositions under Federal Rule of Civil Procedure 30(b)(6) of parties, provided that such depositions are directed solely to one or more of the following issues: (i) a party's connections to Pennsylvania; (ii) a party's corporate structure, including the identities of its parents, subsidiaries, and affiliates; (iii) the structure of a party's business operations, including its facilities, manufacturing processes, and sales and distribution processes; (iv) the identities, titles, locations, and responsibilities of a party's employees; (v) the identities of a party's customers, suppliers, and related chains of distribution; (vi) a party's membership in trade associations and the attendance of its employees at trade association meetings; (vii) a party's policies regarding use of personal or company-owned devices; (viii) how a party maintains and/or preserves documents and electronically stored information, including transaction and cost data; and (ix) how a party's data is structured and its understanding of the fields therein;

3. The parties must not seek and must not respond to discovery about the criminal investigation that the Antitrust Division of the U.S. Department of Justice ("Department of Justice") is conducting into the generic pharmaceuticals industry;

4. A person responding to a discovery request (*e.g.*, subpoena, request for production of documents, notice of deposition) ("Responding Person") must not disclose what documents or other information has been provided to the Department of Justice in the course of its criminal investigation into the generic pharmaceuticals industry, provided that nothing in this paragraph prohibits a Responding Person from providing documents or other information that previously had been provided to the Department of Justice so long as the production is made in a manner that does not indicate whether those documents or other information previously had been provided to the Department of Justice;

5. Any party that sends a discovery request to a non-party must provide a copy of this Order to that non-party at the time such request is sent;

6. Any party that sends a discovery request must provide a copy of such request to the Department of Justice at the time such request is sent;

7. Any organization that designates a person to testify on its behalf at a deposition in response to a notice or subpoena sent under Federal Rule of Civil Procedure 30(b)(6) must notify the Department of Justice of the identity of its designee at least 7 days before the deposition occurs;

8. Nothing in this Order precludes a party from communicating with another party or non-party during the limited stay established by this Order about additional discovery that may be sought if this Order is modified;

9. Nothing in this Order precludes a party or non-party from objecting to, moving to quash, or seeking a protective order excusing a response to any discovery request;

10. If a party takes a deposition under Federal Rule of Civil Procedure 30(b)(6) and paragraph 2 of this Order, the fact of that deposition shall not prejudice that party's ability to conduct additional depositions on other topics after the discovery stay is lifted; and

11. After meeting and conferring with the other parties (including Intervenor United States of America), a party may move to modify paragraph 2 of this Order to allow additional categories of discovery to proceed.

It is so **ORDERED.**

BY THE COURT:

_____

CYNTHIA M. RUFE, J.

Exhibit A

1. This request must be answered only if You are contesting the Eastern District of Pennsylvania's personal jurisdiction over You. All Documents concerning (a) any business transacted in the Commonwealth of Pennsylvania by You; (b) contracting to supply services or things in the Commonwealth of Pennsylvania by You; (c) Your interest in, use of, or possession of real property in the Commonwealth of Pennsylvania; (d) solicitations for business in the Commonwealth of Pennsylvania through a local office or agents; (e) occasions on which Your agents entered the Commonwealth of Pennsylvania to solicit business; (f) advertisements, listings or bank accounts in the Commonwealth of Pennsylvania; (g) the volume of business conducted in the Commonwealth of Pennsylvania by You; (h) business registration by You to conduct business in the Commonwealth of Pennsylvania and (i) meetings in the Commonwealth of Pennsylvania between You and one or more Defendants, competitors, or third parties concerning any of Your generic pharmaceuticals, including but not limited to meetings or events You attended that was held at, hosted by, or sponsored by a pharmaceutical industry trade association or other host of industry events related to pharmaceuticals.

2. Organizational charts, personnel directories, and other documents sufficient to show Your organizational structure, including:

(a) the identity of Your parent companies, subsidiaries, affiliates, and joint ventures;

(b) the identity and location of each facility owned, controlled, or operated by You that is engaged in the production of any generic pharmaceutical , or of any inputs used in the production of any generic pharmaceutical;

(c) the organization of any division, department, unit, or subdivision of Your company that has any responsibilities concerning the acquisition of active pharmaceutical ingredient(s) ("API") for, or the production, storage, distribution, packaging, marketing, pricing, prices, price reporting, or sales of Your generic pharmaceuticals; participation in or involvement with trade associations for generic pharmaceuticals, industry conferences related to generic pharmaceuticals,

or external workshops related to generic pharmaceuticals; professional travel; or antitrust compliance.

(d) the identity of any officers, directors, employees, committees, subcommittees, or working groups that have any responsibility concerning the acquisition of API for, or production, storage, distribution, packaging, marketing, pricing, prices, price reporting, or sales of Your generic pharmaceuticals;

(e) the identity of any officers, directors, employees, committees, subcommittees, or working groups that have any responsibility for communications and negotiations with wholesalers, pharmacies, group purchasing organizations ("GPOs"), and pharmacy benefit managers concerning Your generic pharmaceuticals;

(f) the identity of any officers, directors, employees, committees, subcommittees, or working groups that have any responsibility for communications and negotiations with any other Defendant or any competitor;

(g) the identity of any officers, directors, employees, committees, subcommittees, or working groups that have any responsibility for antitrust compliance;

(h) the identity of any officers, directors, employees, committees, subcommittees, or working groups that have any responsibility for participation in or involvement with trade associations related to generic pharmaceuticals, industry conferences related to generic pharmaceuticals, or external workshops related to generic pharmaceuticals;

(i) the identity of Your information technology ("IT") or information services departments or divisions, including their members' names, or outsourced IT services (including data storage) or temporary consultants; and

(j) this subpart must be answered only if You are contesting Plaintiffs' service of pre-litigation notice to You as required by Massachusetts General Law Ch. 93A: Documents sufficient to show that you presently maintain: (i) a place of business, and (ii) assets in Massachusetts within the meaning of Mass. Gen. Law. Ch. 93A § 9(3).

3. Documents sufficient to identify:

(a) Your directors, officers, and senior managers, as well as any secretaries, administrative assistants, or travel personnel assigned to them;

(b) any other employee with management or supervisory authority over the manufacture, production, distribution, marketing, pricing, or sale of generic pharmaceuticals; and

(c) each of Your employees who attended or participated in any trade association event concerning generic pharmaceuticals with any other Defendant or any competitor or was involved in coordinating the attendance or participation of any

of Your employees, including any secretaries, administrative assistants, or travel personnel.

4. Documents sufficient to show any proposed, contemplated, planned, pending or executed purchases, sales, acquisitions, mergers, joint ventures, divestitures, transfers, spinoffs or any other change in Your ownership or the ownership of any subsidiaries, corporate affiliates, departments, business units or other subdivisions of your company involved in the production, manufacture, distribution, marketing, pricing, or sale of generic pharmaceuticals.

5. All Board of Director and Board committee agendas, minutes (and drafts thereof), pre-meeting Board packets, presentations made to or by the Board of Directors and Board Committees, and notes and communications regarding Board of Director and Board Committee meetings, except that You may redact any portions of such documents discussing the criminal investigation conducted by the Antitrust Division of the U.S. Department of Justice into the generic pharmaceuticals industry, even if those portions would not be subject to redaction for reasons of attorney-client privilege or the work product doctrine. Any documents responsive to this request that are redacted solely for reasons other than attorney-client privilege or the work product doctrine shall be noted with the stamp "Redacted-Subject to Stay" or comparable notation.

6. All monthly, quarterly and yearly audited and unaudited financial documents and data, including profit and loss statements, balance sheets, cash flow statements, and other financial information concerning any of Your generic pharmaceuticals, that were prepared for or received by any of Your officers, directors, or senior managers (including the Chief Financial Officer, treasurer(s), or controller(s)).

7. All monthly, quarterly and yearly audited and unaudited financial documents and data, including profit and loss statements, balance sheets, cash flow statements, and other financial

information concerning Your generic pharmaceutical operations, sales, and marketing that were prepared for or received by any of Your officers, directors, or senior managers (including the Chief Financial Officer, treasurer(s), or controller(s)).

8. Documents sufficient to show by month, quarter, and year the cost allocations, cost apportioning rules, and accounting practices that are or were used to calculate Your profits, profit margins, or projected profits concerning the sale of any of Your generic pharmaceuticals.

9. Documents sufficient to show by month, quarter, and year Your profits (including income measures such as EBIT and EBITDA), profit margins, profit levels, or projected profits concerning the sale of any of Your generic pharmaceuticals.

10. Documents sufficient to show the name and address of each trade association (including committees and subcommittees) of which You or Your employees are or were a member or participant, as well as documents sufficient to show dates of membership and dates of participation in each trade association, including in committees, subcommittees, or on the trade association's board of directors or similar governing body.

11. All documents concerning meetings of each trade association identified in response to the immediately preceding request and each of its committees, subcommittees, board of directors, or other similar governing body, including meeting invitations, meeting agendas, transcripts, minutes, notes, summaries, attendance lists, expense reports and travel itineraries, handouts, presentations, or correspondence related to such meetings.

12. All documents that You have sent to or received from any trade association identified in response to Request No. 10 concerning prices, pricing, pricing policies or practices, bids, customers, customer allocation, territory allocation, competitive conditions, antitrust compliance, marketing, or sales of generic pharmaceuticals.

13. All documents that You have sent to or received from any trade association concerning any of Your generic pharmaceuticals.

14. All documents concerning any meeting or event You attended that was held at, hosted by, or sponsored by a pharmaceutical industry trade association or other host of industry events related to pharmaceuticals, including any of the following entities:

(a) Association for Accessible Medicines (formerly Generic Pharmaceutical Association);

(b) National Association of Chain Drug Stores

(c) Minnesota Multistate Contracting Alliance for Pharmacy;

(d) Efficient Collaborative Retail Marketing, including any Efficient Program; Planning Sessions, or EPPS;

(e) Healthcare Distribution Alliance (formerly Health Distribution Management Association);

(f) American Society of Health-System Pharmacists;

(g) National Pharmacy Purchasing Association; and

(h) Health Care Supply Chain Association.

15. All documents concerning the events known as “Girls Night Out” or “Women in the Industry” or similar social or professional gatherings of one or more Defendant or competitor, whether officially sanctioned or informally organized.

16. All documents concerning any meals (including industry dinners), coffees, or cocktails attended by more than one Defendant or competitor.

17. All documents concerning any travel during which more than one Defendant or competitor met.

18. For each of Your employees with responsibility for recommending, reviewing, monitoring, setting, updating, reporting, changing, modifying, announcing, or approving prices or bids for generic pharmaceuticals:

(a) all calendars, appointment books, and appointment notes;

(b) all trip and travel logs;

(c) all time sheets or records;

(d) all expense vouchers or expense reports and supporting documents;

(e) all telephone number logs, directories, contact management systems, notebooks, and Rolodex-type contact files;

(f) all handwritten journals or notebooks used to memorialize work activities, including but not limited to, meetings and conference calls;

(g) all bills, statements, records, databases, and logs concerning the employee's office, home, cellular, or other mobile or landline telephone(s);

(h) documents sufficient to identify all email addresses, social or industrial/business web-based media accounts (*e.g.*, Facebook®, Twitter®, LinkedIn® Instagram®, Snapchat®, Cluster),cellular phone numbers, office phone, and facsimile numbers, or other telephone numbers assigned by You to each such employee or used by the employee in connection with his or her employment by You; and

(i) documents sufficient to show the dates of employment, the title and dates of each position held, and job duties.

19. For each of Your employees with responsibility for marketing or sales of generic pharmaceuticals:

(a) all calendars, appointment books, and appointment notes;

(b) all trip and travel logs;

(c) all time sheets or records;

(d) all expense vouchers or expense reports and supporting documents;

(e) all telephone number logs, directories, notebooks, and Rolodex card files;

(f) all handwritten journals or notebooks used to memorialize work activities, including but not limited to, meetings and conference calls.

(g) all bills, statements, records, databases, and logs concerning the employee's office, home, cellular, or other mobile or landline telephone(s);

(h) documents sufficient to identify all email addresses, social or industrial/business web-based media accounts (*e.g.*, Facebook®, Twitter®, LinkedIn® Instagram®, Snapchat®, Cluster), cellular phone numbers, office phone and facsimile

numbers, or other telephone numbers assigned by You to each such employee or used by the employee in connection with his or her employment by You; and

(i) documents sufficient to show the dates of employment, the title and dates of each position held, and job duties.

20. All documents concerning any meetings or communications between two or more Defendants, competitors, or third parties concerning any of Your generic pharmaceuticals.

21. All documents concerning any communication between two or more Defendants or competitors concerning prices, pricing, pricing policies or practices, bids, customers, customer allocation, territory allocation, competitive conditions, marketing, production, or sales of Your generic pharmaceuticals.

22. All documents concerning any meetings between You and any other Defendant or any competitor, including: (a) calendars, appointment books, appointment notes, or any other handwritten notes; (b) trip and travel logs or itineraries and time sheets or records; (c) receipts or invoices; (d) expense vouchers or expense reports and supporting documents; and (e) telephone bills, statements, and records; and (f) text messages (including any SMS, MMS, or iMessages).

23. All documents concerning the allocation of customers, territories, or geographic markets for generic pharmaceuticals between two or more Defendants or competitors.

24. All documents concerning any other Defendant's or any competitor's: (a) pricing policies and practices for generic pharmaceuticals; (b) costs, pricing, or prices for generic pharmaceuticals; or (c) employees with responsibility for generic pharmaceutical production, sales, pricing or marketing.

25. All documents concerning the deletion, destruction, or erasure of any communications between two or more Defendants or competitors.

26. All documents concerning the need or desire for secrecy of any communications between two or more Defendants or competitors, including documents regarding how or whether such

communications should or should not be transmitted.

27. Irrespective of time period, all statements, affidavits, declarations or other factual material referring to or submitted in connection with any investigation or litigation relating to the pricing or sale of generic pharmaceuticals other than the criminal investigation that the Antitrust Division of the U.S. Department of Justice is conducting into the generic pharmaceuticals industry.

28. Irrespective of time period, all documents provided to the United States House of Representatives or the United States Senate, or any committee, subcommittee, employee, representative or agent thereof; the Government Accountability Office; any regulatory or investigative agency of any state or the District of Columbia; the Food and Drug Administration; or the United States Department of Health and Human Services in connection with, or in response to, any request for information or documents concerning any of Your generic pharmaceuticals or Your generic drug portfolio generally, including:

(a) all documents that You submitted voluntarily;

(b) all documents provided or produced subject to subpoena or other investigatory demand issued by any of the entities identified in this Request;

(c) all subpoenas and other investigatory demands issued by any of the entities identified in this Request concerning antitrust violations or the pricing of generic pharmaceuticals, including all related correspondence with said entities; and

(d) all position papers and prepared remarks (including any drafts or text of such papers or remarks, and communications regarding such remarks) submitted or presented, or intended to be submitted or presented, to any of the entities identified in this Request, and

(e) all transcripts, notes, summaries, and recordings of, and communications regarding testimony given to any of the entities identified in this Request in connection with any investigation of antitrust violations or the pricing of generic pharmaceuticals.

29. All documents concerning Your refusal to join or Your withdrawal from any contract, combination, conspiracy, agreement or understanding to fix, raise, stabilize or maintain the prices of generic pharmaceuticals or to allocate territories, geographic markets for, or customers of generic pharmaceuticals.

30. All documents relating to any of Your generic pharmaceuticals and concerning any other Defendant or any competitor, except for documents about the criminal investigation conducted by the Antitrust Division of the U.S. Department of Justice into the generic pharmaceuticals industry.

31. All documents concerning any action, process, method, manner, policy, practice, strategy or procedure that You proposed, considered or used for setting, raising, lowering, changing or maintaining: (a) the prices You offered or charged for generic pharmaceuticals; and (b) Your capacity to produce or distribute generic pharmaceuticals.

32. All documents concerning prices, pricing, pricing policies or practices, solicited or unsolicited bids, requests for proposals ("RFPs"), customers, customer allocation, territory or market allocation, competitive conditions, marketing production, or sales of any of Your generic pharmaceuticals.

33. All documents concerning prices, pricing, pricing policies or practices, solicited or unsolicited bids, RFPs, customers, customer allocation, territory or market allocation, competitive conditions, marketing, production, or sales of any of Your generic pharmaceuticals

submitted to the United States House of Representatives or the United States Senate, or any committee, subcommittee, employee, representative or agent thereof; the Government Accountability Office; any regulatory or investigative agency of any state or the District of Columbia; the Food and Drug Administration; or the United States Department of Health and Human Services, including for example, documents submitted to meet product and pricing reporting requirements.

34. All pricing manuals, matrices, guidelines, policies, formulas, and algorithms for each customer, class of customer, or class of trade or subgroup thereof for any of Your generic pharmaceuticals.

35. All documents concerning written contracts or policies related to Your sales of any generic pharmaceutical, including terms relating to payment, pricing, price protection, chargebacks, rebates, right of first refusal, discounts, and other price or quantity adjustments.

36. All documents concerning written contracts between You and a purchaser that provide that the purchaser will take delivery of any generic pharmaceutical from a person, firm, corporation, or business entity other than You (such as a wholesaler).

37. All documents concerning any proposal or offer made by You to any prospective or current buyer to supply any generic pharmaceutical, whether accepted by the buyer or not.

38. For all of Your generic pharmaceuticals, documents sufficient to show, for each month, for each NDC, Your actual:

(a) list price;
(b) average sales price (ASP)
(c) average wholesale price;
(d) average transaction price;
(e) wholesale acquisition cost;
(f) direct price;

(g) price under Medicare program;

(h) price under Medicaid program;

(i) maximum allowable price;

(j) average manufacturing price as defined by, and reported to the Centers for Medicare and Medicaid Services;

(k) average discount off of wholesale price or wholesale acquisition cost;

(l) net revenue;

(m) gross sales;

(n) net sales;

(o) all measures of margin, income, earnings, and profits;

(p) unit volumes sold;

(q) unit volumes sold net of returns;

(r) chargebacks;

(s) rebates;

(t) discounts;

(u) administrative fees;

(v) billbacks;

(w) unit adjustments;

(x) price adjustments;

(y) shelf-stock price adjustments;

(z) returns;

(aa) third-party returns;

(bb) error corrections;

(cc) nominally priced goods;

(dd) free goods; and

(ee) total product contribution.

39. All documents concerning Your actual, potential, expected, or projected production volume, production capacity, unit sales, dollar sales, prices or other terms of sale, forecasts, or profits from any of Your generic pharmaceuticals.

40. All documents concerning any Defendant's or any competitor's actual, potential, expected, contemplated or projected production volume, production capacity, costs, unit sales,

dollar sales, prices or other terms of sale, or profits from any of Your generic pharmaceuticals.

41. All documents concerning any contemplated or actual change in Your or any Defendant's or any competitor's production volume, production capacity, costs, unit sales, dollar sales, prices or other terms of sale, or profits from any of Your generic pharmaceuticals.

42. All documents concerning Your business plans, marketing reports, strategic plans, revenue goals, pricing strategy, or economic analyses concerning any of Your generic pharmaceuticals.

43. All documents concerning any actual or potential scarcity or shortage of any of Your generic pharmaceuticals, including without limitation, Documents and ESI concerning communications with the U.S. Food and Drug Administration ("FDA") or any other person.

44. All documents concerning any downgrade by the FDA of any of Your generic pharmaceuticals, including documents concerning communications with the FDA or any other person.

45. All documents concerning any decision to discontinue or partially discontinue the sale of any of Your generic pharmaceuticals, including documents concerning communications with the FDA or any other person.

46. Document sufficient to identify Your suppliers of any generic pharmaceutical and any communications about increased or reduced supply.

47. Documents sufficient to show the manufacturing process (including any API, excipients, and other raw material inputs) used in the production of any of Your generic pharmaceuticals, including the process contained in your ANDA and in any post-approval supplements.

48. Documents sufficient to identify each entity that supplies You with any API, excipients, and other raw material inputs for any of Your generic pharmaceuticals, and the name and

location of that entity's facilities that make the ingredient or material supplied to You.

49. All agreements between You and each entity that supplies You with any API, excipients, and other raw material inputs for any generic pharmaceutical.

50. Documents sufficient to show the types and monthly amounts and costs, as well as the source, of any API, excipients, and other raw material inputs used to produce any of Your generic pharmaceuticals, including data and documents sufficient to show the relative proportion of cost associated with each component of variable cost and each component of total cost.

51. All documents concerning any relationship between the costs of producing, distributing, marketing, promoting, or selling any of Your generic pharmaceuticals, and the price or prices at which the generic pharmaceutical was or is sold.

52. Documents sufficient to show, on a daily basis, Your actual and projected costs and expenses attributable to the manufacture, marketing, and sale of any of Your generic pharmaceuticals, including:

(a) fixed costs;

(b) overhead costs;

(c) variable costs, including disaggregated costs;

(d) short-run average variable costs;

(e) long-run average variable costs;

(f) operating costs;

(g) sales and distribution cost;

(h) cost of goods sold;

(i) costs of purchasing API and other ingredient supplies or inputs;

(j) manufacturing costs;

(k) energy costs;

(l) marketing, advertising, promotional and sales expenses;

(m) depreciable and capital improvements;

(n) public relations costs;

(o) sales force costs;

(p) co-promotion costs;

(q) publication costs;

(r) regulatory compliance;

(s) licensing fees and royalties paid and received;

(t) materials cost, by each material;

(u) labor cost;

(v) marginal cost;

(w) transportation costs;

(x) storage costs; and

(y) destruction costs.

