No. 25-3006

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: NATIONAL PRESCRIPTION OPIATE LITIGATION

In re: EXPRESS SCRIPTS, INC., et al.,

Petitioners.

O R D E R

Before: SUHRHEINRICH, BATCHELDER, and LARSEN, Circuit Judges.

Defendants Express Scripts, Inc. and ESI Mail Pharmacy Service, Inc. (collectively, "Express Scripts"), OptumRx, Inc., OptumInsight, Inc., and OptumInsight Life Sciences, Inc., along with seven non-party Pharmacy Benefit Managers participating in discovery, petition for a writ of mandamus directing the district court to reverse two discovery orders in the underlying multidistrict National Prescription Opiate Litigation compelling the production of internal communications and personnel files for the benefit of Plaintiff City of Rochester, New York.

The petition concerns two categories of discovery: "Audit Documents" containing internal communications about regulatory compliance, which Express Scripts argues amount to legal advice protected by attorney-client privilege; and "Personnel File Materials" for each former or current employee that Rochester deposes, which Petitioners argue are irrelevant and outweighed by privacy concerns. The Special Master concluded that the Audit Documents were primarily business communications and that the Personnel File Materials were sufficiently relevant and covered by standing protective orders. The district court affirmed both conclusions.

Mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)). In *Mohawk Industries, Inc. v. Carpenter*, the Supreme Court concluded that interlocutory review of discovery orders will rarely be justified because "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." 558 U.S. 100, 109 (2009). And because mandamus relief is not warranted when there is an adequate alternative remedy, *Cheney*, 542 U.S. at 380–81, Petitioners are not entitled to the writ.

Even assuming post-judgment appeal is not an adequate alternative, Petitioners must also show "that [their] right to issuance of the writ is clear and indisputable" in this case. *Id.* at 381 (cleaned up). Historically, "[t]he inability to cure an unlawful piercing of the privilege through direct appeal has led numerous courts of appeals to regularly utilize mandamus when important interests such as privilege are at issue." *In re Lott*, 424 F.3d 446, 450 (6th Cir. 2005). But *Mohawk* made clear that mandamus relief is justified only when a discovery order "amounts to a judicial usurpation of power or a clear abuse of discretion, or otherwise works a manifest injustice." 558 U.S. at 111 (cleaned up). This case does not present any of these "extraordinary circumstances." *Id.*

Petitioners' arguments as to the Audit Documents ultimately boil down to a disagreement with the district court's factual conclusions, first as to whether the facts of this case are distinguishable from the facts of *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981), and second as to whether the predominant purpose of the communications was in fact legal advice as opposed to business operations. But "[f]actual errors cannot justify the issuance of the writ." *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 306 n.14 (6th Cir. 1984); *see also In re Metro.*

Gov't of Nashville & Davidson Cnty., 606 F.3d 855, 866 (6th Cir. 2010) (recognizing that "evaluating the strength and persuasiveness of all the evidence in the case [is] not a legal issue that might support mandamus"). Contrary to Petitioners' suggestion, *Upjohn* does not stand for the proposition that communications related to internal compliance audits are privileged. *See* 449 U.S. at 396 ("[W]e decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas.").

Petitioners' arguments as to the Personnel File Materials do not demonstrate a right to the writ, either. Petitioners argue that the court impermissibly compelled production of the materials without a formal request by Rochester and that the court relied on a generalized finding that personnel materials are relevant when it was required to conduct a deponent-by-deponent examination for a "compelling showing of relevance." But they offer no binding authority for the proposition that the district court applied the wrong standard for assessing relevance, and the default rule, Federal Rule of Civil Procedure 26(b), sets a low bar. The district court's conclusion that the personnel files were relevant insofar as they provide "detailed background information" that allows plaintiffs to "focus their questions on relevant areas rather than wasting time on irrelevant probing questions" is sufficient to overcome Petitioners' claim that these decisions were the kind of extraordinary abuses of discretion that justify mandamus relief. *See Mohawk*, 558 U.S. at 111; *see also In re Am. President Lines, Ltd.*, 929 F.2d 226, 228 (6th Cir. 1991) (order); *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 566 (1987) (Blackmun, J., concurring in part) (recognizing district courts' "discretionary powers to control discovery in order to ensure fairness to both parties").

Likewise, any dispute over the lack of a formal request for the personnel files falls far below the extraordinary abuses that justify mandamus relief. *See Mohawk*, 558 U.S. at 111. Email

records reflect that Rochester requested the production of deponents' personnel files. **R. 5807-2, Ex. B.** Whether the email requests satisfied Federal Rule of Civil Procedure 34's formal requirements is a fact-based question that does not justify the "drastic and extraordinary" remedy of mandamus. *Cheney*, 542 U.S. at 380 (quoting *Fahey*, 332 U.S. at 259).

Accordingly, the petition for a writ of mandamus is **DENIED**. The Chamber of Commerce of the United States's motion for leave to file an amicus brief is **GRANTED**.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kelly L. Stephens
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: June 03, 2025

Mr. Robert Edward Dunn
Eimer Stahl
1999 S. Bascom Avenue
Suite 1025
Campbell, CA 95008

Mr. David Andrew Hatchett
Alston & Bird
1201 W. Peachtree Street, N.W.
Suite 4900
Atlanta, GA 30309

Mr. Christopher George Michel
Quinn, Emanuel, Urquhart & Sullivan
1300 I Street, N.W.
Suite 900
Washington, DC 20005

Mr. Peter H. Weinberger
Spangenberg, Shibley & Liber
1001 Lakeside Avenue, E.
Suite 1700
Cleveland, OH 44114

Re: Case No. 25-3006, *In re: Express Scripts, Inc., et al*
Originating Case No. 1:17-md-02804

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jill E. Colyer
Case Management Specialist
Direct Dial No. 513-564-7024

cc: Mr. Brian D. Boone
Mr. Jonathan Gordon Cooper
Mr. William Herman Jordan
Mr. Michael John Lyle
Ms. Sandy Opacich

Enclosure

No mandate to issue