53. All documents concerning any changes to the costs and expenses listed in the immediately preceding request.

54. Documents sufficient to show the data, publications, and other sources (whether internal or third-party) You use or have used to monitor the costs of raw materials used to produce any of Your generic pharmaceuticals.

55. All documents concerning any shortages or disruption of the supply of any API, excipients, and other raw material inputs used to produce any of Your generic pharmaceuticals.

56. All documents concerning the competitive conditions of the United States market(s) (including any geographic subdivisions thereof) for any of Your generic pharmaceuticals, including Your market share and the market share of any other seller of the generic

pharmaceutical.

57. All documents concerning the impact of acquisitions, sales, mergers, or other changes in corporate ownership of any drug manufacturer or seller on the United States market (including any geographic subdivisions thereof) for any of Your generic pharmaceuticals, including the purchase of individual drugs or molecules as the result of required divestitures.

58. All documents concerning the entry, attempted entry, non-entry, discontinuation of manufacture or sale, or withdrawal from the market of any branded or generic version of the any of Your generic pharmaceuticals, in the United States and any geographic subdivisions thereof.

59. All documents concerning any actual or prospective methods, practices, policies, or strategies for gaining or maintaining market share in the market(s) for any of Your generic pharmaceuticals.

60. All documents concerning the competitive strengths or weaknesses of the manufacturers and sellers of any of Your generic pharmaceuticals.

61. Documents sufficient to show the data, publications, and other sources (whether internal or third-party) You use or have used to monitor the United States market (including any geographic subdivisions thereof) for any generic pharmaceutical.

62. All documents concerning the fungibility, substitutability, price elasticity, or interchangeability of any of Your generic pharmaceuticals with any other drug.

63. All documents sent to or received by the FDA concerning the marketing status, discontinuance of manufacture or sale, ANDA approval status, or withdrawal from the market of any branded or generic version of the any of Your generic pharmaceuticals.

64. All documents concerning any actual or potential change in the marketing status, discontinuance of manufacture or sale, or withdrawal from the market of any branded or generic

version of any of Your generic pharmaceuticals.

65. All documents concerning Your policies, practices, guidelines and training directed to compliance with the antitrust or competition laws of the United States, of any state or the District of Columbia of the United States, or any foreign country, including all documents concerning the creation of such policies, and any statements signed by Your employees involved in the pricing or sale of any of Your generic pharmaceuticals acknowledging their receipt of or compliance with Your antitrust compliance policies.

66. All documents concerning any other Defendant's or any competitor's antitrust compliance, policies, efforts, programs, trainings, admonitions, warnings, communications, and concerns.

67. All transaction-level sales (and sales adjustment) data (in digital, computer readable format) concerning Your U.S. sales of any of Your generic pharmaceuticals. Such data shall be produced in the most disaggregated form (meaning at the individual transaction level, not aggregated by month, quarter, or any other time period). Such data shall identify, where applicable, for each sale or other transaction (including returns and error corrections):

(a) the unique invoice number, unique invoice date, unique purchase order number, unique purchase order date, unique sale date, and unique shipment date;

(b) the identity of the particular product, and any and all codes concerning transaction types, as well as descriptions of those transaction types;

(c) the quantity and units of measure for each sale;

(d) the name and address of, and all unique codes or identifiers for, the person, firm, corporation, or other business entity billed or credited for the sale (the bill-to customer) and, in addition, the full name and address of the parent company, if the database or documents identify a subsidiary, corporate affiliate, division, satellite office, or warehouse;

(e) the name and address of, and all unique codes or identifiers for, the person, firm, corporation, or other business entity to whom You shipped the products (the ship-to customer) and, in addition, the full name and address of the parent company, if

the database or documents identify a subsidiary, corporate affiliate, division, satellite office, or warehouse;

(f) the SKU, NDC, UPC, package size in extended units per package, and any and all other unique codes or other identifiers;

(g) the amount paid for freight and the identity of the freight payor;

(h) the number of packages sold, returned or otherwise affected by the transaction;

(i) any price or unit adjustments identified by adjustment type (including discounts, rebates, chargebacks, billbacks, price adjustments, credits, debits, shelf-stock price adjustments, returns, error corrections, free goods, or nominally-priced goods), whether monthly, quarterly or at any other periodicity, involving or concerning sales or transactions of any of Your generic pharmaceuticals, and including all database fields specified above in this request;

(j) the basis for calculating the price or unit adjustments referenced in subsection (i) (*i.e.* percentage discount off of WAC).

(k) the gross amount in dollars, dollars per package, and dollars per unit, for each sale or transaction or the source of the transaction price;

(l) the net amount in dollars, dollars per package, and dollars per unit, for each sale or transaction or the source of the transaction price;

(m) all pricing information concerning the sale, including shipping, tax, or similar charges;

(n) any discounts, rebates, credits, freight allowances, free goods, or any other pricing adjustment, with sufficient information to attribute these adjustments to individual sales;

(o) All administrative fee transactions including: (i) fee amount paid, (ii) date of payment, (iii) date or date range of sales relating to the fee that was paid, (iv) information sufficient to identify the type of administrative fee (if applicable), (v) customer name, (vi) customer number, (vii) customer address, and (viii) customer class of trade code and the description of that code;

(p) the currency in which the sale was billed and paid;

(q) the location from which the generic pharmaceutical was shipped; and

(r) information sufficient to identify the contract(s) governing the transaction.

68. All data (in digital, computer-readable format) for each of Your generic pharmaceuticals concerning chargebacks, rebates, discounts, or other price or quantity adjustments, given or

accrued, whether applicable to direct or indirect sales. Such data shall be produced in the most disaggregated form (meaning at the transaction level where possible, not aggregated by month or quarter or any other time period). Such data shall identify:

(a) each transaction, including the date and type (i.e., chargeback, rebate, discount, or other price or quantity adjustment) thereof;

(b) the name and address of, and all unique codes or identifiers (including class of trade and those used to differentiate between direct and indirect customers) for, the person, firm, corporation, or other business entity to whom You paid, or on whose behalf You accrued, the chargeback, rebate, discount or other price or quantity adjustment;

(c) the name and address of, and all unique codes or identifiers for (including class of trade and those used to differentiate between direct and indirect customers), the person(s), firm(s), corporation(s), or other business entity(ies) that made the purchase(s) in respect of which You paid or accrued the chargeback, rebate, discount or other price or quantity adjustment;

(d) the sales, or group of sales, upon which the chargeback, rebate, discount or other price or quantity adjustment is based, including:

(1) the number of units of the particular product sold, by package size, SKU, UPC, NDC, and any and all other unique codes or other identifiers for each sale or other transaction;

(2) the bill-to customer;

(3) the ship-to customer;

(4) the date(s) of the sales, or group of sales;

(5) the invoice amount in dollars for the sale(s) or group of sales;

(e) the amount of the chargeback, rebate, discount, or other price or quantity adjustment;

(f) in the case of a chargeback transaction, the contract price and wholesale acquisition cost;

(g) information sufficient to identify the contract, agreement, or other basis governing the payment or accrual of the chargeback, rebate, discount, or other price or quantity adjustment; and

(h) the basis for calculating the chargeback, rebate, discount, or other price or quantity adjustment (*i.e.* percentage discount off of WAC).

69. With regard to the data requested in Request Nos. 67-68, please provide:

(a) a separate product list, including NDC, SKU, UPC, product description, and package size;

(b) customer lookup tables or any other tables that list, for each bill-to customer and ship-to customer, the customer number, parent customer number, customer group number, customer identity, contact information, address, class of trade (e.g., SIC code), and description of the class of trade;

(c) data dictionaries, decoding documents, lists and definitions for each transaction code, abbreviation, or other field or entry code or value, and indicating whether quantity values for each transaction type should be included in calculating net quantity sold, or should be ignored because they do not affect net quantity sold; and

(d) all datasets and calculations used:

(1) to determine accrued rebates or chargebacks; or

(2) to periodically reconcile accrued rebates or chargebacks with actual rebates or chargebacks.

(e) a key or identification of a set of variables that allows for the correct merging and combining of the data You produce;

(f) to the extent that codes or values have changed over time as the result of a database platform shift, redesign, etc., mapping Documents or datasets connecting values in previous periods to their equivalent counterparts.

70. Documents sufficient to identify Your policies and practices concerning discounts, rebates, credits, freight allowances, free goods or services, or any other price or quantity adjustment of any kind, including any customer contract which refers to or contains any such information;

71. All documents related to the offer and utilization of coupons or other discounts for any of Your generic pharmaceuticals that You made available to end-payers.

72. All documents, reports, or analyses concerning copayments or coinsurance attributable to consumers' purchases of any of Your generic pharmaceuticals.

73. All documents reflecting the chains of distribution for sale of the Any generic pharmaceutical in the United States.

74. For each of Your generic pharmaceuticals, documents sufficient to show, for each month, the prices, dollar sales, and units dispensed attributable to each of:

(a) Medicare;

(b) Medicaid;

(c) Children's Health Insurance Program (CHIP); and

(d) Tricare.

75. All data or reports generated by IMS, CMS or Verispan, or any comparable third-party (including Medi-Span, ImpactRX, Truven, Symphony Health, Wolters Kluwer, and First Databank), in whatever format it was received from the third party, relating to the sale, prescription, marketing, promotion, or detailing of pharmaceuticals for any of Your generic pharmaceuticals, including the below third-party data, or reports generated by You using such data.

(a) IMS National Prescription Audit or Xponent data, including NDC code, TRx, NRx, extended units, retail sales dollars, retail sales price, wholesale acquisition cost, distribution channel, patient age, patient co-payment, payment type, and geographic information.

(b) IMS National Sales Perspective data, including NDC code, total units, extended units, total sales dollars, price, wholesale acquisition cost, and distribution channel.

(c) CMS Drug Utilization data, including TRx, Medicaid paid amount and extended units.

(d) Verispan Vector One National (VONA) data, including TRx, NRx, extended units, retail sales dollars and retail sales price.

76. All documents prepared by, submitted to, or received from any consulting firm or agency, financial or business services firm, investor (actual or contemplated) relating to the production,

manufacture, distribution, marketing, profitability, pricing, or sale of any of Your generic pharmaceuticals.

77. All documents about Your communications about any of the lawsuits in the above-captioned MDL with non-parties, including class members, except for documents about the criminal investigation conducted by the Antitrust Division of the U.S. Department of Justice into the generic pharmaceuticals industry.

78. All documents reflecting or concerning Your communications with any of the plaintiffs named in any of the lawsuits in the above-captioned MDL.

79. Documents sufficient to identify and describe the systems and structures You use to store, maintain, or utilize Your ESI, including all codes, information, documentation, ESI or programs necessary to utilize any ESI You are producing in response to these requests.

80. Documents sufficient to identify Your preservation, retention, backup, storage, destruction, and litigation hold policies and practices for documents, electronic communications equipment, and data storage media (including phones, mobile devices, laptops, tablets, pagers, personal computers, servers, removable storage media, cloud storage, and backup media) as well as any changes to, enforcement of, and compliance with, those policies over the Relevant Period.

81. To the extent not encompassed in Your response to Request No. 80, documents sufficient to show Your policies and practices regarding: (a) the maintenance, transfer, destruction, deletion, or preservation of documents and electronic equipment (including laptops, work stations, mobile and other personal devices) maintained or used by employees who leave Your employment or who transfer to another Department ("off-boarding"); (b) the transfer of documents to new employees or transferred employees ("on-boarding"); and (c) migration of data from retired or replaced electronic communications equipment and systems (for example,

laptop or personal computer retirement and replacement), as well as any changes to, enforcement of, and compliance with those policies over the Relevant Period.

82. Documents sufficient to identify all workstations, laptops, mobile devices, storage media and similar electronic equipment or media used by each individual identified in Request No. 3, that are no longer in active use and retained and stored and the location of such stored electronic equipment.

83. Documents sufficient to identify Your internal telephone systems and services and any databases or storage systems in which records of telephone communications (e.g., call detail records and similar logs of telephone calls made or received and voicemails received) are stored.

84. Documents sufficient to show any known departure or variance from any of Your policies concerning the retention, storage, or destruction of any document identified in Request Nos. 80 and 81.

85. All documents concerning the removal, redaction, erasure, alteration or deletion of any computer file or electronic data responsive to any discovery request served by any Plaintiff in this MDL, including file fragments and deleted files.

86. Documents sufficient to show Your policies and procedures concerning the use of instant messaging services or applications, social media, and mobile devices, including phones, PDAs, and tablets by Your personnel, including any “bring your own device” or “bring your own technology” policies.

87. Documents sufficient to show Your policies and procedures concerning confidentiality of Your business information.

88. All documents not requested herein that you produce to any defendant in this MDL.

89. All of Your transaction-level sales (and sales adjustment) data (in digital, computer

readable format) for each Drug at Issue concerning indirect sales, together with any discounts, price adjustments or offsets contained in the transaction data. Such data shall be produced in the most disaggregated form (meaning at the transaction level, not aggregated by month or quarter). Such data shall identify, where applicable, for each sale or other transaction (including error corrections):

(a) wholesaler name;

(b) wholesaler number;

(c) wholesaler DEA number;

(d) indirect customer name;

(e) indirect customer number;

(f) indirect customer DEA number;

(g) indirect customer complete address;

(h) indirect customer class of trade code;

(i) indirect customer class of trade code description;

(j) NDC;

(k) product description;

(l) product form;

(m) product strength;

(n) product package size;

(o) date of transaction between the wholesaler and its customer (i.e., the indirect customer);

(p) contract price;

(q) wholesale price;

(r) price paid by the indirect purchaser;

(s) number of units sold;

(t) location of transaction (city and state);

(u) gross profit, net profit, and rate of return; and

(v) all administrative fee transactions including: (i) fee amount paid, (ii) date of payment, (iii) date or date range of sales relating to the fee that was paid, (iv) information sufficient to identify the type of administrative fee (if applicable), (v) customer name, (vi) customer number, (vii) customer address, and (viii) customer class of trade code and the description of that code;

90. For the Drug at Issue, documents sufficient to identify the total number of units of the Drug at Issue sold to end-payers on a monthly, quarterly and annual basis, together with documents sufficient to show: (a) location of sales (city and state); (b) product description; (c) product strength; (d) product formulation; (e) package size in terms of units per package; and (f) NDC, UPC, or SKU.

91. All documents, studies, reports and analyses identifying or concerning any persons and entities that indirectly purchased and/or paid for some or all of the purchase price of the Drug at Issue.

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	.	Case No. 2:16-MD-02724-CMR
	.	Case No. 2:17-CV-01879-CMR
GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	.	
	.	U.S. Courthouse
	.	601 Market Street
	.	Philadelphia, PA 19106
STATUS CONFERENCE	.	
	.	
	.	May 4, 2017
. . . . .	.	2:01 p.m.

REVISED TRANSCRIPT OF STATUS CONFERENCE
BEFORE HONORABLE CYNTHIA M. RUFE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For USA (Intervenor):

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the authority—

MALE VOICES: Couple weeks.

MR. MORGENSTERN: I think a couple of weeks.

THE COURT: Okay, 30 days. 30 days is a good round number, and we intend to address leadership momentarily.

MR. MORGENSTERN: Great. Thank you, Your Honor.

THE COURT: Thank you. Would counsel agree that this is a good time to hear from the Government?

MS. NAST: Yes, Your Honor. We may want to respond afterwards.

THE COURT: I know. And you'll get a chance to do that in writing as well.

MS. NAST: Thank you, Your Honor.

MR. EWALT: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. EWALT: Andrew Ewalt from the Antitrust Division of the U.S. Department of Justice, on behalf of the Intervenor, United States of America. I want to thank Your Honor for hearing from us today. As has been discussed by virtually everyone already, we did file a motion on Monday asking for a stay of discovery for a period to allow the cases to get organized.

The stay was our way of communicating to the Court the importance of proceeding in an orderly fashion with discovery here, to make sure that the civil discovery in these

consolidated cases doesn't interfere with our ongoing criminal investigations. This investigation has been under way for some time, continues to develop, and there are very substantial overlaps between parties involved, and the drugs involved, certainly the legal claims involved there, and we have concerns that if civil discovery went ahead as quickly as some of the proposals have suggested, - - an opportunity to be heard, that there could be—civil discovery could interfere with our criminal work.

So, we filed a motion with the hope that Your Honor would consider the impacts of that discovery on the criminal case, the criminal investigation, excuse me, when you're fashioning the procedures and organizing the MDL here today.

THE COURT: Thank you, Mr. Ewalt. It's my understanding that in certain other courts, before all of the cases were put under this umbrella, the Government had intervened for the same purposes and the same reasons. And also, that several of the Judges had already ordered that limited discovery proceed, depositions of certain individuals would not. Did that hamper the investigation?

MR. EWALT: If I could, so, I believe there are two cases that Your Honor has in mind, one before Judge Rakoff and one before Judge Pauley. So both of those, Your Honor is correct, both of those Judges considered requests from the Government before the Panel had acted. But I think that it is

really-the different context here is really important. Part of the reasoning behind the Panel's decision to consolidate these cases was so that discovery could be done on a coordinated basis—

THE COURT: Coordinated, yes, absolutely.

MR. EWALT: --an efficient basis, and part of that consideration also was to make sure that a Judge, in this case yourself, Your Honor, had an opportunity to consider the impact sort of all of this discovery on a criminal investigation. So that had happened when Judge Rakoff and Judge Pauley made their decisions, but the Panel knew that some Judges had stayed discovery, or at least discovery had not started in other cases yet, and they knew some Judges had taken a different view, and moved discovery along more quickly. And I think that inherent in the idea of consolidation is that if you have some cases over here, and some cases over here, you have to bring them together to find a common path forward, I think that was inherent in what the Panel was doing by consolidating these cases.

And turning specifically to what I understood Judge Rakoff's and Judge Pauley's reasoning to be, before Judge Rakoff, made it very clear from the outset, the very first conference, that discovery was to conclude—I believe the first time was in January, and discovery was to conclude by July, with trial initially in September, and then as additional cases

were filed, trial was pushed back to November. This was a very, very aggressive schedule. And in light of the Court's desire to keep to that schedule, balancing all the issues, all the interests, and Judge Rakoff certainly considered our interest, we believe, at the time, but to keep the schedule he wanted to keep the case moving along, and did not follow through with the stay that we requested.

We're in a different position now. I don't think anyone is calling for a trial this fall. So we hope that our interest in preserving the integrity of the criminal investigation will have some weight in this case.

THE COURT: Well, there's a natural benefit to the Government's position in that this is an MDL that's being reorganized, and discovery can't go full steam ahead in any way, shape or form if we don't have that in place. And it's not going to be haphazard, but we will have to think about how long we can wait, and that's going to, in large part, depend on how many motions I have to decide, what the issues are there, the consolidated complaints, and it may very well also be guided by your own prosecutions and investigations.

So, it is possible to split the baby, as they say, and have document discovery as opposed to depositions of key people who may have to take the Fifth Amendment. I'm pretty familiar with all of that, and I find it very interesting and compelling, and I can't wait to get into it, but the truth is

you have a natural benefit here with the creation of this larger and inclusive MDL, because it will be coordinated, and you won't have to be shifting from Court to Court to plead your situation, as long as I am assured that your investigation is moving forward, and it's not in a black hole that they often accuse MDLs of becoming, so we're not going to let that happen here.

But, I think that there's always common ground, and we'll be looking for that as soon as we get responses, and briefing is concluded on your motion.

MR. EWALT: Thank you, Your Honor. And we'd also be happy to try and work out with parties for all sides some sort of reasonable accommodation. We're just coming into the hearing, we weren't sure how everything would come out, and we wanted to be on record expressing our concerns about the potential for the interference with the criminal investigation of civil discovery.

THE COURT: Well, your record is absolutely made, and I am as concerned about it as anyone, and I think everyone wants to have the information, but not at all costs.

MR. EWALT: Thank you, Your Honor.

THE COURT: Thank you.

MS. NAST: Your Honor, may I respond—

THE COURT: Please do.

MS. NAST: --briefly, very briefly. As you have

already mentioned, there is discovery going on, or had been going on—

THE COURT: Had been.

MS. NAST: --with respect to four of the 18 drugs in the Southern District of New York. There have been many 100s of 1000s of pages produced in the case that—in propranolol, and in the—

THE COURT: [Interposing] And was that coordinated with the case here in the Eastern District?

MS. NAST: No, that has proceeded on its own.

THE COURT: Okay.

MS. NAST: And then in the corticosteroid cases, the Defendants, as I understand it, agreed to the production of certain types of materials, and that production had begun and was ongoing. In propranolol the production was to have been completed, it was aggressive, was to have been completed by April 30th. We consulted with Bob Kaplan, and Bob gave the Defendants—had a sort of loose extension, knowing that the cases were coming here.

What we would suggest—first of all, we've never suggested depositions and we've never suggested interrogatories, we've only suggested, at this point in time, document production to begin. Secondly, what we would suggest is that counsel meet with counsel for the Government, and see, as you pointed out, that there may be common ground. We're not

looking for everything that he's concerned we're looking for. And so, it may be that we can simply work it out. And if we can, we'll file appropriate papers so Your Honor knows. If we can't, we'll file response to the motion.

THE COURT: Very good. That sounds like a good plan.

MS. NAST: Thank you.

THE COURT: Mr. Morgenstern?

MR. MORGENSTERN: Yeah, again, Your Honor—

THE COURT: And then I'll get back to you.

FEMALE VOICE: Thank you, Your Honor.

MR. MORGENSTERN: I just want to make—I just would love to make sure that the record's clear on sort of what happened in the Southern District in those cases. I'm not in the propranolol case, I don't know what they produced, but I understand they produced something. In the so-called corticosteroids cases, the fluocinonide, desonide and clobetasol, we're in actually one of those, the clobetasol case, there was no discovery in that case. The Plaintiffs served a request for production of documents. Judge Pauley had directed or had denied our request for a complete stay so that we wouldn't have to respond to it. We were preparing to respond to it when the JPML ruled, and so we all went back to Judge Pauley and advised him that the case was going to New York, and he suspended his orders. So no one, to my knowledge, has actually responded in writing to those requests for

and the Government did not object to the document request that we did serve, so there was no opposition from the DOJ.

THE COURT: All right, so that's helpful to know, but Mr. Ewalt?

MR. EWALT: I just want to point out, we had a chance to review the document request that they were served in the corticosteroid cases, and after reviewing them we had no objection, and if we had an opportunity to review discovery before it was served in other instances, we might be able to have those same positions.

THE COURT: I have to say that I admire and take very seriously the benefit of having Judges pay attention to these cases, even with full realization that they wouldn't remain with them. They did a great service to all of the parties, and to this MDL, and I appreciate it. It's interesting that we find ourselves in a slightly different kind of situation, but it says that there is room to move. Not everything is at a standstill, and I think that that's our attitude. So we'll all do what we can as efficiently and quickly and fairly as we can.

But I really do appreciate, and I hope that everyone who practices before these wonderful Judges can communicate that, because I think that's what we're supposed to do, and very often it's easier for the Judges to just put it aside, and just say, oh, another Judge will get that MDL and I won't have to deal with it, but they did a service to all of you. So

thank you Judges.

Now, where are we? Because we're going to let everybody talk about that. Ms. Liebenberg?

MS. LIEBENBERG: Just quickly, Your Honor. I just want to echo the opportunity to—that Ms. Nast talked about, about being able to meet with the Government. Because their proposal is only for a limited stay, and they only request that after all of the complaints are filed, 30 days after that, we could engage in negotiations with them with respect to the sequencing and timing of discovery, and so I think we want to—I just want to make sure that, you know, there's a difference between this limited notion of a stay, and the indefinite stay that the Defendants are asking for.

Their proposal is that no discovery could take place until a motion to dismiss is decided with respect to one drug. And then you'd get discovery. And that, of course, would fly in the face of what the Panel recognized in terms of the efficiencies, because there are these overlapping conspiracies, and they recognize there would be witnesses and documents that would be the subject to discovery across all actions.

And just one final point, and I'm sure we'll brief this again, there are no cases in this District or in the Third Circuit that require a blanket stay of discovery during the pendency of a motion to dismiss. And in fact, there are several antitrust class action cases where discovery was

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FWK HOLDINGS, LLC, on behalf of itself and all others similarly situated, Plaintiff, v. ACTAVIS ELIZABETH, LLC, et al., Defendants.	Case No. 1:16-cv-09901-JSR
CÉSAR CASTILLO, INC., individually and on behalf of all those similarly situated, Plaintiff, v. ACTAVIS ELIZABETH, LLC, et al., Defendants.	Case No. 1:17-cv-00078-JSR

MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' MOTION FOR RECONSIDERATION OF ITS MOTION FOR A LIMITED STAY OF CERTAIN DISCOVERY

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The United States of America, by and through the Antitrust Division of the Department of Justice ("the United States"), respectfully submits this Memorandum in support of its application for reconsideration of its motion for a limited stay of certain discovery in these civil actions to protect the public interest in a substantially related, overlapping criminal investigation into the generic pharmaceutical industry. On February 21, 2017, the United States made an oral motion for a limited stay of certain discovery. The Court denied that motion, but permitted the United States to submit a written motion for reconsideration supported by an *ex parte* declaration regarding the status of its criminal investigation.

The United States now moves for reconsideration, and renews its request for a limited stay of certain discovery.[1] Specifically, the United States respectfully requests that the Court: (1) stay indefinitely all requests for documents regarding the criminal investigation into the generic pharmaceutical industry (including, but not limited to, requests for information pertaining to a grand jury or for any information provided to or seized by the United States); (2) stay indefinitely all requests for documents regarding drugs other than propranolol; and (3) stay until at least June 30, 2017, the deposition of any current or former employee of a Defendant involved in or responsible for the pricing of generic pharmaceuticals. In addition, the United States respectfully requests that the Court order the parties to provide the United States with notice of all discovery requests at the same time that they are served on any other party.

[1] Reconsideration is appropriate because the February 24, 2017 Declaration of Mark Grundvig (the "Grundvig Declaration"), submitted *ex parte* with this Memorandum, "might reasonably be expected to alter the conclusion reached by the court" at the February 21, 2017 hearing. *See Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995).

I. BACKGROUND

Plaintiff FWK Holdings, L.L.C., filed a Direct Purchaser Class Action Complaint on December 23, 2016. (Compl., Case No. 1:16-cv-09901, ECF No. 1 ("FWK Compl.").) Plaintiff Cesar Castillo, Inc., filed a similar complaint on January 5, 2017. (CC Compl., Case No. 1:17-cv-00078, ECF No. 1 ("CC Compl.").) Plaintiffs allege that Defendants sold the generic heart medication propranolol at artificially high prices set by collusion among competitors in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaints refer to the United States' criminal investigation into the generic pharmaceutical industry as part of the factual basis for their antitrust claims. (*See, e.g.*, FWK Compl. at ¶¶ 14-15.)

The United States unsealed the first criminal informations in that investigation on December 14, 2016. Those informations charged high-level executives of a generic pharmaceutical company with violating Section 1 of the Sherman Act by fixing prices, allocating customers, and rigging bids related to the sale of doxycycline hyclate, and by fixing prices and allocating customers related to the sale of glyburide. *See United States v. Glazer*, 2:16-cr-506-RBS, ECF No. 1 (E.D. Pa. Dec. 12, 2016); *United States v. Malek*, 2:16-cr-508-RBS, ECF No. 1 (E.D. Pa. Dec. 13, 2016). The two executives—Jeffrey Glazer and Jason Malek—pled guilty to these charges on January 9, 2017, and both are cooperating with the United States' ongoing criminal investigation.[2]

Although, to date, the United States has filed charges against only Glazer and Malek, as described in this Memorandum and detailed more fully in the Grundvig Declaration, the criminal investigation into the generic pharmaceuticals industry is ongoing and broad-ranging, and it has

[2] Pursuant to the plea agreements executed by Glazer and Malek and the United States, the United States has agreed to request that Glazer and Malek's sentencings be delayed until their cooperation is complete. *See United States v. Glazer*, 2:16-cr-506-RBS, ECF No. 18 (E.D. Pa. Jan. 9, 2017); *United States v. Malek*, 2:16-cr-508-RBS, ECF No. 17 (E.D. Pa. Jan. 9, 2017).

already implicated numerous corporations and individuals. Additional corporations and individuals may be implicated as the investigation continues to develop.

II. ARGUMENT

This Court has the inherent authority to stay discovery in the interest of justice. *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986) ("a court may decide in its discretion to stay civil proceedings ... 'when the interests of justice seem ... to require such action....' " (quoting *United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970)). Pursuant to this discretionary authority, courts have granted applications by the United States to stay parallel civil proceedings in order to protect a pending criminal investigation. *See, e.g.*, *SEC v. Downe*, 1993 WL 22126, at *14 (S.D.N.Y. Jan. 26, 1993) (staying SEC enforcement action pending federal grand jury investigation); *United States v. One 1964 Cadillac Coupe DeVille*, 41 F.R.D. 352, 353 (S.D.N.Y. 1966) ("[W]here both civil and criminal proceedings arise out of the same or related transactions the government is ordinarily entitled to a stay of all discovery in the civil case until disposition of the criminal matter.").

District courts in the Second Circuit consider multiple factors when determining whether to stay civil proceedings where there is a parallel criminal investigation. Those factors include: (1) the overlap of the criminal investigation and civil case; (2) the status of the criminal case, including whether the defendant has been indicted; (3) the interests of the plaintiff in proceeding expeditiously; (4) the interests of the defendant; (5) the public interest; and (6) judicial economy. *See Crawford & Sons, Ltd. v. Besser*, 298 F. Supp. 2d 317, 319 (E.D.N.Y. 2004); *see also Parker v. Dawson*, 2007 WL 2462677, at *3 (E.D.N.Y. Aug. 27, 2007); *JHW Greentree Cap., L.P. v. Whittier Trust Co.*, 2005 WL 1705244, at *1 (S.D.N.Y. July 22, 2005); *Am. Express Bus. Fin. Corp. v. RW Prof'l Leasing Servs. Corp.*, 225 F. Supp. 2d 263, 264-65 (E.D.N.Y. 2002); *Downe*, 1993 WL 22126, at *12; *Volmar Distribs., Inc. v. New York Post Co.*, 152 F.R.D. 36, 39

(S.D.N.Y. 1993). Here, the balance of factors weighs in favor of the limited stay sought by the United States.

A. The Civil Actions Substantially Overlap with the United States' Criminal Investigation.

"The most important factor at the threshold is the degree to which the civil issues overlap with the criminal issues." Judge Milton Pollack, *Parallel Civil and Criminal Proceedings,* 129 F.R.D. 201, 203 (S.D.N.Y. 1989). The Complaints demonstrate the substantial overlap here with their multiple references to the criminal investigation. (*See, e.g.*, FWK Compl. ¶¶ 15, 24-28, 74, 99, 102-103, 115.) Plaintiffs' discovery requests also show how they intend to try to expose details of the criminal investigation. For instance, their first set of requests for documents seeks "[i[rrespective of time period, *all documents and ESI* submitted to, or seized by, the United States Department of Justice . . . in connection with, or in response to, any request for information or documents concerning Propranolol or Your generic drug portfolio generally (where Propranolol is within that portfolio)," including, but not limited to, "any such documents and ESI seized by the Department of Justice," "any such documents and ESI which You submitted pursuant to a grand jury subpoena," and "all transcripts of testimony given to any governmental body in connection with or in response to any investigation of antitrust violations or the pricing of Generic pharmaceuticals." (Ex. A, at 9-10 (emphasis added).) Plaintiffs have sought these documents from not only the corporate defendants, but also Jeffrey Glazer and Jason Malek, the two former executives who have pled guilty to violations of the Sherman Act and who are cooperating with the United States' ongoing investigation. (Ex. B, at 8-9; Ex. C, at 8-9.)

Even if these requests were limited to propranolol—the only drug that the Complaints allege to have been affected by a price-fixing conspiracy—they would overlap directly with the

United Sates' criminal investigation. (*See* Grundvig Decl. ¶ 11.) But Plaintiffs' requests cover more than just documents related to that single drug. They also demand production of documents related to the defendants' "drug portfolio[s] generally (where Propranolol is within that portfolio)." (*See, e.g.*, Ex. A, at 9.) Thus, absent a stay, discovery in these cases would sweep up evidence related to other drugs that the United States is currently investigating. (*See* Grundvig Decl. ¶¶ 8, 11.)

B. The Interests of the Public and Government in Enforcement of the Criminal Laws Support the Proposed Stay.

The public has a significant interest in "allowing the Government to conduct a complete, unimpeded investigation into potential criminal activity." *Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd.*, 7 F. Supp. 2d 523, 529 (D.N.J. 1998); *see also Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962) ("Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities."); *Bureerong v. Uvawas*, 167 F.R.D. 83, 87 (C.D. Cal. 1996) ("[T]he interests of the Government in protecting its criminal investigation are clearly the paramount concern here.").

Broad civil discovery in these cases would threaten the United States' ongoing investigation because subjects of the investigation will gain access to a plethora of evidence that they could not otherwise obtain. (*See* Grundvig Decl. ¶¶ 15-16.) For example, as described above in Part II.A, Plaintiffs have already served on all Defendants a document request seeking information about how they have participated in the ongoing criminal investigation. (*See* Ex. A, at 9-10.) If each Defendant's response was shared with all other Defendants, they would all gain

additional insight into the current status of the investigation and, thus, be better able to formulate strategies to insulate themselves from criminal accountability.

Similarly, any Defendant could observe Plaintiffs' depositions of its co-Defendants' employees to learn whether those employees could inculpate them or their executives (who may be subjects of the ongoing criminal investigation) and whether they already have (or have not) shared inculpatory information with the United States. That information would necessarily provide insight into the scope and substance of the criminal investigation thereby inappropriately allowing Defendants in the civil suits and their executives to use the information to formulate their responses to the criminal investigation. For example, a Defendant might become less likely to cooperate with the investigation if it learned that it had less to gain from cooperation because it could not offer the government as much new information as it previously believed possible. And broad discovery would permit Defendants not only to observe depositions noticed by Plaintiffs, but also to ask questions of the civil co-defendants' employees, or even to notice their own depositions of those employees in attempts to destroy the credibility of witnesses who might incriminate them. *See In re WorldCom, Inc., Sec. Litig.*, 2002 WL 31729501, at *9 (S.D.N.Y. Dec. 5, 2002) (observing that United States Attorney "has a significant interest in preserving the usefulness of cooperating defendants as Government witnesses").

It is not possible to conceive in advance every possible way that civil discovery could be used by skilled and motivated counsel to disrupt the United States' ongoing criminal investigation, but these examples demonstrate some of the potential harms. By contrast, the United States' proposed stay would limit the greatest risks, without preventing the parties from preparing the civil cases for trial. Staying document requests touching upon the criminal investigation and limiting requests to the drug at issue in this lawsuit (propranolol) would limit

the parties' ability to inappropriately piece together details of the broader criminal investigation. But they could still seek documents on all other topics concerning propranolol, including the Defendants' pricing decisions on propranolol, their communications with competitors about propranolol, or the Plaintiffs' purchases of propranolol. If depositions of persons with pricing responsibility were stayed, the parties could still proceed with depositions of other knowledgeable witnesses (such as the Plaintiffs themselves and the parties' damages experts) at any time, and they could conduct depositions of persons with pricing responsibility toward the end of fact discovery (which would probably be necessary in any event, if substantial volumes of documents will be produced). That sequence would spare the witnesses with the greatest potential value and exposure in the criminal investigation from deposition tactics calculated to damage their credibility before they have had an opportunity to cooperate fully, and it would reduce the likelihood that those witnesses would need to impede civil discovery by invoking their Fifth Amendment rights during their depositions. *Cf. SEC v. Saad*, 229 F.R.D. 90, 91 (S.D.N.Y. 2005) (Rakoff, J.) (reiterating that the court had previously stayed depositions of criminal defendants because of the "high likelihood that invocations of the Fifth Amendment privilege will play havoc with the orderly conduct of all . . . of these depositions").

C. The Status of the Criminal Case Supports the Proposed Stay.

Although the unsealed criminal informations do not concern propranolol, courts have granted discovery stays even when civil defendants had not yet been charged criminally. *See, e.g.*, *Downe*, 1993 WL 22126, at *14 (granting stay of SEC enforcement action pending federal grand jury investigation); *Bd. of Governors of Fed. Reserve Sys. v. Pharaon*, 140 F.R.D. 634, 641 (S.D.N.Y. 1991) (stay granted pending state grand jury investigation involving defendant); *SEC v. Control Metals Corp.*, 57 F.R.D. 56, 57 (S.D.N.Y. 1972) (staying civil action pending grand jury investigation); *see also United States v. Hugo Key & Son, Inc.*, 672 F. Supp. 656, 658-

59 (D.R.I. 1987) (staying civil action while Department of Justice considered bringing criminal proceeding based on certain allegations that were the subject matter of the civil claim). For example, in *SEC v. Beacon Hill Asset Management LLC*, Judge Kaplan granted a discovery stay pending the completion of a grand jury investigation. 2003 WL 554618, at *2 (S.D.N.Y. Feb. 27, 2003). Similarly, in *SEC v. Downe*, Judge Leisure stayed the deposition of a cooperating witness, even though no defendants had yet been indicted. 1993 WL 22126, at *13. In addition, in *SEC. v. One or More Unknown Purchasers of Securities of Global Industries, Ltd.*, Judge Abrams permitted a stay of six months pending the U.S. Attorney's decision whether to indict. 2012 WL 5505738, at *3-6.

Judge Abrams explained that courts should be more willing to stay discovery "where, as here, the government is requesting a stay . . . 'in order to protect the integrity of pending criminal investigations, even where an indictment has not yet been returned.'" *Id.* (quoting *Downe*, 1993 WL 22126, at *13). And a "pre-indictment stay is particularly appropriate where both the civil and criminal charges arise from the same remedial statute such that the criminal investigation is likely to vindicate the same public interest as would the civil suit." *In re Par Pharm., Inc., Sec. Litig.*, 133 F.R.D. 12, 14 (S.D.N.Y. 1990) . Here, Plaintiffs allege a violation of the same statute (Section 1 of the Sherman Act) that the United States is investigating, and Plaintiffs claim of propranolol price-fixing overlaps substantially with one aspect of that criminal investigation. (*See* FWK Compl. ¶¶ 131-136; Grundvig Decl. ¶ 11.)

Moreover, courts have recognized that, "before sentencing there is a risk that disclosures in the Civil Case may cause the Court to vacate [] plea agreements." *SEC v. Fishoff*, Case No. 15-cv-3725, 2016 WL 1262508, at *3 (D.N.J. Mar. 31, 2016) (citation omitted). And where an individual is "in the process of working out cooperation agreements with the government," the

United States has "considerable" interest in limiting related civil proceedings because of "concerns about possible perjury, manufacture of false evidence and intimidation of confidential informants." *SEC v. Mersky*, Case No. 93-cv-5200, 1994 WL 22305, at *5 (E.D. Pa. Jan. 25, 1994). Those concerns apply with particular force here because the United States is conducting sensitive negotiations with potential criminal defendants and has a considerable interest in limiting the sworn testimony given by its cooperators. (*See* Grundvig Decl. ¶ 13.)

D. The Requested Stay Will Not Unduly Burden the Interests of the Parties or the Court

In addition to the facts discussed above, the court also should consider the interests of the parties and of judicial economy when deciding whether to stay discovery. There is no reason to believe that the proposed stay would harm the Defendants' interests because they have expressed agreement, at least in principle, with a limited stay of discovery previously proposed by the United States.

Although Plaintiffs may object, they are unlikely to suffer any substantial prejudice from the limited stay proposed by the United States. As explained above in Part II.B, the proposed stay would allow broad categories of document discovery and some depositions to move forward, and it need not delay resolution of significant procedural issues (*e.g.*, motions to dismiss and for class certification). Plaintiffs would be able to proceed with document discovery concerning propranolol, the only drug put at issue in the Complaints. While a brief stay may impact the sequencing of some depositions, Plaintiffs may benefit from having more time to review documents before deposing employees with pricing responsibilities. And in any event, a stay of four months is reasonable in light of the scope and complexity of the criminal investigation and the substantial public interest in protecting that investigation. *See Landis*, 299 U.S. at 256 ("Especially in cases of extraordinary public moment, the [plaintiff] may be required

to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.").

The Court also has an interest in the "the disposition of the causes on its docket with economy of time and effort[.]" *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (quoting *Landis*, 299 U.S. at 254-55). A stay here could advance that interest because allowing the criminal cases to proceed ahead of the civil actions may result in a narrowing of the factual and legal issues before this Court. *Volmar Distribs., Inc.*, 152 F.R.D. at 40; *Brock v. Tolkow*, 109 F.R.D. 116, 120 (E.D.N.Y. 1985).

III. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant a limited stay of certain document requests and depositions. The proposed stay would protect the interests of the public, while at the same time not unduly delaying the determination of the civil cases or prejudicing the substantial rights of any of the litigants.

Dated: February 24, 2017
Washington, DC

Respectfully submitted,

/s/ Ellen R. Clarke

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COUNSEL FOR INTERVENOR-UNITED STATES

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2017, I caused the foregoing **MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' MOTION FOR RECONSIDERATION OF ITS MOTION FOR A LIMITED STAY OF CERTAIN DISCOVERY** to be filed with the Clerk of Court using the Court's Electronic Document Filing System, which served copies on all interested parties registered for electronic filing, and is available for viewing and downloading from the ECF system.

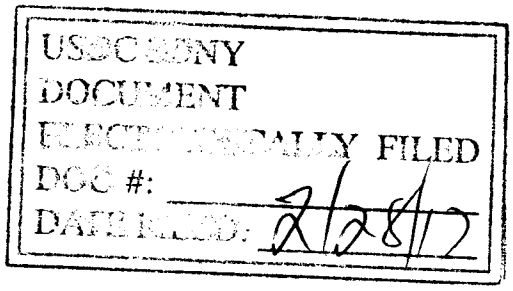
/s/ Ellen R. Clarke
Ellen R. Clarke
Counsel for Intervenor-United States

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FWK HOLDINGS, L.L.C., on behalf of itself and all others similarly situated, Plaintiff, -v- ACTAVIS ELIZABETH, LLC, ET AL., Defendants.	1:16-cv-09901-JSR
CÉSAR CASTILLO, INC., individually and on behalf of all those similarly situated, Plaintiff, -v- ACTAVIS ELIZABETH, LLC, ET AL., Defendants.	1:17-cv-00078-JSR

ORDER



JED S. RAKOFF, U.S.D.J.

The Court has considered the Government's motion for reconsideration of its motion for a stay of the proceedings, including a careful review of its ex parte submission, which will be filed under seal. In its motion for reconsideration, the Government initially requested three forms of relief, two of which related to document production, but at the public hearing on document discovery disputes held on February 24, 2017, see Transcript, the Government orally informed the Court that it was now withdrawing its two document stay requests. The Government in effect reserved the right, however, to object to any new document requests made later in the case; and, in this regard, the parties are hereby directed to inform

the Government of all discovery requests, whether for documents, depositions, interrogatories, or the like, as the case moves forward.

With respect to the Government's third request, specifically that the Court stay the depositions of any current or former employees of the above-captioned defendants involved in or responsible for the pricing of generic pharmaceuticals, that request is hereby denied except as to cooperators Jeffrey Glazer and Jason Malek. The ex parte submission, while helpful to the Court, does not put forth any substantive arguments not previously presented orally at the time the Government made its original motion, which was denied. For example, at oral argument the Government expressed a fear that a deposition witness who might subsequently become a Government witness might give testimony in his deposition inconsistent with what he might say later on as a Government witness. The Court sees no reason to assume that witnesses who are sworn to tell the truth will give inconsistent testimony under oath; but if that were to happen, in a deposition or simply in a Government interview, such prior inconsistency is surely a relevant fact disclosable in a subsequent criminal case, and not a fact to be hidden. See Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972). Best, then, that any potential inconsistencies be discovered sooner rather than later. Similarly, to the extent the Government is suggesting that it will "refresh" the recollection of any such witness in ways helpful to the Government, such coaching could not

only be ethically dubious but also a seeming subject of Brady and Giglio disclosure.

The one exception to the denial of the Government's third request is that the Court will postpone until June 30, 2017 (the current date for the end of all depositions but not for the end of all discovery), the depositions of Messrs. Malek and Glazer, who, having plead guilty and entered into cooperation agreements with the Government, are likely to invoke their Fifth Amendment privilege if called for depositions. Nonetheless, any party may renew any request for Malek's or Glazer's depositions at the close of the deposition period.

SO ORDERED.

Dated: New York, NY
February 27, 2017

JED S. RAKOFF, U.S.D.J.

EXHIBIT E

GIRARD GIBBS
LLP

MEMO ENDORSED

ATTORNEYS AT LAW

March 10, 2017

VIA ECF

Honorable William H. Pauley, III
United States District Judge
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1920
New York, NY 10007

Re: *In re: Topical Corticosteroid Antitrust Litigation*, No. 16-mc-7000
In re: Clobetasol Antitrust Litigation, No. 16-mc-7229
In re: Desonide Antitrust Litigation, No. 16-mc-7987
In re: Fluocinonide Antitrust Litigation, No. 16-mc-8911

Dear Judge Pauley:

We represent End Payor Plaintiffs in the above-referenced actions, and write with the concurrence of Direct Purchaser Plaintiffs and the U.S. Department of Justice. In accordance with paragraph 26 of Amended Master Case Order No. 1, we write to advise the Court of certain agreements reached between Plaintiffs and the DOJ concerning the conduct of discovery in these actions.

Since the DOJ submitted its February 28, 2017 letter to this Court (ECF No. 58), Plaintiffs' counsel has conferred with Andrew Ewalt of DOJ. Plaintiffs and DOJ have reached agreement concerning the following parameters for the conduct of discovery in these actions, subject to this Court's approval and any further orders the Court may enter.

Taro subpoenas and related communications with DOJ. In Amended Master Case Order No. 1, the Court directed Defendant Taro Pharmaceuticals Industries, Ltd. to produce subpoenas and communications with the DOJ by January 26, 2017. ECF No. 27 ¶ 28.[1] When DOJ intervened and advised that it believed that Taro's production of the documents could interfere with DOJ's ongoing criminal investigation, the Court extended Taro's deadline for production to March 31, 2017. ECF No. 26. DOJ has advised that it continues to object to the Taro production. In consideration of the further agreements set forth below, Plaintiffs agree not to seek enforcement of the Court's order at this time and propose that Taro's compliance with Amended Master Case Order No. 1 be adjourned pending further order of the Court.

[1] "ECF ##" refers to the docket in *In re: Clobetasol Antitrust Litigation*, 16-mc-7229-WHP.

Document and deposition discovery. Plaintiffs have served requests for production of documents upon Defendants. ECF No. 29 at 6. Defendants have moved to stay discovery entirely. ECF No. 60. Plaintiffs oppose Defendants' request in part, and seek to proceed with document discovery while deferring depositions until further order of the Court.[2] ECF No. 65 at 1. DOJ has no objection to Defendants responding to Plaintiffs' First Set of Requests for Production of Documents (dated January 16, 2017), and takes no position on the disagreement between Plaintiffs and Defendants about whether document discovery should be stayed. DOJ agrees with Plaintiffs' position that depositions should be deferred pending further order of the Court.

Notice of discovery to DOJ. The DOJ has requested that the parties provide notice to DOJ of all discovery served in these actions. The parties and DOJ have conferred, and the parties agree to provide DOJ with copies of discovery when it is served.

Plaintiffs and DOJ therefore respectfully request that the Court enter an order (1) adjourning Taro's compliance with Amended Master Case Order No. 1 pending further order of the Court; (2) deferring depositions (other than depositions described in footnote 2 of this letter) pending further of the Court; and (3) requiring all parties to provide DOJ with copies of all discovery when such discovery is served on any party or non-party.

We appreciate the Court's continued attention to these matters.

Respectfully submitted,

GIRARD GIBBS LLP

/s/ *Daniel C. Girard*

Daniel C. Girard

Application granted.

SO ORDERED:

3/22/17

WILLIAM H. PAULEY III
U.S.D.J.

[2] Plaintiffs reserve the right to seek to take earlier depositions on non-liability issues relating to the preservation and production of transactional data and other electronically stored information, for example.

EXHIBIT F

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE STATIC RANDOM ACCESS MEMORY (SRAM) ANTITRUST LITIGATION	No. CV-07-01819-CW No. MDL 1819-CW

STIPULATION AND ~~[PROPOSED]~~ ORDER TO STAY ALL DEPOSITION AND INTERROGATORY DISCOVERY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE STATIC RANDOM ACCESS MEMORY (SRAM) ANTITRUST LITIGATION	No. CV-07-01819-CW No. MDL 1819-CW

STIPULATION AND ~~[PROPOSED]~~ ORDER TO STAY
ALL DEPOSITION AND INTERROGATORY DISCOVERY

On this date, the Court considered the MOTION BY THE UNITED STATES TO STAY ALL DEPOSITION AND INTERROGATORY DISCOVERY. The Court finds that the public's interest in an ongoing related criminal grand jury investigation outweighs the interests of the parties in deposition and interrogatory discovery in this civil matter at this time.

It is therefore Ordered that the Motion be GRANTED. Deposition and interrogatory discovery are stayed until June 1, 2008, subject to a request by the United States to extend the stay. This order to stay does not apply to discovery by defendants in connection with class certification proceedings; provided, however, that defendants shall not be allowed to take

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discovery of co-defendants.

Date: June 11, 2007

By /s/
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Attorneys for Hynix Semiconductor America, Inc., and signing on behalf of all of the following defendants who have entered an appearance in this action, with express permission from their counsel: Alliance Semiconductor Corporation, Cypress Semiconductor Corporation, Epson America, Inc., Epson Eletronics America, Inc., Etron Technology, Inc., Etron Technology America, Inc., Integrated Silicon Solution, Inc., Fujitsu Ltd.,

U. S. DEPARTMENT OF JUSTICE

By /s/
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Attorneys for the United States Department Of Justice

GSI Technology, Inc., Hitachi America, Ltd., Integrated Device Technology, Inc., Micron Technology, Inc., Micron Semiconductor Products, Inc. (including Crucial Technology, an unincorporated division), Mitsubishi Electric & Electronics USA, Inc., NEC Electronics America, Inc., Renesas Technology America, Inc., Samsung Semiconductor, Inc., Sharp Electronics Corporation, Sony Corporation of America and Sony Electronics Inc., STMicroelectronics, Inc., Toshiba America, Inc., Toshiba America Electronic Components, Inc., and Winbond Electronics Corporation America

IT IS SO ORDERED

Date: June 12, 2007

United States District Court Judge

EXHIBIT G

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[Other Parties and their counsel appear at end]

United States District Court
Northern District Of California
San Francisco Division

In re DYNAMIC RANDOM ACCESS MEMORY (DRAM) ANTITRUST LITIGATION	No. M-02-1486-PJH MDL No. 1486
This Documents Relates To: ALL ACTIONS	**STIPULATION AND ORDER LIMITING THE SCOPE OF DISCOVERY** Date: None Time: N/A Judge: The Honorable Phyllis J. Hamilton

Certain Defendants in this case having moved for an Order staying all discovery pending completion of the pending grand jury proceedings; and the United States, through the Department of Justice, Antitrust Division, San Francisco Office, having moved to intervene and for a stay of all non-documentary discovery pending completion of the grand jury proceedings and any resulting criminal trial; and Plaintiffs having opposed these motions; and the Parties and proposed intervenor having resolved their differences by agreeing to the terms of this Stipulation and Order; IT IS HEREBY STIPULATED AND AGREED as follows:

1. The motion of the United States to intervene for the limited purpose of opposing certain discovery is GRANTED.

2. The limitations on discovery set forth in this Order may be lifted or modified on motion of any party at any time for good cause shown. The Court shall conduct a Discovery Status Conference within nine months of the date of entry of this Order to address the course of discovery and the continuing need, if any, for the limitations on discovery set forth in this Order. Similar conferences will be scheduled thereafter at six month intervals or on such other basis as the Court may deem appropriate. If there is no showing that the conditions motivating the limitations on discovery set forth in this Order have changed, it shall be presumed that the provisions of this Order shall remain in effect.

3. As soon as practicable, Plaintiffs and Defendants shall meet and confer regarding an appropriate Protective Order to govern proceedings in this case; and, if unable to agree, the Court will entertain a motion concerning such order. If a motion and hearing are necessary, the Plaintiffs and Defendants will use their best efforts to place the motion on the Court's calendar for a hearing no later than May 15, 2003.

4. The parties recognize that a federal grand jury, located in the Northern District of California, is currently conducting an investigation into competitive conditions in the

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DRAM industry. Within 30 days of the date of entry of a Protective Order, each Defendant shall produce to the other Parties for inspection and copying all documents theretofore produced by such Defendant to that grand jury in compliance with the subpoenas issued by the grand jury in June 2002 or any subsequent subpoenas issued; *provided, however,* that with respect to documents responsive to subsequent grand jury subpoenas, nothing in this Stipulation and Order shall prevent any Defendant from objecting to production on appropriate grounds under the Federal Rules of Civil Procedure. Every 90 days thereafter, each Defendant shall produce to the other Parties for inspection and copying, on a rolling basis, all documents produced to the grand jury in compliance with such subpoenas during the preceding 90 days. Reasonable costs for copying shall be borne by the Party receiving the copy.

5. Within 30 days of entry of a Protective Order, each Plaintiff shall produce (a) all documents referred to in the Plaintiff's Complaint, and (b) for each DRAM product purchased during the "class period" as defined in the Complaint, documents sufficient to show the the identity of the seller, the particular product (or "part") purchased, the quantities purchased, and the prices paid by the Plaintiff.

6. No interrogatories or requests to admit shall be propounded, except that any Party may propound interrogatories seeking from any Plaintiff or Defendant (a) statistical data concerning aggregate sales or purchases of DRAM products by the respective Plaintiff or Defendant within the "class period(s)" as defined in the Complaints, (b) identification of the types of products purchased or sold by the respective Plaintiff or Defendant during such time period, and (c) identification of distribution channels used by the respective Plaintiff or Defendant during such time period. These interrogatories may not call for narrative responses, but shall be limited to statistical or identifying data only; *provided, however,* that the interrogatory contemplated by subsection (c) above may require the responding party to name

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the various distribution channels it used during the relevant time period. With respect to interrogatories directed to any Plaintiff, the information sought in these interrogatories is not intended to be different from the information mentioned in paragraph 5 above.

7. No depositions may be taken, except that depositions may be taken of Defendants' customers or Defendants' suppliers, or their employees, provided in any case that the deponent is not a former employee of any Defendant. No questions may be asked at any deposition about the grand jury proceedings or the witness' testimony, if any, before the grand jury or communications with the United States relating to the grand jury proceedings. If any such question is asked, counsel may direct the witness not to answer.

8. No deposition may be taken on less than three weeks notice absent agreement of all Parties and the United States, or as the Court may order for good cause shown. All interrogatories and notices of deposition shall be served upon the United States at the same time as served on any Party. Absent further order of the Court for good cause shown, no responses to any interrogatories, nor transcripts of depositions, shall be provided to any non-party (except the United States as set forth below); nor shall any party provide to any non-party (except (a) personnel working on this case on behalf of a party , or (b) the United States as set forth below), any information concerning the contents of any interrogatory response or deposition. For purposes of ensuring that the terms of this Stipulation and Order are enforced, the United States will be permitted to review (but not copy) all discovery produced by any Party, including deposition transcripts and responses to interrogatories and requests for admissions.

9. Plaintiffs have indicated their intention to file a single Consolidated Complaint. Notwithstanding any provision of this Order, to the extent that any Defendant denies in its Answer this Court's personal jurisdiction over such Defendant, or moves to dismiss on that

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By: _____
Niall E. Lynch

Attorneys for Intervenor United States

Based on the stipulation of the parties, and for good cause shown, the foregoing is hereby SO ORDERED:

_____
Phyllis J. Hamilton
United States District Judge

Dated: April 16, 2003

EXHIBIT H

U.S. Department of Justice

Antitrust Division

New York Field Office

26 Federal Plaza *212-335-8036*
Room 3630
New York, New York 10278-0004 *FAX 212-335-8023*

January 29, 2016

Via ECF

The Honorable James Orenstein
U.S. Magistrate Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Filed Under Seal

Re: In re Parking Heaters Antitrust Litigation
No. 15-MC-940 (JG) (JO)

Dear Judge Orenstein:

We represent the United States, which is investigating price-fixing in the parking heater industry in violation of the Sherman Act. That investigation has resulted in several prosecutions, including a guilty plea by Espar, Inc. (U.S. v. Espar, Inc., No. 1:15-cr-00028-JG (EDNY)), and, more recently, indictments of three individuals – Frank Haeusler, Volker Hohensee, and Harald Sailer – who have been charged as members of the same price-fixing conspiracy (U.S. v. Haeusler et al, No. 5:15-cr-20784-JCO-APP (E.D. Mich.)). As Your Honor is aware, the subject matter of the government's investigation overlaps substantially with that of the civil actions consolidated in In re Parking Heaters Antitrust Litigation ("the civil actions"). We appreciate the opportunity to submit this letter to Your Honor to address our concerns regarding the Proposed Case Management Order ("CMO") submitted in the civil actions. Because this letter reveals non-public details about the United States' investigation and prosecutions, we have submitted it under seal, and we appreciate the Court keeping this letter *in camera*.

While the United States has no objection to early document production beginning in the civil actions, we believe that a minor change to the parties' proposed CMO is required to avoid potential prejudice to our ongoing investigation and prosecutions.

The first paragraph of the proposed CMO states that the defendants "shall produce to Plaintiffs documents for the period October 1, 2007 to December 31, 2014 relating to the above-

captioned matter **as agreed to by the Parties**" (our emphasis).

We object to any discovery in the civil actions that The fact that such production presumably would be covered under the Protective Order in this matter does not erase this concern. a large group – all the parties, their counsel, and the many individuals and organizations that will be entitled to see produced materials under the terms of the Protective Order, including experts, witnesses, and current and former employees of Espar and Webasto.

We believe that this concern can be resolved by making minor changes to paragraph 1 of the proposed CMO. Rather than agreeing to production of , the parties could agree to production of certain listed categories of documents, for example, all communications between Espar and Webasto, all documents relating to pricing of parking heaters, or all documents identified by certain relevant custodians or search terms. While we understand that collecting and producing documents in enumerated categories entails more time and effort it should be no more burdensome than typical discovery in a civil case.

We have spoken to counsel for the plaintiffs and defendants and explained our concerns, to the extent possible given the confidential nature of our investigation. The parties have told us that they would try to assuage our concerns by using a euphemism for in the CMO instead of explicitly identifying it as such – which is why paragraph 1 of the CMO identifies the documents to be produced in vague terms, "as agreed to by the Parties." We told the parties that

was not sufficient. Whether or not the CMO or any other written document [redacted] then our concern remains. Our concern is one of substance, not form.

We appreciate the opportunity to be heard. Please contact us if you have questions or wish to hear further from us on this issue.

Sincerely,

Carrie A. Syme
Trial Attorney
Antitrust Division, NY Office
U.S. Department of Justice
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[1] [redacted] Although that does not cure the precise problem addressed in this letter, we very much appreciate the parties' cooperation in this regard.

EXHIBIT I

U.S. District Court
Eastern District of New York (Brooklyn)
CIVIL DOCKET FOR CASE #: 1:15-mc-00940-DLI-JO

In re Parking Heaters Antitrust Litigation
Assigned to: Chief Judge Dora Lizette Irizarry
Referred to: Magistrate Judge James Orenstein

Date Filed: 05/27/2015
Jury Demand: Plaintiff

Date Filed	#	Docket Text
02/01/2016		ORDER re 74 Sealed, Letter filed by U.S. Department of Justice -- The government objects that the parties' agreement, *inter alia*, to the effect that the defendants will produce to the plaintiffs certain categories of documents "as agreed to by the Parties" will allow the parties or others to infer certain information about the government's deliberations or investigative actions. I disagree that that is a basis for me to prohibit the parties from agreeing to exchange information on terms they find mutually agreeable. I therefore overrule the government's objections to the parties' jointly proposed case management order. I further respectfully direct the government to file a redacted copy of its sealed letter on the public docket, redacting only specific non-public details of any pending investigation. Ordered by Magistrate Judge James Orenstein on 2/1/2016. (Smerd, Jocelyn) (Entered: 02/01/2016)

EXHIBIT J

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
Joseph A. Dickson
United States Magistrate Judge

Martin Luther King, Jr. Federal Bldg.
& U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07102
(973-645-2580)

LETTER ORDER

July 5, 2016

All counsel of record via ECF

Re: In re Liquid Aluminum Sulfate Antitrust Litigation
No. 16-MD-2687 (JLL) (JAD)

Counsel:

There are multiple preliminary discovery and case management issues pending before the Court: (1) the parties' dispute regarding whether Defendants should be made to provide Plaintiffs' counsel with documents Defendants previously produced to the United States Department of Justice ("DOJ") in connection with a government investigation; (ECF Nos. 140, 141, 144, 149, 168, 175, 183, 187); (2) a proposed stipulation, entered into by the DOJ and counsel for Plaintiffs, that would impose a partial stay of discovery for a period of nine months; (ECF No 167); (3) Defendants Brian Steppig and Vincent Opalewski's joint motion to stay this matter as to them pending resolution of a parallel criminal proceeding (and a proposed stipulation resolving that motion); (ECF Nos. 148, 152, 155, 170, 172, 173, 176); and (4) the parties' dispute regarding whether the Court should enter a preservation order in this matter. (ECF Nos. 178 and 179). Most of these matters have become, to some extent, interrelated and the Court will resolve them simultaneously.

I. The Status of Discovery and Plaintiffs' Request for Documents that Defendants Previously Provided to the Government

This case is still in its relative infancy and remains in the pleadings phase. Plaintiffs are required to file a consolidated amended complaint on or before July 19, 2016. (ECF No. 153). Defendants are required to "answer or otherwise move with respect to the consolidated amended complaint on or before 60 days after a consolidated amended complaint is filed." (March 9, 2016 Order at 2, ECF No. 72). Defendants anticipate filing motions to dismiss that amended pleading, and the parties disagree as to whether the Court should permit any discovery until the pleadings have become fixed.

The parties' dispute centers on Plaintiffs' request that the Court immediately compel Defendants to turn over any documents that Defendants previously produced to the DOJ in response to certain subpoenas (the "Government Productions"). (Pl.'s April 22, 2016 Letter at 1, ECF No. 149) ("Plaintiffs are not suggesting going forward with full-blown discovery at this time. What we are requesting is to simply produce another copy of what [Defendants] have already produced to the Government.").[1] Defendants' argument against providing Plaintiffs with copies of the Government Productions is narrow, and now focuses exclusively on whether Plaintiffs are entitled to any discovery prior to the District Court's resolution of Defendants' potential motions to dismiss Plaintiffs' forthcoming consolidated amended complaint. (See, e.g., Tr. of April 26, 2016 Conf. at 13:23-15:5).

[1] The Court notes that, during the March 3, 2016 conference in this matter, Plaintiffs also suggested that the parties proceed with full discovery as soon as Plaintiffs file their consolidated amended pleading. (Tr. of March 3, 2016 Conf. at 10:14-7; 11:22-24, ECF No. 130). The Court will address the propriety of such discovery below.

While it appeared, at one time or another, that Defendants may have had certain other arguments against turning over their Government Productions, those issues have since been resolved. For instance, during the March 3, 2016 conference in this matter, the Court recognized that the DOJ might have confidentiality concerns given the nature of the subpoenas in question. (Tr. of March 3, 2016 Conf. at 27:25-28:4, ECF No. 130). Plaintiffs have since advised, however, that they conferred with the DOJ on that issue, and the DOJ indicated that it did not oppose the Defendants' provision of their Government Productions to Plaintiffs in this case. (Pls.' April 14, 2016 Letter, ECF No. 141). The Court further acknowledges that, by letter dated April 19, 2016, certain Defendants requested that they "be permitted to make confidential submissions regarding the Government Productions prior to any order regarding discovery." (Defs.' April 19, 2016 Letter at 3, ECF No. 144). Counsel for Kemira Chemicals, Inc. reiterated that request during the April 26, 2016 conference in this matter. (Tr. of April 26, 2016 Conf. at 19:23-20-4) (noting that, if the Court decides to "have all defendants consider producing their documents, Kemira and I'm sure the other defendants are more than willing to meet with [the Court] . . . to make sure you understand the scope of the production, et cetera."). The Court advised that it would like to "have those meetings in the context of this issue obviously, because we're running up on the clock a little bit now", (id. at 20:19-21), and directed that defense counsel could set up such a meeting either by identifying themselves at the conference or by contacting chambers *ex-parte* (Plaintiffs' counsel having no objection). (Id. at 20:11-18). To date, only one Defendant, Geo Specialty Chemicals (which, the Court understands, has already provided certain documents to Plaintiffs) requested such a meeting. To the extent that Defendants have concerns regarding the size or scope of their

Government Productions or, in fact, any issue other than the traditional timeframe for discovery, they have not brought them before the Court. Finally, to the extent that any Defendant contended that provision of the Government Productions would subject them to a significant burden (an unlikely proposition, considering that Defendants have already assembled all of the materials in question in connection with the DOJ's investigation), the Court would certainly have considered such an argument. No Defendant has done so and, in fact, one Defendant, Kemira Chemicals, Inc., has explicitly disclaimed such a position. (Id. at 13:23-14:2) ("Your Honor, it's not a burden issue and we're not making a burden argument. But it has to do with the proper staging of litigation and at what point do the plaintiffs and their lawyers have a right to access our files."). Having addressed these potential concerns, the Court will turn to Defendants' argument regarding the timing of Plaintiffs' requested productions.

As noted above, Defendants anticipate filing motions to dismiss Plaintiffs' forthcoming consolidated amended complaint, and contend that the parties should not engage in discovery of any kind (including provision of the already compiled Government Productions) until after the District Court has resolved those motions. The Court may, in its discretion, stay discovery during the pendency of a motion to dismiss. See In re Orthopedic Bone Screw Prod. Liab. Litig., 264 F.3d 344, 365 (3d Cir. 2001). Such stays, however, are neither automatic nor mandatory. While this Court is mindful of the Court of Appeals' guidance that motions to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) "should typically 'be resolved before discovery begins,'" Levey v. Brownstone Inv. Group, LLC, 590 F. App'x 132, 137 (3d Cir. 2014) (quoting Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997)), that concern is most applicable in

situations where a pleading contains limited factual information and the plaintiff seeks to use the discovery process as a "fishing expedition" to try to manufacture a cause of action, id. ("Given what little the complaint tells us, there is nothing reasonable about Levey's expectation that taking discovery would reveal any infringement . . . Indeed, 'were we to reverse the dismissal to here to allow for discovery,' all we would be doing would be providing [him] the opportunity 'to conduct a fishing expedition in order to find a cause of action.'") (citations omitted), and is particularly acute in cases where the costs of discovery figure to be massive (e.g., antitrust cases). See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558-560 (2007).

The Court does not believe that Plaintiffs seek discovery as part of a "fishing expedition" intended to uncover a previously unknown cause of action. Indeed, the Court understands that multiple defendants have either pled guilty or sought leniency from the government regarding the very misconduct Plaintiffs allege. Two individual Defendants are currently involved in a related criminal proceeding pending in this District. While the Court is not making any findings regarding the potential merit of either Plaintiffs' forthcoming amended pleading or Defendants' anticipated motions to dismiss, it appears that Plaintiffs' claims may very well survive, in some form, past the pleadings phase. The Court also recognizes, however, that many Defendants have not admitted to wrongdoing, that certain of Plaintiffs' claims may be subject to dismissal, and that this case is likely to involve the sort of extensive discovery costs that the Supreme Court envisioned in Twombly. The Court has, therefore, declined to endorse the "stipulation" (not signed by any defendant in this case) that Plaintiffs entered into with the DOJ providing for a partial stay of discovery. (ECF No. 167). Plaintiffs' proposed stay, which would curtail interrogatories and

depositions but permit full document discovery, (id.), is akin to no stay at all, as much, if not most, of the discovery expenses in this matter, at least in the initial stages, will be related to document discovery. This Court is also mindful of the importance of protecting "the integrity of parallel criminal prosecutions involving common legal and factual issues," as the DOJ and Plaintiffs articulated in their joint letter dated May 17, 2016. (ECF No. 167). This Court, in its discretion, therefore finds that the parties shall not conduct any discovery in this matter, other than that expressly permitted in this Letter Order, pending further Order of the Court.

The Court's concerns regarding the timing, scope, and expense of discovery in this matter (i.e., the same concerns the Supreme Court articulated in Twombly) do not apply with regard to the Government Productions. As Defendants have already compiled that material and produced it to the DOJ, there would be little burden (in effort or expense) associated with making a second copy and producing it to Plaintiffs' counsel. Defendants have not raised any other persuasive arguments in opposition to production. Similarly, the Court is not concerned that allowing Plaintiffs access to the Government Productions will impede any ongoing criminal investigations, as the DOJ has advised that it has no objection to such dissemination. (Pls.' April 14, 2016 Letter, ECF No. 141). Therefore, while the Court will not permit the parties to engage in full discovery, it will require all Defendants (other than Defendants Brian Steppig and Vincent Opalewski) to turn a copy of their Government Productions, if any, over to lead counsel for Plaintiffs.

The Court must first, however, address Plaintiffs' obligation to update the Court regarding the status of their review of documents Plaintiffs previously received from certain Defendants. As multiple Defendants pointed out in their letter dated May 31, 2016, (ECF No. 175), this Court

acknowledged, during the April 26, 2016 conference in this matter, that Plaintiffs had already received approximately two million pages of documents. (Tr. of April 26, 2016 Conf. at 24:2-7). The Court directed Plaintiffs to review those documents and to "see whether there's more forthcoming information from the ACPERA discussions", and observed that "[Plaintiffs] may not need [the Government Productions] to build [their] new complaint." (Id.). By letter dated June 10, 2016, Plaintiffs argued that "the Court did not . . . 'instruct Plaintiffs to review those [previously produced] documents to help determine if, in fact, further production of documents by other defendants is necessary or appropriate.'" (ECF No. 183 at 1) (citation omitted). Plaintiffs are mistaken. That is precisely what the Court directed Plaintiffs to do. (Tr. of April 26, 2016 Conf. at 24:2-7). In any case, the Court did not set a deadline for Plaintiffs to provide that analysis and the Court is mindful that, given the size of the document production in question, it would take a significant amount of time for Plaintiffs to review and digest that information. More importantly, upon further reflection, the Court believes that such a report would be of little utility. Obviously, Plaintiffs' counsel can only speculate as to whether additional, relevant information might be contained in Defendants' Government Productions, or to what extent such information might assist Plaintiffs in drafting their amended pleading. Plaintiffs' counsel would therefore necessarily seek to obtain as much information as possible before filing that pleading, essentially rendering the requirement that Plaintiffs submit a status report expressly reiterating their production request a formality. Therefore, while the Court finds that Plaintiffs failed to comply with the directive to advise the Court regarding their review of the approximately two million pages of documents Plaintiffs' already received in connection with this matter, this does not alter the Court's

conclusion. All Defendants (other than Defendants Brian Steppig and Vincent Opalewski) shall turn a copy of their Government Productions, if any, over to lead counsel for Plaintiffs **on or before July 15, 2016.**

II. Defendants Steppig and Opalewski's Motion to Stay

On April 25, 2016, individual Defendants Brian Steppig and Vincent Opalewski filed a joint motion seeking "to stay [this] litigation as to them until the resolution of the parallel criminal case against them currently pending [in this District] . . . *United States v. Vincent Opalewski and Brian Steppig*, Case No. 2:16-cr-0065 (D.N.J.)." (Motion to Stay at 1, ECF No. 152). To date, no party has filed any opposition to that motion. Indeed, by letter dated June 2, 2016 Plaintiffs' lead counsel submitted a proposed stipulation (signed by counsel for Plaintiffs and counsel for Defendants Steppig and Opalewski) to address that motion by, among other things, staying all litigation as to Defendants' Steppig and Opalewski for a period of nine months. The Court cannot, however, endorse that proposed stipulation in its current form as it: (1) relies on and is intertwined with the proposed, partial stay of discovery that Plaintiffs and the DOJ presented to the Court. (ECF No. 167). As noted above, the Court has rejected that proposal; and (2) would result in the motion to stay remaining unadjudicated on the Court's docket indefinitely.

Instead, mindful of the agreement between Plaintiffs and Defendants Steppig and Opalewski to stay all litigation against those Defendants for a period of nine months, and considering that no other party has filed any response to the motion to stay, this Court crafts the following resolution: First, this civil litigation is completely stayed as to Defendants Steppig and Opalewski through and including March 31, 2017. Second, prior to the expiration of the stay, the

parties shall meet and confer to discuss whether the stay should continue, and Defendants Steppig and Opalewski may make an application, whether on consent or otherwise, to continue the stay. Third, if the parallel criminal proceeding against them should resolve prior to March 31, 2017, Defendants Steppig and Opalewski shall so advise the Court. Finally, any party shall have the right to make an application to terminate or modify the stay.

III. Plaintiffs' Request for Entry of a Preservation Order

By Order dated February 16, 2016, (ECF No. 2), the Hon. Jose L. Linares, U.S.D.J. reminded the parties "of their duty to preserve evidence that may be relevant to this action," confirmed that "[a]ny evidence preservation order previously entered in any of the transferred actions shall remain in full force and effect until further order of the Court", and directed the parties to "take reasonable steps to preserve all evidence that may be relevant to this litigation" "[u]ntil the parties reach an agreement on a preservation plan or the Court orders otherwise." (Id. at 5). By letter dated June 8, 2016, Plaintiffs advised that they prepared a proposed preservation order and that the parties engaged in a meet and confer to discuss its terms. (Pls.' June 8, 2016 Letter at 1, ECF No. 178). Plaintiffs contend that Defendants refused to meaningfully participate in those discussions, and that Defendants indicated "they would reevaluate their refusal to discuss any plan after Plaintiffs file a Consolidated Amended Complaint." (Id.). Plaintiffs argue that "[a]bsent the immediate entry of [Plaintiff's proposed order] . . . it may be too late to stop the destruction of evidence that could easily have been preserved had the parties discussed the issue." (Id. at 2).

In their response dated June 9, 2016, certain Defendants argued that Plaintiffs' proposed preservation order was unnecessary (as Defendants have already taken adequate steps to preserve

potentially relevant documents, as explained in Paragraph E of the parties' February 25, 2016 Joint Status Update (ECF No. 3)), premature (as Plaintiffs have not yet filed their consolidated amended pleading), and unfairly overbroad and one-sided. (See generally Defs.' June 9, 2016 Letter, ECF No. 179).

The Court starts with the basic premise that parties have an ongoing obligation to preserve potentially relevant information, regardless of whether a court separately orders preservation or the litigants work out a mutually agreeable preservation protocol. See Fed. R. Civ. P. 26(f)(2); L. Civ. R. 26.1(d)(3)(a); see also, e.g., Mosaid Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 336 (D.N.J. 2004) ("Samsung had notice that this litigation had begun and therefore had an affirmative obligation to preserve potentially relevant evidence, including technical e-mails."). "This obligation, backed by the court's power to impose sanctions for the destruction of such evidence, is sufficient in most cases to secure the preservation of relevant evidence." Young v. Facebook, Inc., No. 10-cv-3579 (JF), 2010 WL 3564847, *1 (N.D. Cal. Sept. 13, 2010). The entry of a separate preservation order is, therefore, the exception rather than the rule.

The Court notes that the United States Court of Appeals for the Third Circuit has not yet addressed the factors a court should consider when determining whether to enter a discovery preservation order. Case law from various District Courts that have considered the issue, however, provides helpful guidance and reveals a common theme: the party requesting the order must establish its necessity.

For instance, in Capricorn Power Co., Inc. v Siemens Westinghouse Power Corp., 220 F.R.D. 429 (W.D. Pa 2004), the United States District Court for the Western District of

Pennsylvania created a three-factor balancing test for use "when deciding a motion to preserve documents, things and land." Id. at 433. Specifically, the Capricorn Power court found it necessary to consider:

> 1) the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence; 2) any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and 3) the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.

Id. at 433-34. The Western District of Pennsylvania formed this test "by molding the factors used in granting injunctive relief with the considerations, policies and goals applicable to discovery." Id. at 433. The United States District Court for the Northern District of California has adopted an essentially identical test. Bright Solutions for Dyslexia, Inc. v. Doe 1, No. 15-cv-1618 (JSC), 2015 WL 5159125, *2 (N.D. Cal. Sept. 2, 2015). In Am. LegalNet, Inc. v. Davis, 673 F. Supp. 2d 1063 (C.D. Cal. 2009), the United States District Court for the Central District of California resolved an application for a preservation order by applying a "streamlined two-pronged standard that 'requires that one seeking a preservation order demonstrate that it is necessary and not unduly burdensome.'" Id. at 1071-72 (quoting Pueblo of Laguna v. United States, 60 Fed. Cl. 133, 135-36 (2004)). The United States District Court for the Northern District of Indiana has described preservation orders as "'injunctive remed[ies]'" that are only appropriate "upon an adequate showing that equitable relief is warranted.'" Chandler v. Buncich, No. 12-cv-175, 2012 WL 4343314, *2 (N.D. Ind. Sept. 22, 2012) (quoting In re African-American Slave Descendants'

Litig., No. 02-cv-2264, 2003 WL 24085346, *2 (N.D. Ill. July 15, 2003)). The Chandler court went on to note that "'[i]n making this determination, the court considers: 1) whether [the movant] can demonstrate that [the non-movant] will destroy necessary documentation without a preservation order; 2) whether [the movant] will suffer irreparable harm if a preservation order is not entered; and 3) the burden imposed upon the parties by granting a preservation order.'" Id. (quoting In re African-American Slave Descendants' Litig., 2003 WL 24085346 at *2). As noted above, the common theme running through each of these tests is that the party seeking a preservation order must make an affirmative showing establishing that the order is necessary.

This Court finds that the Capricorn Power court's three-factor test strikes an appropriate balance in that it requires the moving party to establish the need for a preservation order but also maintains the level of judicial discretion and flexibility necessary for effective case management. Indeed, the Court notes that one Judge in this District previously applied that test in resolving a motion to preserve documents and other information. LaSala v. Marfin Popular Bank Pub. Co., No. 09-cv-968 (JAP), 2009 WL 2449902, at *2 (D.N.J. Aug. 7, 2009) (Arpert, U.S.M.J.). Here, the Court's application of the Capricorn Power test is straightforward, as Plaintiffs have not made a sufficient showing regarding why a preservation order is necessary in this case. Plaintiffs have not presented any facts that would give the Court concern "for the continuing existence and maintenance of the integrity of the evidence in question,"[2] Capricorn Power, 220 F.R.D. at 433, or

[2] Plaintiffs simply articulate their "fear" that "[a]bsent the immediate entry of [their proposed order] . . . it may be too late to stop the destruction of evidence that could easily have been preserved had the parties discussed the issue." (Pls.' June 8, 2016 Letter at 2, ECF No. 178). Plaintiffs do not identify any basis for their concern.

that they might face some irreparable harm in the event the Court declines to enter a preservation order. Id. Indeed, the Court notes that Judge Linares has already Ordered both parties to "take reasonable steps to preserve all evidence that may be relevant to this litigation." (Feb. 16, 2016 Order at 5, ECF No. 2). Plaintiffs have not addressed why another, more detailed order is necessary at this point. As Plaintiffs have not met their burden, their application for a preservation order is **DENIED WITHOUT PREJUDICE**.

While the record for this matter cannot currently justify the entry of a detailed preservation order, the Court believes that a protocol that sets forth the litigants' preservation obligations would benefit all parties. The Court will therefore Order the parties to meet and confer in good faith regarding the preparation of an appropriate preservation protocol (not Order) for this matter. The Court reminds the parties that, regardless of whether they are, in fact, able to create a mutually agreeable protocol or whether the Court enters a preservation Order at some later date, the parties are already subject to an existing, affirmative obligation to preserve relevant information, in accordance with both Judge Linares's February 16, 2016 Order and governing case law. See, e.g., Nissan World, LLC v. Mkt. Scan Info. Sys., No. 05-cv-2839 (MAH), 2014 U.S. Dist. LEXIS 59902, *62, n. 10 (D.N.J. Apr. 30, 2014) ("A litigant is 'under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation'") (quoting Scott v. IBM Corp., 196 F.R.D. 233, 249 (D.N.J. 2000)). To the extent any party discards, destroys or otherwise loses such information, it acts at its own peril.

IV. CONCLUSION

Based on the foregoing, it is on this 5th day of July, 2016,

ORDERED that, on or before July 15, 2016, all Defendants (other than Defendants Steppig and Opalewski), shall provide Plaintiffs' lead counsel with a copy of their Government Productions, if any; and it is further

ORDERED that Plaintiffs' informal request that the Court Order a partial stay of discovery in this matter (in a form agreed by Plaintiffs and the DOJ), (ECF No. 167), is **DENIED**; and it is further

ORDERED that all discovery, other than certain Defendants' provision of a copy of their Government Productions to Plaintiffs' lead counsel, is hereby stayed pending further Order of the Court; and it is further

ORDERED that Defendants Steppig and Opalewski's Motion to Stay, (ECF No. 152), is **GRANTED IN PART AND DENIED IN PART**. This civil litigation is completely stayed as to Defendants Steppig and Opalewski through and including March 31, 2017. Prior to the expiration of the stay, the parties shall meet and confer to discuss whether the stay should continue, and Defendants Steppig and Opalewski may make an application, whether on consent or otherwise, to continue the stay. If the parallel criminal proceeding against them should resolve prior to March 31, 2017, Defendants Steppig and Opalewski shall so advise the Court. Any party shall have the right to make an application to terminate or modify the stay; and it is further

ORDERED that Plaintiffs' informal request that the Court enter a discovery preservation order in this matter, (ECF No. 178), is **DENIED WITHOUT PREJUDICE**; and it is further

ORDERED that the parties shall meet and confer in an attempt to reach a mutually agreeable protocol for the preservation of potentially relevant information.

SO ORDERED

JOSEPH A. DICKSON, U.S.M.J.

cc: Hon. Jose L. Linares, U.S.D.J.

EXHIBIT K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MUNICIPAL DERIVATIVES
ANTITRUST LITIGATION,

Plaintiff,

v. 08 CV 2516

BANK OF AMERICA, et al,

Defendant.

----------x

New York, N.Y.
May 27, 2010
11:00 A.M.

Before:

HON. GABRIEL W. GORENSTEIN,
Magistrate Judge

APPEARANCES

FOR PLAINTIFFS:

US DEPARTMENT OF JUSTICE, ANTITRUST DIVISION
PATRICIA L. JANNACO
MICHELLE RINDONE,
JOHN vanLONKHUYZEN

BOIES SCHILLER AND FLEXNER
BY: MATT FRIEDRICH

HAUSFELD, LLP
BY: MICHAEL D. HAUSFELD

COTCHETT PITRE & MCCARTHY
BY: STEVEN WILLIAMS

LIEFF CABRASER HEIMANN & BERNSTEIN LLP
BY: DANIEL SELTZ

KING & SPALDING
By: Kevin Sullivan

SIMPSON THATCHER & BARTLETT, LLP
BY: JOSEPH WAYLAND

(Case called; in open court)

THE DEPUTY CLERK: All rise. 08 CV 2516.

THE COURT: Be seated if you're not addressing the Court.

All right. We have a lot of other people here, but I guess they are not going to be making a formal appearance.

We're here, today -- actually, hold on one second.

We are here today based on an application of the Antitrust Division of the Department of Justice for a partial stay in this case.

I have received their papers, and opposition papers from what's called the public entity plaintiffs, and from the plaintiff's, generally. And I also received a document from Goldman Sachs relating to a specific statement in one of the papers.

I guess I'll start by asking Ms. Jannaco some questions.

MS. JANNACO: Yes, sir.

THE COURT: If I understand what's going on right now, there is already document discovery, is that right? From your point of view, you haven't sought a stay of document discovery.

MS. JANNACO: We are not seeking a stay of document discovery, your Honor.

THE COURT: Okay. So I guess what I'm really trying to understand as an initial matter, is what is the difference

concern to the government, whereas it is with the tapes.

MS. JANNACO: Well, the tapes contain actual conversations that are evidence of collusive conduct among the people we are investigating.

THE COURT: Surely the documents could consist of -- I mean I guess people don't normally collude by documents, but they could certainly be producing some documents that might relate in some way, or might be important to that whole process.

MS. JANNACO: That's true, your Honor. But not to the extent that the tapes do.

On the other hand, in not objecting to the documents -- we have sought, right from the beginning, not to hamstring the plaintiffs in getting information. We feel that the tapes are more sensitive information and help to put a lot of material together which, at this point, we don't want to have disclosed in order to protect our grand jury investigation and our prosecutions.

So there is sort of a qualitative difference between those two types of discovery. I mean ordinarily, documents would not contain conversations, and they don't necessarily contain -- while they contain communications, they don't necessarily contain the critical communications that are evidence of the conspiracies that we're investigating.

THE COURT: And putting aside depositions, which I

understand a little better what your concerned with, let's focus on our local rule on interrogatories, and tell me what the specific objection is as to allowing the parties to proceed. And if you need me to remind you what it says, I would be happy to.

MS. JANNACO: If you would, your Honor, I appreciate that.

THE COURT: It allows the requests for names of witnesses with knowledge and information relevant to the subject matter of the action, first category.

Second, is computation of damages.

Third, is the existence, custodian location, descriptions of documents. And by "documents," that means tapes, evidence, information, and so forth.

MS. JANNACO: We would have no objection to any interrogatories that would assist the plaintiffs in determining where they could find further information when the time comes for them to explore it more in depth, your Honor. But we -- we are concerned about interrogatories -- well, we're not even concerned so much if they -- if the interrogatories ask for the names of people who have participated in the deals that are -- that are.

THE COURT: Let's -- let me just -- let's focus this. I'll do it a category at a time.

MS. JANNACO: Okay.

THE COURT: What is the problem with the parties complying with an interrogatory that seeks the names of witnesses with knowledge and information relevant to the subject matter of the action.

MS. JANNACO: That particular type of interrogatory, I don't think would be a problem.

THE COURT: Second, computation of each category of damage alleged.

MS. JANNACO: I don't know -- personally, I don't know if that's premature at this point but, you know, it's hard to say given --

THE COURT: This is a trick question, Ms. Jannaco, to see how doctrinaire you are, because I think this is an interrogatory that only a plaintiff could answer.

MS. JANNACO: Okay.

THE COURT: I assume there is no question.

MS. JANNACO: I guess, for that kind of interrogatory, there would be no objection; you assume right.

THE COURT: Now, you have succeeded in not coming across as completely extreme.

MS. JANNACO: Thank you.

THE COURT: Third, the existence, custodian, location, and general description of relevant documents. And "documents" under our rules, includes tapes, physical evidence, and so forth.

MS. JANNACO: Well, we have never had an objection to those kinds of interrogatories.

THE COURT: So just to cut through, you have no problem with interrogatories under 33A; right?

MS. JANNACO: I guess if that's the rule, your Honor.

THE COURT: Just checking.

MS. JANNACO: Okay.

THE COURT: Okay.

I would like to focus for a moment on the possibility that we do this in stages. In other words, that we have a stay of certain types of discovery, now, that gets revisited at a point when it would be likely to be reached anyway. And so it's no mystery what I'm thinking about, I'll tell you, which is that we allow discovery, now, of documents. And by "documents," I include tapes and everything else that the our rules would call documents, which I know that the government objects to are local interrogatories 33.A. And that would be it until we see where we are after that first phase is accomplished.

So, under that scenario -- and we can talk about whether there could be rule 45 subpoenas to third parties for documents or things. Only I don't know if that is really an issue, but if we were to have that discovery proceed now, I have already established, Ms. Jannaco, that the interrogatory piece is not a problem. So, really, the only new piece that

EXHIBIT L

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: OPTICAL DISK DRIVE PRODUCTS ANTITRUST LITIGATION This Document Relates to All Cases.	MDL Docket No. M:10-2143 VRW Date: June 24, 2010 Time: 10:00 a.m. Court: Hon. Vaughn R. Walker

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' MOTION FOR A LIMITED STAY OF DISCOVERY

I. Introduction

The United States Department of Justice, Antitrust Division ("DOJ") submits this Memorandum of Points and Authorities in support of its Motion for a Limited Stay of Discovery. The stay is necessary to avoid interference with a closely related, ongoing criminal antitrust investigation in this judicial district. Because the underlying facts and parties involved in the civil case are also involved in the criminal matter, a stay is necessary to preserve the secrecy of grand jury proceedings, as well as to prevent the use of broad discovery rules in the civil case from being used to circumvent the more limited criminal discovery available to defendants not yet indicted in the criminal matter.

If discovery were allowed to proceed immediately, the parties to this civil action would be able to closely track the scope and direction of the grand jury investigation and to uncover information protected by the secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure. Defendants could also use civil discovery to identify witnesses who are cooperating with the DOJ and to discover much of the information witnesses are disclosing to the DOJ and the grand jury. The Defendants could target those witnesses who may appear before the grand jury, or who are cooperating with the government, and depose them regarding their contacts and communications with the grand jury and the DOJ. Access to information relating to communications with the government or grand jury could expose the scope and direction of the grand jury's investigation and the evidence before the grand jury. Full discovery would substantially undermine the integrity of the grand jury investigation and discourage witnesses from coming forward and cooperating fully with the DOJ. Immediate, full discovery would also unduly expose and punish any witnesses who chose to cooperate with the DOJ early in the investigation.

For these reasons, the DOJ requests a limited stay of discovery, as specified in the Proposed Order, for a period of twelve months, following the filing of Plaintiffs' consolidated complaint in the matter, to be followed by staged discovery. During the initial twelve-month stay, the case will not be idle. The Proposed Order allows for the production of a wide array of

documents. Furthermore, Plaintiffs will need to file and serve a consolidated complaint, and Defendants will likely file a number of motions, including motions to dismiss.

If the Court grants the twelve-month stay of discovery, the DOJ expects that at the end of the stay it would, after meeting and conferring with all parties, move the Court to enter a staged discovery schedule, with document discovery proceeding first, followed by full discovery after a reasonable period of time.

II. Statement of Facts

The DOJ is currently assisting a grand jury investigating possible criminal antitrust violations in the optical disk drive ("ODD") industry. In October 2009, soon after several companies publicly announced that they had been served with ODD grand jury subpoenas, civil plaintiffs began filing class action lawsuits against ODD manufacturers, alleging price fixing and other antitrust violations. On April 2, 2010, the cases were transferred and assigned to the Northern District of California. On May 12, 2010, the United States filed a motion to intervene for the purpose of limiting discovery until the conclusion of an ongoing criminal grand jury investigation. On May 18, 2010, this Court granted the United States' Motion to Intervene. Pursuant to the Court's request of May 6, 2010, the United States is filing its Motion for a Limited Stay of Discovery on or before May 20, 2010 in order to meet the briefing schedule dictated by the tentative hearing date set by the Court for the government's motion for a stay. In their Joint Case Management Conference Statement filed on April 29, 2010, plaintiffs have already requested that defendants, as part of their initial disclosures, produce all documents produced to the Department of Justice either voluntarily or pursuant to a *grand jury subpoena.* Prior to filing its Motion for a Limited Stay of Discovery, the United States circulated a proposed stipulation to Plaintiffs and Defendants. That proposed stay is virtually identical to the stipulated stay agreed to by the parties and the United States in the Cathode Ray Tubes civil litigation.

In the past decade, the Antitrust Division has conducted numerous investigations into alleged criminal antitrust violations in the Northern District of California. In only four of these matters has the government sought limited stays to prevent civil litigation from impeding grand

jury investigations, In each of these cases, the court has entered an order granting a stay. These matters are: dynamic random access memory ("DRAM"), static random access memory ("SRAM"), liquid crystal display ("TFT-LCD"), and cathode ray tube ("CRT"). In only one of these matters did the government decline to bring significant charges. The ODD investigation contains facts, issues, and concerns similar to these other investigations.

In the DRAM matter, Judge Hamilton granted a stay of all deposition and interrogatory discovery in the civil action until completion of the criminal grand jury investigation. *In re: DRAM Antitrust Litigation*, M-02-1486-PJH (N.D. Cal.), Stipulation and Order Limiting the Scope of Discovery (April 16, 2003). Attached as Exhibit 1. The criminal investigation resulted in guilty pleas by four companies, fines totaling $860 million, and charges being brought against 18 executives, 16 of which pleaded guilty.

In the SRAM matter, Judge Wilken granted a stay similar to the stay granted in the DRAM litigation. *In re: SRAM Antitrust Litigation*, No. CV-07-o1819-CW (N.D. Cal.), Stipulation and Order to Stay All Deposition and Interrogatory Discovery (June 12, 2007). Attached as Exhibit 2 .

In the TFT-LCD matter, Judge Illston found that the documents produced to the grand jury, which included detailed notes of hundreds of meetings between competitors, would reveal the nature, scope and direction of the ongoing grand jury investigation. Judge Illston ordered a stay on virtually all discovery and scheduled a Discovery Status Conference to occur eight months from the date of the stay. At that Discovery Status Conference, the parties filed a stipulated discovery schedule. *In re: TFT-LCD Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal.), Order Granting United States' Motion to Stay Discovery (September 25, 2007). Attached as Exhibit 3. To date, six companies have pleaded guilty to criminal antitrust charges and have been sentenced to pay criminal fines totaling more than $860 million. Additionally, 11 executives have been charged and six have pleaded guilty.

Most recently n the CRT matter, the parties in the CRT litigation were able to reach a stipulated stay in which virtually all merits discovery was stayed for an initial six-month period

of time. Subsequently, the parties have extended and amended the stay on more than two occasions. *In re: CRT Antitrust Litigation*, No. CV-07-5944-SC (N.D. Cal.), Stipulation and Order for Limited Discovery Stay (September 12, 2008) and the extensions to that stay filed respectively on January 30, 2009, June 8, 2009, and January 5, 2010. Attached as Exhibit 4. To date, two executives have been charged with criminal antitrust violations. The proposed ODD Order closely tracks the stipulation reached between the parties in the CRT litigation.

As explained in this Memorandum, and detailed more fully in the Declaration of Sidney A. Majalya (filed under seal), the criminal investigation into price fixing in the ODD industry presents circumstances that warrant a limited stay, not only of deposition and interrogatory discovery, but also of certain document discovery.

III. The Integrity of the Ongoing Grand Jury Investigation May Be Compromised if This Court Does Not Order a Limited Stay of Discovery

The district court has the discretionary power to stay proceedings in one action until the disposition of another. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). In deciding whether to grant a stay of civil proceedings pending a criminal investigation, a court should look to "particular circumstances and competing interests involved in the case," and consider the following factors:

> (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons or entities not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Federal Savings and Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902-03 (9th Cir. 1989). An analysis of these five factors supports the DOJ's request for a stay.

1. Interest of the Plaintiffs

A temporary curb on discovery will not substantially affect the Plaintiffs' interests. The Proposed Order provides for the immediate production of several categories of documents relating to ODDs that do not touch upon the liability of Defendants. Permitted discovery would include information relating to: Defendants' sales, production capacity, capacity utilization,

production costs, inventory levels, sales volumes, product lines, profitability, competitive position, market share, sales terms and conditions, costs, prices, shipments, customers, or distributors; the identity of Defendants' persons in positions of management or control of Defendants' respective ODD operations, including any directors, officers, managing agents, and employees; the storage, location, retention, destruction, or identity of corporate records; personal jurisdiction over Defendants; and class certification. Once the initial time twelve-month stay period lapses, the proposed staged discovery will provide ample time for Plaintiffs to gather evidence to pursue their cases.

The discovery schedule proposed in the Proposed Order may, in fact, be beneficial to the Plaintiffs. It will allow the grand jury the necessary time to investigate and prosecute the criminal allegations. If the DOJ is able to secure guilty pleas or convictions against Defendants, this will immeasurably aid the Plaintiffs in their ability to secure civil relief against the Defendants. A guilty plea or conviction would eliminate the need for Plaintiffs to prove civil liability and would allow them to focus solely on proving damages. Furthermore, individuals and companies that are convicted in the criminal matter will have strong incentives to reach settlements with civil Plaintiffs. Conversely, allowing full discovery to proceed in the civil case will adversely affect the Plaintiffs because it will most likely slow down the resolution of both the civil and criminal matters.

2. Burden on the Defendants

The limited stay of discovery will not impose a burden on the Defendants. The scope and nature of any successful criminal charge may well refine the civil case's focus, potentially reducing the cost to Defendants of discovery in this matter. Moreover, any Defendant not charged in the criminal investigation would likely be in a better position to resolve the civil litigation on favorable terms. In addition, as discussed in more detail below, a stay of discovery will protect the Defendants' employees from having to unnecessarily assert their Fifth Amendment privilege against self-incrimination during civil depositions, assertions that would be accompanied by adverse inferences against the Defendants in the civil litigation.

3. Convenience of the Court

The government's proposed stay will not inconvenience the Court. Resolution of the criminal case may allow the Court to avoid spending judicial resources on issues that may be resolved in the criminal process. *Bureerong v. Uvawas*, 167 F.R.D. 83, 87 (C.D. Cal. 1996) (resolution of criminal matter parallel to civil case "would pare down the issues to be determined in the civil case, and serve the interests of judicial economy by narrowing the focus of the action . . .."). By allowing the criminal case to proceed unhindered by substantial civil discovery, the matter will be brought to a quicker resolution. Additionally, with possible guilty pleas or convictions, the Court will avoid wasting judicial resources on resolving the litigation of liability issues in the civil matter. Allowing parallel civil and criminal proceedings to proceed without a stay will inevitably be duplicative and waste limited judicial resources.

Moreover, as the TFT-LCD litigation illustrates, imposing a stay will not completely halt the proceedings in this case: the Proposed Order permits certain categories of discovery, as described above; the Plaintiffs still need to file a consolidated complaint and serve all Defendants in the United States and abroad; and the Defendants are likely to file a substantial number of motions, including motions to dismiss in light of the United States Supreme Court's decision in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

4. Interests of Nonparties

Any interests of victims not represented in the class action litigation will be minimally affected. As with the class action litigants, any criminal convictions obtained by the DOJ will materially aid these victims in recovering damages.

The only other nonparties with any potential concern are the Defendants' employees who may be called before the grand jury and who may also be forced to testify in a deposition. To the extent these witnesses' rights are implicated by this motion, their interests support the DOJ's request for a stay.

In determining whether the interests of a nonparty witness support the issuance of a stay, a major consideration is whether the witness has testified or is about to testify before the grand

jury. *First Merchants Enterprise, Inc. v. Shannon*, 1989 WL 25214 (S.D.N.Y. 1989). In *First Merchants*, the court stayed the deposition of a nonparty witness who was cooperating with the grand jury, pending the conclusion of the investigation and the resolution of any charges ultimately brought against the Defendant. *Id. See also Board of Governors of the Federal Reserve System v. Pharaon*, 140 F.R.D. 634, 638-39 (S.D.N.Y. 1991).

In criminal antitrust grand jury investigations, it is common for the DOJ to bring before the grand jury numerous employees from the companies under investigation. If, prior to their grand jury testimony and resolution of their status with the DOJ, employees are required to testify in a civil deposition, those employees will be placed in the untenable position of having to choose between asserting their Fifth Amendment right against self-incrimination, with the negative inference that comes with that decision, or testifying in the deposition and running the risk of self-incrimination in the criminal matter. Such a "choice" weighs in favor of a limited stay of discovery.

5. Public Interest in Criminal Enforcement

Of the five factors identified by the Ninth Circuit, the most important factor under the facts of this case is the public interest in criminal enforcement. The DOJ's and the public's interest in a stay is twofold: (1) to ensure that the liberal discovery laws under civil cases are not improperly used for criminal discovery; and (2) to ensure that information gathered by the government and presented to the grand jury is not disclosed. *Bureerong*, 167 F.R.D. at 86-87 ("The interests of the government in protecting its criminal investigation are clearly the paramount concern . . .."). Both concerns overwhelmingly support the imposition of a limited stay.

First, it is well established that the public interest in the prosecution of a criminal case is entitled to precedence over the rights of parties in a related civil case when application of civil discovery rules would circumvent the more limited rules of criminal discovery. *See Osband v. Woodford*, 290 F.3d 1036, 1042-43 (9th Cir. 2002) (quoting *McSurely v. McClellan*, 426 F.2d 664, 671-72 (D.C. Cir. 1970) ("[C]ivil discovery may not be used to subvert limitations on

discovery in criminal cases, either by the government or by private parties."); *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962) ("A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit.").[1]

Limits on civil discovery are also warranted where the grand jury is still investigating the criminal conduct and has not yet returned an indictment. *See Souza v. Schiltgen*, 1996 WL 241824 (N.D. Cal. 1996). In *Souza*, the plaintiff, who was the subject of a criminal investigation relating to his employment of illegal aliens and their use of counterfeit green cards and work permits, was sued by the INS as part of his application for naturalization. *Id.* at *1. The INS moved for a stay of all civil proceedings pending resolution of all criminal proceedings. *Id.* The plaintiff argued that a stay should not be granted because the government was only involved in a "provisional investigation" and not a formal "criminal proceeding." *Id.* The court rejected the plaintiff's narrow interpretation of a "criminal proceeding," and, relying on *Campbell v. Eastland*, held that a stay of all civil proceedings was warranted to prevent the plaintiff "from having the opportunity to use the liberal rules of discovery applicable to this civil action to gain an unfair advantage in the possible criminal case against him." *Id.* at *3. Even more importantly, the court recognized that "[a]dministrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt

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[1] Rule 26 of the Federal Rules of Civil Procedure allows a party to take a deposition of any person having nonprivileged information relevant to any issue in the civil case. The scope of discovery in criminal cases is much narrower under Rule 16 of the Federal Rules of Criminal Procedure. Rule 16 does not "authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500." Under § 3500(a), statements of government witnesses, including prospective witnesses, shall not "be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." Moreover, the criminal rules do not generally permit depositions or interrogatories as a means of discovery. *See* Fed. R. Crim. P. 15 and 16.

determination of his civil claims or liabilities." *Id.*; *see also, Securities and Exchange Commission v. Downe*, 1993 WL 22126, *12-14 (S.D.N.Y. 1993) (granting a stay of all discovery for a limited period of time during the pendency of a parallel criminal investigation, to prevent Defendants' use of civil discovery rules to obtain evidence not available to them in the criminal proceeding).

In this case, the DOJ's and the public's interest in an unhindered investigation into a complex criminal matter outweighs the Plaintiffs' and Defendants' limited interest in taking discovery at this very early stage. The Defendants are aware of a criminal investigation by the DOJ, and, if a stay is not granted, Defendants likely will initiate discovery against the Plaintiffs and other codefendants and their employees. Discovery against codefendants and third-party witnesses raises the greatest concern for abuse of the discovery process. By seeking discovery from codefendants and third-party witnesses, the Defendants will certainly have the incentive to gain any information that will assist them in their defense of the government's criminal investigation -- including discovery directed at those witnesses who may be cooperating with the government. This may cause witnesses to be less than forthcoming in the grand jury investigation or subject them to threats and intimidation. This may also prematurely reveal the identity of any possible cooperators and reveal the substance of their testimony and documents.

Allowing immediate, unlimited discovery will also interfere with the grand jury secrecy afforded by Federal Rule of Criminal Procedure 6(e). Here, Plaintiffs' document requests are likely to expose the nature, scope, and direction of the ODD grand jury investigation. Plaintiffs demand that Defendants produce both the materials provided to the grand jury and the actual grand jury subpoena itself. The focus of the grand jury investigation, as well as the identities of potential witnesses or targets, will most certainly be revealed if Plaintiffs are provided with these documents. Grand jury secrecy will again be violated during the course of deposition testimony, when individuals who are cooperating with the investigation may be forced to reveal the scope and direction of the ongoing criminal investigation as well as the identity of others who may be

providing evidence to the grand jury or the government. The same result will occur if interrogatories are directed to witnesses cooperating with the grand jury.

In situations such as this one, courts frequently stay discovery in a civil action to avoid abuse of civil discovery rules and preserve the secrecy of ongoing grand jury proceedings. *See S.E.C. v. Downe*, 1993 WL 22126 at *13 ("[W]here a party or witness in a civil case is cooperating with a grand jury investigation relating to the subject matter of the civil suit, there is a compelling reason to stay discovery of the civil case pending resolution of the criminal investigation."); *Founding Church of Scientology v. Kelley*, 77 F.R.D. 378, 380-381 (D.C. Cir. 1977) (refusing to compel interrogatories during pendency of federal criminal grand jury investigation); *See Wallace v. General Electric Co.*, 1989 WL 13701 (E.D. Pa. 1989) (staying federal civil deposition of investigating officer pending completion of state criminal case); *Pharaon*, 140 F.R.D. at 639-41 (in staying federal civil deposition pending the completion of the government's grand jury investigation, the court stated that a "litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery."). Here, unbounded discovery raises a significant risk that information gathered by the government and the grand jury, which otherwise would not have been available under the Federal Rules of Criminal Procedure, will be disclosed to the parties.

In balancing the various interests at issue, the five-factor test strongly supports the DOJ's motion for a stay, particularly the DOJ's compelling interest in freely investigating and enforcing the federal criminal laws. The only factor which tends to favor the absence of a stay is the disputable inconvenience to the Plaintiffs, but that factor is minor compared to the compelling interest of the DOJ to preserve the secrecy and integrity of its criminal grand jury investigation. Given the overwhelming interest of the DOJ to prevent the disclosure of grand jury information, the Court should grant the DOJ's motion.

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IV. Conclusion

For the foregoing reasons, it is respectfully requested that the Court order a limited stay of discovery as specified in the Proposed Order, to be followed by staged discovery on a schedule to be determined pending a progress report by the DOJ to the Court.

Dated: May 20, 2010

Respectfully submitted,

/s/ Sidney A. Majalya
Sidney A. Majalya
Attorney, San Francisco Office
Antitrust Division
U.S. Department of Justice

EXHIBIT M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CIVIL MINUTE ORDER

VAUGHN R. WALKER
United States District Chief Judge

Date: June 24, 2010
Courtroom Deputy: Cora Klein Court Reporter: Connie Kuhl

Case No. MDL Docket No. 3:10-md-2143 VRW

Title: In re OPTICAL DISK DRIVE PRODUCTS ANTITTRUST LITIGATION
ALL CASES

DIRECT PURCHASER PLAINTIFFS:
Guido Saveri, Joseph M Alioto
Gary L Specks, Bruce L Simon
Joseph Tabacco, Gadio Zirpoli
Michael Lechman, Theresa Moore

INDIRECT PURCHASER PLAINTIFFS:
Jeff Friedman, Stephen Larson
Derek Howard, Jack Lee

DEFENDANTS:
Daniel Wall, John Cove, Ian Simmons, Patrick Hein, Ismail Ramsey, Katharine Kates, Matt Jacobs, Chris Hockett, Aaron Myers

UNITED STATES:
Sidney Majalya

PROCEEDINGS:
Government's motion to stay discovery, Doc #67.
Direct purchaser plaintiffs' motions to shorten time and to strike defendants' response to plaintiffs' opposition, Doc ##109, 110.

RESULTS:
The court heard argument from counsel. Direct purchaser plaintiffs' motion to shorten time, Doc #110, is GRANTED. Direct purchaser plaintiffs' motion to strike, Doc #109, is DENIED. Government's motion to stay discovery, Doc #67 is DENIED.

The court set the following case management schedule:
Indirect and direct purchaser plaintiffs' consolidated complaints shall be filed on or before August 26, 2010.
A FRCP 26(f) conference shall be held between the parties on or before September 9, 2010.
Initial disclosures shall be made on or before September 23, 2010.
A further case management conference shall be held at 10:00 AM on Wednesday, September 29, 2010.

EXHIBIT N

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER, CHIEF JUDGE

In Re: OPTICAL DISK DRIVE PRODUCTS ANTITRUST LITIGATION - ALL CASES	MDL No. M-10-2143 (VRW) San Francisco, California Thursday, June 24, 2010 (56 pages)

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

Direct Plaintiffs:

Saveri & Saveri, Inc.
BY: GUIDO SAVERI
CADIO ZIRPOLI

Kaplan, Fox & Kilsheimer, LLP
BY: GARY L. SPECKS

Alioto Law Firm
BY: JOSEPH ALIOTO
THERESA D. MOORE

Pearson Simon•Warshaw•Penny, LLP
BY: BRUCE L. SIMON

Hausfeld, LLP
BY: MICHAEL P. LEHMANN

Lieff, Cabraser
BY: ANDREW S. KINGSDALE

Berman, DeValerio
BY: JOSEPH J. TABACCO JR.

civilian criminal litigation."

And I agree with Mr. Wall's comment, that in a situation such as this, there are serious issues which transcend the particular interests of the parties to the litigation, and to the civil proceedings. A decision about the timing and the sequencing of this discovery is not a decision that should be made lightly.

But I also agree with the tenor and tone and substance I think of the comments made by Mr. Saveri, that in the absence of particular concerns, I think we should proceed with the civil litigation pretty much in the same manner and in the same order that we would proceed with the civil litigation in the absence of a pending grand jury proceeding. To be sure, that grand jury proceeding may affect some particular aspects of the discovery, may affect the timing of it in various ways, but we have civil cases before us and it's appropriate to proceed with those as expeditiously and in as orderly a fashion as we can.

So I am disinclined to grant the blanket kind of stay on discovery that the government seeks here. What I would attempt to do, what I am attempting to do, is to create as much as possible a level playing field between the plaintiffs and the defendants in the civil litigation as we go forward, without unduly jeopardizing the quite legitimate interests of the government in protecting its case, its confidential informants, and protecting the integrity of the leniency

program which it has in place.

Here's what I think we should do: We should have the plaintiffs submit their consolidated amended complaints, both the indirect and direct plaintiffs. That we should allow the plaintiffs to propound whatever discovery that they believe is appropriate to propound, and then sit down first after the 26(f) conference, among the parties, and the initial disclosures, at a further case management conference, at which we will take up the particulars of the discovery that the plaintiffs want to pursue.

I am impressed with the government's point, which I think was a good point that it made in support of its position, that while the defendants know what documents they turned over to the grand jury, not all of the defendants are aware of the whole universe of documents that may be before the grand jury. And there are legitimate government interests with respect to the confidentiality of some of those submissions.

But I think we can discuss the particulars of what is necessary to protect the government's legitimate interests in conducting its investigation and protecting its confidential witnesses, informants and protecting its leniency program, in the context of specific discovery requests, rather than imposing a blanket stay of all discovery. So here's what I propose:

A slight modification of the schedule that we

EXHIBIT O

HAGENS BERMAN

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March 11, 2011

Via ECF

Magistrate Judge Spero
U.S. District Court, N.D. Cal.
San Francisco Division
Courtroom A - 15th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *In Re Optical Disk Drive Products Antitrust Litig.*
U.S.D.C. N.D. Cal., Case No. 3:10-md-02143-RS (JCS)

Dear Magistrate Judge Spero:

The Indirect Purchaser Plaintiffs, Direct Purchaser Plaintiffs, Sony Optiarc America Inc. ("Sony Optiarc America"), Hitachi-LG Data Storage, Inc. and Hitachi-LG Data Storage Korea, Inc. (collectively "HLDS"), Toshiba Samsung Storage Technology Korea Corporation ("TSST-Korea"), Quanta Storage, Inc. and Quanta Storage America, Inc. (collectively "Quanta") respectfully submit the following joint letter pursuant to this Court's Standing Order.

I. DISPUTED DISCOVERY

The Indirect and Direct Purchaser Plaintiffs jointly move to compel all documents relating to optical disk drives ("ODDs") or ODD products produced by the above Defendants to the U.S. Department of Justice ("DOJ"). The request for production of documents at issue is:

> ALL DOCUMENTS RELATING TO ALL ODDs and ODD PRODUCTS that YOU produced to any United States governmental entity, including but not limited to the United States Department of Justice, either voluntarily or pursuant to a grand jury subpoena, RELATING TO potential violations of United States antitrust laws.

The lead trial counsel met and conferred in person regarding this issue on February 2, 2011. On February 16, 2011, the law clerk to Judge Seeborg confirmed that this Court was the magistrate assigned for discovery disputes. The parties further met and conferred on additional occasions, including February 25, 2011, March 1, 2011, and March 4, 2011.

II. PLAINTIFFS' POSITION

This private civil antitrust action concerning allegations of price-fixing by an international cartel of ODD manufacturers and patent-holders was preceded by a criminal antitrust investigation by the DOJ. The DOJ issued subpoenas to certain Defendants requesting information regarding the same price-fixing activities as involved in this consolidated proceeding. Plaintiffs here request the documents those Defendants have produced to the DOJ, excluding any documents generated by the DOJ (e.g., the subpoenas). Defendants refuse to produce this corpus of documents, arguing: (i) a blanket stay exists, excusing any production of documents until Judge Seeborg rules on the pending motions to dismiss; (ii) Defendants eventually will only produce documents produced to the DOJ if those documents are also responsive to another request for production of documents; or (iii) Federal Rule of Criminal Procedure 6(e) prevents defendants from turning over copies of material produced to the grand jury. Each argument is without merit.

A. No Blanket Stay of Discovery Exists

Some of the Defendants (Sony Optiarc America, HLDS, TSST-Korea and Quanta) assert that Judge Walker made a sweeping finding precluding all production of discovery until after the motions to dismiss are resolved. This position takes Judge Walker's comments at an earlier case management conference grossly out of context and overstates Judge Walker's guidance.

During the September 29, 2010, hearing, Judge Walker explicitly "reject[ed] the idea of a blanket stay of discovery."[1] At that hearing, the Defendants argued that the breadth of Plaintiffs' claims were so far-reaching, the scope of discovery here might be unmanageable. Yet, Judge Walker stated that he did not want to "have completely artificial sequencing of events, pleading, then discovery, and then more motions."[2] The Court was sensitive to the concern laid out in *Twombly* about the burden discovery can cause in antitrust matters (thus, the Court's comment that defendants would not be required to "back up the truck and put all the documents on the truck") but that does not mean the opposite was true – that the Court contemplated that Defendants would not have to produce a single document until the pleadings were settled. As the Court noted at the hearing, it was not drawing clear lines in the sand, but was only providing general guidance.[3]

Moreover, the suggestion that a blanket stay of discovery is appropriate until motions to dismiss have been decided has been rejected by the courts. As the *Flash Memory* court commented, "*Twombly* does not erect an automatic, blanket prohibition on any and all discovery before an antitrust plaintiff's complaint survives a motion to dismiss. . . . [*Twombly*] did not hold, implicitly or otherwise, that discovery in antitrust actions is stayed or abated until after a

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1 Hr'g. Tr. (Sept. 29, 2010) at 44:22-24.

2 Hr'g. Tr. (Sept. 29, 2010) at 45:25-46:2.

3 Hr'g Tr. (Sept. 29, 2010) at 46:3-5 ("So I know that's not very definitive, but you have a response date for the discovery, and I think that will be very illuminating").

complaint survives a Rule 12(b)(6) challenge." *In re Flash Memory Antitrust Litig.*, No. C 07-0086, 2007 U.S. Dist. LEXIS 95869, at *23-*24 (N.D. Cal. Dec. 24, 2007).[4] Any such finding would contradict Judge Walker's denial of the DOJ's request for a stay in this case.

B. Documents Produced to the DOJ Are Relevant to Plaintiffs' Claims

Other Defendants (TSST-Korea and HLDS) assert that they need not produce the corpus of documents produced to the DOJ as a whole, but will produce these documents only if they are independently responsive to another request for production of documents. Three types of documents possibly exist here: (i) documents generated by the grand jury or DOJ; (ii) documents produced to the grand jury; and (iii) presentations or investigative memoranda presented by the Defendants to the grand jury or the DOJ. Plaintiffs seek only the last two of these three categories.

Documents produced or presented to the DOJ and/or grand jury are undeniably relevant. Federal Rule of Civil Procedure 26(b)(l) provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(l). "Relevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." *EEOC v. Lexus of Serramonte*, No. C 05-0962, 2006 U.S. Dist. LEXIS 66438, at *15 (N.D. Cal. Sept. 1, 2006).

Here, the documents were produced in a criminal investigation into the very same facts and conduct related to potential violations of the Sherman Antitrust Act. The DOJ has stated that "[t]here is an ongoing grand jury investigation into possible price fixing and other antitrust violations in the ODD market."[5] Given the DOJ's motion to intervene in this case, motion to stay civil discovery and the overlapping description of the factual investigation, ***the grand jury is investigating the same facts and conduct as alleged in this civil case.***

Furthermore, Defendants themselves have repeatedly argued that the scope of the alleged conspiracy in this civil action is ***far broader*** than that being investigated by the DOJ.[6] Given Defendants' arguments, it is inconceivable that the allegations in the two operative complaints could be both vastly overly inclusive in the scope of the conspiracy and yet, under-inclusive for the purpose of discovery.

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4 All internal citations and quotations omitted and all emphasis added, unless otherwise indicated.

5 *See* Declaration of Sidney A. Majalya in Support of the United States' Motion to Intervene, ECF No. 44 at ¶ 3. *See also* Memorandum of Points and Authorities in Support of the United States' Motion for a Limited Stay of Discovery, ECF No. 68 at 2 (admitting the DOJ is "assisting a grand jury investigating possible criminal antitrust violations in the optical disk drive ("ODD") industry").

6 *See, e.g.*, Hr'g Tr. (June 24, 2010) at 18:9-11 (Counsel for Defendants: "I can tell you, based upon the limited amount of information that we have [about the grand jury investigation], that the complaint is grossly overbroad; it has -- it names parties who are under investigation; the scope of the conspiracy is all wrong, they have all -- all sorts of errors to it. But that they don't know about, because all they know is that somebody issued a press release saying that there was a grand jury subpoena.").

And, during the course of the meet and confer process, not one Defendant articulated any category or topic of documents that had been produced to the grand jury that might not be relevant to the claims or defenses in this action. Plaintiffs' counsel asked repeatedly, to no avail. Given that the "party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections," (*Cable & Computer Tech. v. Lockheed Sanders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal. 1997)), Defendants' inability to identify any categories of non-relevant documents alone defeats their objection.

Given the reality of the overlap between a grand jury investigation and civil litigation in price-fixing conspiracies, courts in this district routinely find documents produced to the DOJ during a criminal investigation relevant to a later-filed private civil antitrust action and order production. Every court in this district that has considered these issues in price-fixing conspiracies in the last decade has ordered production of the documents produced to the DOJ.[7]

C. Little Burden Exists in Producing a Discrete Set of Documents Already Collected and Produced to the DOJ

Defendants also cannot credibly claim undue burden. Plaintiffs request documents that Defendants have already compiled, organized, and produced in a suitable format to the DOJ. Thus, the burden in producing these documents to Plaintiffs would be *de minimus*. Sony Optiarc America has taken the position that reviewing the documents for confidentiality would be burdensome; whereas Quanta has taken the position that simply reviewing these documents for relevance would be burdensome. The burden to review documents, however, is something encountered in all litigation. Defendants have made no additional showing here, never mind the required showing that the information is not "reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(B). A Stipulated Protective Order has been entered (ECF No. 323) governing the protection and handling of documents produced in this litigation. Other courts in this district addressing the issue of grand jury documents have relied on similar protective orders to address concerns of confidentiality. Defendants have utterly failed to make a showing of undue burden here.

D. Federal Rule of Criminal Procedure 6(e) Does Not Shield Defendants from Their Discovery Obligations

Some Defendants (Quanta) rely on Federal Rule of Criminal Procedure 6(e), which states that unless provided otherwise, grand jurors, interpreters, court reporters, operators of recording devices, persons transcribing recorded testimony, and attorneys for the government must not

[7] *See, e.g., In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. M:07-CV-01819, slip op. at 3 (N.D. Cal. Jan. 5, 2009); *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, No. M:07-1827, MDL No. 1827, slip op. at 4 (N.D. Cal. May 27, 2008); *In re Flash Memory Antitrust Litig.*, 2007 U.S. Dist. LEXIS 95869, at *23 (N.D. Cal. Dec. 24, 2007) (rejecting argument that documents produced to the DOJ in response to a grand jury subpoena were not relevant, noting only a concern over the production of the documents prior to the filing of a consolidated pleading); *In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417, 2007 U.S. Dist. LEXIS 57982, at *17 (N.D. Cal. July 24, 2007) (ordering production of documents produced to DOJ); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M-02-1486, slip. op. at 2-3 (N.D. Cal. Apr. 16, 2003).

disclose matters occurring before the grand jury. Fed. R. Crim. P. 6(e). But as numerous courts have observed, defendants are not on this list, and thus, the constraints of Rule 6(e) do not apply. For example, in *In re Graphics Processing Units Antitrust Litig.*, 2007 U.S. Dist. LEXIS 57982, at *17, Judge Alsup rejected defendants' claims of protection under Rule 6(e) and ordered the production of documents produced to a DOJ grand jury. Judge Alsup reasoned that "[s]ince defendants are free to volunteer the information, a court may compel a disclosure. Nothing in Rule 6(e) is otherwise." *Id.*

The purpose of Rule 6(e) is "only to protect against disclosure of what is said or takes place in the grand jury room . . . it is not the purpose of the Rule to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury." *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1411 (9th Cir. 1993). Thus, as one court has noted: "to the extent that the documents in question were prepared antecedent to and independent of the grand jury investigation, there is less likelihood that their production will reveal the essence of what is occurring in the grand jury room." *In re Blood Reagents Antitrust Litig.*, MDL No. 09-2081, 2010 U.S. Dist. LEXIS 86930, at *30-*31 (E.D. Pa. Aug. 23, 2010).

Defendants' documents were drafted and created for business purposes – albeit illegal purposes. Rule 6(e) exists to protect the workings of the grand jury alone. Defendants may not hide behind this protection to avoid the production of discovery in this case.

E. Plaintiffs' Requested Relief

Plaintiffs request this Court order all documents produced to the DOJ be made available to Plaintiffs within fourteen days, and thereafter Defendants' supplemental productions made to the DOJ shall be made available simultaneously to Plaintiffs.

III. DEFENDANTS' POSITION

Plaintiffs' request has already been heard and denied. At the September 29, 2010 case management conference, Judge Walker[8] ruled that document productions need not proceed until "after the *Twombly* motions have been decided." (Hrg. Tr. (Sept. 29, 2010) at 45:16-21 (Exhibit A).) Counsel for Direct Plaintiffs then specifically requested that the Court order any grand jury materials be produced to Plaintiffs. Judge Walker rejected this request *sub silentio*. (*Id.* at 47:10-14, 49:8-13.) Indeed, lacking any real basis for their Complaints, Plaintiffs have been trying to get access to these documents since the moment they commenced these cases and, each time, this request has been rejected.[9] While permitting certain written discovery to commence, Judge Walker ruled that there should be "limitations on discovery," including a proper

[8] These cases were originally assigned to then-Chief Judge Walker, and then transferred to Judge Seeborg on October 8, 2010, following Judge Walker's announced retirement.

[9] During the initial case management conference, Plaintiffs also asked that Defendants be required to produce any grand jury materials prior to their having to file consolidated complaints, in order "to find out exactly what this case is all about. What's the big secret?" (Hrg. Tr. (May 6, 2010) at 12:24-13:6) (Exhibit B).) Judge Walker declined Plaintiffs' request for discovery to determine what their own purported case concerned.

sequencing which contemplates taking up issues related to discovery objections after resolution of the motions to dismiss. (*Id*. at 44:16-45:21.)

Since Judge Walker's ruling, the motions to dismiss have been briefed and argued. With these motions now submitted and awaiting ruling, Plaintiffs' motion to compel asks the Court to impose wholly unnecessary, premature burdens on Defendants and should be denied.

A. The Consolidated Complaints and Defendants' Motions to Dismiss

These lawsuits commenced days after the October 2009 disclosures by three optical disk drive ("ODD") manufacturers that they had received subpoenas from the Department of Justice as part of an investigation into the ODD industry – an investigation that is purportedly ongoing, but that has not led to a single indictment or guilty plea by any company.

The Direct and Indirect Purchaser Plaintiffs' consolidated complaints purport to allege a single, international price-fixing conspiracy involving an array of disparate products, which encompasses between 26 and 30 defendants and has continued from 2004 to the present. The complaints are filled with generalized allegations about the ODD industry, the existence of DOJ subpoenas and misconduct in unrelated product markets. In contrast to the general allegations, Plaintiffs allege the supposed rigging of three individual bids to two computer manufacturers (Dell Inc. and Hewlett-Packard Company). From averments about three supposedly rigged bids to Dell and H-P – two non-party Original Equipment Manufacturers ("OEMs") purchasing ODDs from only a handful of Defendants – Plaintiffs allege a five-year conspiracy covering industry-wide price fixing of not just ODDs but also any "ODD Products," which they define to include any number of *finished products* that happen to contain an ODD as a component, including any desktop or laptop computer, camcorder, television, video-game console, and CD, DVD or Blu-Ray player.

On October 12, 2010, Defendants filed joint and individual motions to dismiss, challenging the plausibility of the supposed conspiracy and showing why, even if the bid rigging allegations were sufficient as to OEM customers Dell and H-P, they do not support the vast conspiracy alleged, nor do they confer antitrust standing on either direct or indirect purchasers. For example, the supposed "direct purchasers" lack standing because there is no basis to allege any wrongdoing concerning sales as to which any Plaintiff alleges it is in the line of distribution.

B. The District Court Already Denied Plaintiffs' Request, and Their Motion Offers No Compelling Reason to Revisit the Court's Ruling.

Because of the "serious" threshold challenges to the complaints expected by Defendants' motions to dismiss, the Court agreed to set certain "limitations on discovery" even before Defendants filed their motions. Specifically, noting that it was "highly likely that some defendants or some products as a result of those motions … may be eliminated from the litigation," Judge Walker ruled that Defendants should serve written responses to Plaintiffs' discovery, including any objections about burden and the appropriateness of the discovery, but

that the Court and parties would "take up those issues after the *Twombly* motions have been decided." (*See* Exhibit A at 44:16-45:21.)

Defendants' motions to dismiss raise substantial issues regarding the sufficiency of the complaints and the proper parties to assert those claims. Indeed, some of the issues, including the threshold standing challenge to the purported "direct purchasers," raise problems for which Plaintiffs may never be able to plead around and could result in final dismissal. Judge Walker's decision to sequence discovery and postpone any disputes pending resolution of the motions is consistent with precedent in and out of this circuit. As the Ninth Circuit has held, "[t]he purpose of F.R. Civ. P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery." *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). Put differently, a "plaintiff is required to state a viable claim at the outset, not allege deficient claims and then seek discovery to cure the deficiencies." *APL Co Pte. Ltd. v. UK Aerosols Ltd., Inc*., 452 F. Supp. 2d 939, 945 (N.D. Cal. 2006); *see also In re Text Messaging Antitrust Litig*., __ F.3d __, 2010 WL 5367383 at *6 (7th Cir. 2010) (finding that a complaint must show "a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery"); *Mann v. Brenner*, 2010 U.S. App. LEXIS 6540, at *18 (3d Cir. Mar. 30, 2010) ("[T]he idea that discovery should be permitted before deciding a motion to dismiss is unsupported and defies common sense"); *In re Graphics Processing Units Antitrust Litig*., 2007 WL 2127577, No. C 06-07417 WHA (N.D. Cal. 2007) ("*GPU*").

The *GPU* ruling is instructive. There, addressing a similar request for all grand jury documents, Judge Alsup refused to order production and "conclude[d] that first resolving the motions to dismiss is the better course." 2007 WL 2127577, at *5. He reasoned that "[a]fter full ventilation of the viability *vel non* of the complaint, we will all be in a much better position to evaluate how much, if any, discovery to allow" and then found that "adjudicating the motions to dismiss will shed light on the best course of discovery." *Id*.[10] Here, too, resolution of the motions to dismiss will, among other things, better clarify the scope of this action and the categories (if any) of responsive documents.

Plaintiffs do not provide any reasons for challenging Judge Walker's prior discovery rulings and nothing in the current procedural posture warrants reconsideration.

C. Plaintiffs' Requests Are Objectionable, In Any Event

Overbroad. Even aside from Judge Walker's ruling, both sets of Plaintiffs' requests for all documents produced to U.S. government entities "relating to ODD Products" are overbroad on their face. The fact a document has been turned over to the grand jury does not automatically render it discoverable, or even relevant to the claims or defenses, in these separate civil cases. Because Plaintiffs have offered "no persuasive argument or authority that information about an investigation into a possible conspiracy . . . (as opposed to [information about] underlying

[10] Like here, "there ha[d] been no indictment, much less any guilty plea by any defendant" in *GPU*, a factor which Judge Alsup found militated in favor of rejecting a request for grand jury materials prior to resolution of the motions to dismiss. 2007 WL 2127577, at *5.

actions) is relevant to a claim or defense in this litigation," they have no right to the "broad" discovery they seek to compel. *In re Urethane Antitrust Litig.*, No. 04-MD-1616-JWL, 2010 U.S. Dist. LEXIS 134110, at *53 (D. Kan. Dec. 17, 2010) (refusing to compel production of "all documents provided to [agencies] related to an investigation into violations of antitrust law" to the extent such documents were not being produced in response to a separate, valid request).

This is consistent with Judge Seeborg's comments during the hearing on the motions to dismiss that "it's unfair, frankly, to draw a conclusion premised on the simple issuance of a grand jury subpoena" because, in his experience, "an awful lot of them resulted in the determination that there was no basis to proceed." (Hrg. Tr. (Feb. 16, 2011) at 31:8-22.); *see also id*. at 32:20-33:3 ("What I'm concerned about is, a subpoena really means nothing. A subpoena simply means that there is a reason for the law enforcement to want to ask some questions …. I'm not even sure it's part of the puzzle") (Exhibit C.)

It is Plaintiffs' burden to serve a proper request. Much like a request seeking "all emails sent during February 2009" would be plainly overbroad, even if some relevant documents may fall within that request, discovery of essentially everything produced in response to a grand jury subpoena, just because it was produced, is similarly overbroad. *See In re Sulfuric Acid Antitrust Litig.*, 2004 U.S. Dist. LEXIS 6194, at *18 (N.D. Ill. 2004) (noting that "one might wonder how the plaintiffs would show a need for a general request for everything given to the Government, when they have served at least 65 other (presumably) tailored requests seeking information relevant to the claims and defenses in the case," in the context of addressing Defendants' Fed. R. Crim. P. 6(e) objections). It is not the responding party's burden to identify which documents, included within an objectionable request, may be relevant to the case. *See Lopez v. Chertoff*, No. CV 07-1566-LEW, 2009 WL 1575214, at *3 (E.D. Cal. June 2, 2009) (concluding that "one of the purposes of Rule 34 is to prevent fishing expeditions, and thus Plaintiff has some responsibility to narrow his request[,]" and denying the motion to compel because plaintiff's request "leaves Defendant to speculate as to what types of documents Plaintiff seeks").[11]

In any event, Defendants' meet and confer efforts to narrow this request, and to work toward a production of those grand jury materials which may ultimately be relevant to (i) one of Plaintiffs' other discovery requests, and (ii) the claims and defenses in these cases, have further illuminated the prudence of Judge Walker's ruling that discovery disputes should await resolution of the motions to dismiss in order to determine the size and shape of these cases.

Burdensome. The requests at issue here – for all documents produced to the government "relating to ODD Products" – are burdensome. Compliance is not as simple as making copies of what has been produced to the government and then forwarding it along. The productions include various documents that do not relate to "ODD Products," and Defendants would have to review each document for responsiveness. The Indirect Purchasers further qualified their request and seek only documents which "relat[e] to potential violations of United States antitrust laws."

[11] Indeed, this request is particularly irrelevant with respect to direct purchaser plaintiffs because they are neither Dell or H-P, and if the Court agrees that they lack standing, these plaintiffs will never be entitled to this (or any) discovery.

This vague limitation would require Defendants to undertake additional substantive review of the documents – a burden exacerbated by the significant number of foreign language documents.

Other burdens apply as well. For example, privacy concerns relating to individuals' information produced to the government would have to be addressed; confidentiality designations under the protective order entered in these cases would have to be assessed and added on a document-by-document basis; and adjustments may need to be made to accommodate the parties' anticipated stipulation for the production electronic documents.[12] *See GPU*, 2007 WL 2127577, at *5 (finding that, despite the relatively minor incremental cost to make a duplicate set of materials already gathered and produced to the government, "[s]till, there would be the issue of various objections (based, for example, on employee privacy) that might be assertable against plaintiffs that were unasserted against the government"). Similar to *GPU*, "whether and the extent to which" Defendants may ultimately be required to undertake a review and production of certain of these documents "will be best decided after ruling on the Rule 12 motions." *See id*.

Improper Under Fed. R. Crim. P. 6(e). Rule 6(e)(2) also counsels against compelling production of the documents Plaintiffs seek here. "Rule 6(e) imposes a general rule against disclosure of 'matters occurring before the grand jury' …." *U.S. v. Dynavac*, 6 F.3d 1407, 1411 (9th Cir. 1993). Although Defendants are not among the parties bound by the secrecy provisions of Rule 6, "[g]rand jury secrecy and its underling policy are no less violated by unwarranted disclosure in a civil action than in any other context." *Bd. of Ed. of Evanston High School Dist. No. 202 v. Admiral Heating and Ventilation, Inc*., 513 F.Supp. 600, 604 (N.D.Ill. 1981); *Sulfuric Acid*, 2004 U.S. Dist. LEXIS 6194, at *8.

Here, the Government originally sought a stay of discovery "to preserve the secrecy of the grand jury proceedings …."[13] While Judge Walker did not grant that stay, he did state: "I am impressed with the government's point …. And there are legitimate government interests with respect to the confidentiality of some of those submissions. But I think we can discuss the particulars of what is necessary to protect the government's legitimate interests … in the context of specific discovery requests, rather than imposing a blanket stay on discovery." (Hrg. Tr. (June 24, 2010) at 53:11-23) (Exhibit D).)

Plaintiffs limit their motion to a document request that would reveal what specific documents the grand jury is considering. "[I]f a document is sought for its own sake rather than to learn what took place before the grand jury, and if its disclosure will not compromise the integrity of the grand jury process, Rule 6(e) does not prohibit its release." *Dynavac*, 6 F.3d at 1411-12. Plaintiffs here, however, are not pursuing any other document requests for their own sake; instead, they are pursuing a request that, standing alone, can have no other purpose than determining the who, what, when, how and why of the grand jury's investigation. Production of

[12] Several disputed issues concerning the specifications of electronic document production remain. Compliance with some of Plaintiffs' outstanding demands, such as segregation of documents by language and production in a non-standard encoding format, would cost Defendants considerable amounts of time and money.

[13] *See* Government's Memorandum in Support of Motion, filed May 20, 2010 (Dkt. 68).

such a collection would be inappropriate. *See e.g. In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827, 2007 WL 2782951 (N.D. Cal. Sept. 25, 2007).

D. Final Position and Proposed Compromise

• *Hitachi-LG Data Storage, Inc. and Hitachi-LG Data Storage Korea, Inc. ("HLDS")*: Consistent with the prior ruling by Judge Walker, which requires rejecting plaintiffs' position that their motion to compel is ripe, the HLDS defendants have agreed that they will, at an appropriate point in the litigation, produce documents that may have been produced to the U.S. Department of Justice to the extent those documents are produced in response to a valid, unobjectionable separate request, and have offered to meet and confer regarding the scope of that production.

• *Quanta Storage Inc. and Quanta Storage America, Inc. ("QSI")*: Some or all of the documents sought in response to this request may be properly discoverable in response to other requests. QSI will not withhold documents responsive to other requests just because they may have been produced to a grand jury.

• *Sony-Optiarc America, Inc. ("SOA")*: As explained in SOA's motion to dismiss, none of the allegations in the complaints are sufficient to state a claim against SOA, which is not identified as having entered into any agreement even with respect to the three bids to H-P and Dell. Indeed, the single e-auction allegation that even names SOA as a bid participant involves a claim that two other defendants agreed to reduce a price offered to Dell in December 2008. Consistent with Judge Walker's ruling, if the Court rules that Plaintiffs have stated a claim against SOA, SOA will meet and confer with Plaintiffs to discuss the scope of its document production and the proper narrowing of Plaintiffs' requests.

• *Toshiba Samsung Storage Technology Korea Corp. ("TSST-K")*: TSST-K is not asserting that documents produced to a governmental entity in response to a grand jury subpoena are insulated from civil discovery, and will not withhold documents responsive to proper discovery requests merely because they may have also been produced to a grand jury. On the other hand, until the parties receive clarification regarding which parts, if any, of the cases will remain, TSST-K cannot determine what is relevant to the claims and defenses in these cases. TSST-K has agreed to begin reviewing its production to the government, and segregating those documents by complaint allegations, such that it will be well-positioned to identify particular categories of documents following the ruling on the motions to dismiss.

* * *

Respectfully submitted,

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EXHIBIT P

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CIVIL MINUTE ORDER

CASE NO. C 10-MD-02143 RS (JCS)

CASE NAME: In Re: Optical Disk Drive Products Antitrust Litigation

MAGISTRATE JUDGE JOSEPH C. SPERO **COURTROOM DEPUTY: Karen Hom**

DATE: April 7, 2011 **TIME: 36 m** **COURT REPORTER: Lydia Zinn**

COUNSEL FOR PLAINTIFF:
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Patrick Hein

PROCEEDINGS: **RULING:**

1. Telephonic Discovery Hearing re: Joint Letter on Motion to Compel [docket no. 370] **Granted**

ORDERED AFTER HEARING:

Documents shall be produced by all defendants' within sixty (60) days from today.

ORDER TO BE PREPARED BY: **() Plaintiff** **() Defendant** **() Court**

CASE CONTINUED TO: **at 1:30 p.m., for a further case mgmt conference.**

Number of Depos: **Number of Experts:** **Discovery Cutoff:**

Expert Disclosure: **Expert Rebuttal:** **Expert Discovery Cutoff:**

Motions Hearing: **at 9:30 a.m.** **Pretrial Conference:** **at 1:30 p.m.**

Trial Date: **at 8:30 a.m.** **()Jury** **()Court** **Set for** **days**

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cc: **Chambers; Karen**

* (T) = Telephonic Appearance

EXHIBIT Q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MUNICIPAL DERIVATIVES ANTITRUST LITIGATION

ORDER
MDL No. 1950
Lead case: 08 Civ. 2516 (VM) (GWG)

THIS DOCUMENT RELATES TO: ALL ACTIONS

GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

As discussed today at a proceeding on the record, the application of the Antitrust Division of the Department of Justice ("the Government") to intervene pursuant to Fed. R. Civ. P. 24(b) is granted for the limited purpose of moving to stay discovery.

The Government's application to stay discovery is granted in part and denied in part. The following types of discovery shall not be stayed: (1) requests (including subpoenas) for documents and other tangible things (including but not limited to electronically stored information and tape recordings), (2) interrogatories pursuant to Local Civil Rule 33.3(a), (3) interrogatories seeking the identities of speakers, transactions and other summary information relating to tape recordings, and (4) depositions of custodians of documents concerning matters relating to the production of documents.[1] All other discovery is stayed until February 1, 2011. The Government has leave to move to extend the stay, provided its application is filed no later than December 31, 2010. Prior to filing any such application, however, the Government shall confer with the parties to determine if an agreement can be reached with respect to its request to extend the stay.

The Government shall be informed in advance of any deposition. Any tape recordings shall be disclosed only pursuant to the terms of a protective order. The parties and the Government shall attempt to agree on the terms of such an order. If they are unable to do so, the disagreement may be presented to the Court by letter.

SO ORDERED.

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[1] These categories describe the types of discovery that are not stayed. The recipient of a discovery request may still object to the request, if permitted under the Federal Rules of Civil Procedure, even if the request falls within one these categories.

Dated: May 27, 2010
New York, New York

GABRIEL W. GORENSTEIN
United States Magistrate Judge

EXHIBIT R

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MUNICIPAL DERIVATIVES ANTITRUST LITIGATION	MDL No. 1950 Master Docket No. 08-02516 (VM) (DF)
THIS DOCUMENT RELATES TO: ALL ACTIONS	**THIRD CONSOLIDATED AMENDED CLASS ACTION COMPLAINT** JURY TRIAL DEMANDED

NATURE OF THE CASE

1. Plaintiffs allege herein a conspiracy among Defendants and certain named and unnamed co-conspirators, to fix, maintain or stabilize the price of, and to rig bids and allocate customers and markets for, Municipal Derivatives (as defined below) sold in the United States and its territories.

2. Plaintiffs and Provider Defendant Bank of America, N.A. ("Bank of America") have engaged in confidential discussions about some of the facts and circumstances detailed in this Complaint The information contained in this Complaint comes in part from information obtained from Bank of America and in part from publicly-available information, including regulatory filings, other complaints on file in these proceedings and the Court's rulings on them, and pleadings in criminal cases.

3. This Complaint incorporates all of the allegations against defendants named in the Second Consolidated Amended Complaint ("SCAC") that the Court sustained in *Hinds County, Miss. v. Wachovia Nat'l Bank, N.A.*, 700 F.Supp.2d 378 (S.D.N.Y. 2010) ("*Hinds II*").

The present complaint differs principally from the SCAC in that it adds various GE entities[1] as named defendants, as the Court expressly permitted Interim Class Plaintiffs to do in *Hinds County, Miss. v. Wachovia Nat'l Bank, N.A.*, 620 F.Supp.2d 499 (S.D.N.Y. 2009) ("*Hinds I*"). These additions are based in part on the Court's rulings in *Hinds County, Miss. v. Wachovia Nat'l Bank, N.A.*, 708 F.Supp.2d 348 (S.D.N.Y. 2010) ("*Hinds III*") and *Hinds County, Miss. v. Wachovia Nat'l Bank, N.A.*, No. 08 Civ. 2516. 2010 WL 1837823 (S.D.N.Y. April 26, 2010) ("*Hinds IV*"). The present Complaint also contains additions based on informations or indictments and guilty pleas that often postdated the Court's decisions in *Hinds II*, *Hinds III*, and *Hinds IV*. These include: (a) the "Indictment" (Oct. 29, 2009) and "Superseding Indictment" (Dec. 7, 2010) (and other pleadings or communications) against Broker Defendant CDR Financial Products ("CDR") and its officers David Rubin ("Rubin"), Zevi Wolmark ("Wolmark"), and Evan Andrew Zarefsky ("Zarefsky") in *United States v. Rubin/Chambers, Dunhill Ins. Servs.*, Inc., No 09 cr 1058 (S.D.N.Y.) ("*CDR*") and the subsequent guilty pleas of CDR and Rubin; (b) the "Plea Agreement" (Feb. 22, 2010) of (and antecedent information against) Dani Naeh ("Naeh") of CDR in *United States v. Naeh*, No. 10 Crim. 139 (S.D.N.Y.) ("*Naeh*"); (c) the "Plea Agreement" (March 11, 2010) of (and antecedent information against) Matthew Rothman ("Rothman") of CDR in *United States v. Rothman*, No. 10 Crim. 200 (S.D.N.Y.) ("*Rothman*"); (d) the "Plea Agreement" (March 15, 2010) of (and antecedent information against) Douglas Goldberg of CDR in *Unted States v. Goldberg*, No. 10 Crim. 209 (S.D.N.Y.) ("*Goldberg*"); (e) the "Plea Agreement" (May 21, 2010) of (and antecedent information against) Mark Zaino ("Zaino") of Provider Defendant UBS AG ("UBS") and, before

[1] Susman Godfrey L.L.P. is Counsel for Plaintiffs against all Defendants except the GE related entities added here, Trinity Funding Co. LLC or GE Funding Capital Market Services, Inc.

that, CDR in *Unted States v. Zaino*, No. 10 Crim. 434 (S.D.N.Y.) ("*Zaino*"); (f) the "Plea Agreement" (Aug. 12, 2010) of (and antecedent information against) Martin Kanefsky ("Kanefsky") of Broker Defendant Kane Capital ("Kane") in *United States v. Kanefsky*, No. 10 Crim. 721 (S.D.N.Y.) ("*Kanefsky*"); (g) the "Indictment" (Aug. 19, 2010) against Dominick Carollo ("Carollo") of Provider Defendants the Royal Bank of Canada ("RBoC") and, before that, Provider Defendants Trinity Funding Co., LLC ("GE Trinity"), Trinity Plus Funding Co.,LLC ("GE Trinity Plus"), and GE Funding Capital Market Services, Inc. ("GE Funding"); Steven Goldberg of FSA, and, before that, GE Trinity, GE Trinity Plus, and GE Funding, and Peter Grimm ("Grimm") of Provider Defendants GE Trinity, GE Trinity Plus, and GE Funding in *United States v. Carollo, et al.*, 10 Crim. 00654 (S.D.N.Y.) ("*Carollo*"); (h) the "Plea Agreement" (Sept. 8, 2010) of (and antecedent information against) Adrian Scott-Jones ("Scott-Jones") of Capital Financial Partners, Inc. ("CFP") in *Unted States v Scott-Jones*, No. 10 Crim. 794 (S.D.N.Y.) ("*Scott-Jones*"); (i) the "Information" (Sept. 9, 2010) against Douglas Campbell, formerly of Provider Defendants Bank of America and Piper Jaffray & Co. ("Piper Jaffray") in *United States v. Campbell*, No. 10 Crim. 803 (S.D.N.Y.) ("*Campbell*"); (j) the "Plea Agreement" (Nov. 30, 2010) of (and antecedent information against) James Hertz ("Hertz") of Provider Defendant JP Morgan Chase & Co. ("JP Morgan") in *Unted States v. Hertz*, No. 10 Crim. 1178 (S.D.N.Y.) ("*Hertz*"); (k) the "Information" (Dec. 9, 2010) against Peter Ghavami ("Ghavami"), Gary Heinz ("Heinz"), and Michael Welty ("Welty") of UBS in *United States v. Ghavami, et al.*, No. 10 Crim. 1217 (S.D.N.Y.) ("*Ghavami*"); and (l) the settlement agreement entered into on December 23, 2011 between GE Funding Capital Market Services, Inc. and the Attorneys General ("AGs") of various states. The present Complaint also contains additions based on the bill of particulars submitted by the DOJ in CDR and submitted as an exhibit to the

February 10, 2010 letter to the Court in that case. With respect to CDR's role in the alleged conspiracy, the bill of particulars lists approximately 250 affected transactions and refers to 30 individual and 25 entity co-conspirators. These additions are also prompted in part by the "Second Amended Complaint" (Feb. 23, 2011) in *Jefferson's Ferry v. Bank of America*, MDL No. 1950 (S.D.N.Y.) (Dkt. No. 1245) ("*Jefferson's Ferry* Complaint") and on a complaint filed by the Securities & Exchange Commission ("SEC") in *SEC v. LeCroy*, No. Cv. 09-B-2238 S (N.D. Ala.) ("*LeCroy*").

4. As explained below, Bank of America has received a conditional leniency letter from the DOJ's Antitrust Division. This fact, in and of itself, is significant. It means that Bank of America is an *admitted felon*. It further means that Bank of America is an *admitted co-conspirator*. The significance of obtaining a conditional leniency letter was explained by Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, in a November 19, 2008 presentation available on the DOJ's website at http://www.usdoj.gov/atr/public/criminal/239583.htm:

> *Does a leniency applicant have to admit to a criminal violation of the antitrust laws before receiving a conditional leniency letter?*
>
> Yes. The Division's leniency policies were established for corporations and individuals "reporting their illegal antitrust activity," and the policies protect leniency recipients from criminal conviction. Thus, *the applicant must admit its participation in a criminal antitrust violation involving price fixing, bid rigging, capacity restriction, or allocation of markets, customers, or sales or production volumes before it will receive a conditional leniency letter.* Applicants that have not engaged in criminal violations of the antitrust laws have no need to receive leniency protection from a criminal violation and will receive no benefit from the leniency program.
>
> When the model corporate conditional leniency letter was first drafted, the Division did not employ a marker system.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2017, I caused the foregoing Class Plaintiffs' Opposition to (1) Defendants' Motion to Stay Discovery Pending Resolution of Defendants' Motions to Dismiss and (2) Intervenor United States' Cross-Motion to Extend Discovery Stay to be filed electronically with the Clerk of the Court by using the CM/ECF system which will serve a copy on all interested parties registered for electronic filing, and is available for viewing and downloading from the ECF system.

/s/ *Roberta D. Liebenberg*
Roberta D. Liebenberg