No. 19-3549

In the United States Court of Appeals
for the Third Circuit

IN RE: ACTAVIS HOLDCO U.S., INC.; ACTAVIS PHARMA, INC.; AKORN, INC.; AKORN SALES INC.; AMNEAL PHARMACEUTICALS, INC.; APOTEX CORPORATION; ASCEND LABORATORIES, LLC; AUROBINDO PHARMA USA, INC.; CITRON PHARMA, LLC; DAVA PHARMACEUTICALS, LLC; DR. REDDY'S LABORATORIES, INC.; ENDO INTERNATIONAL, PLC; EPIC PHARMA, LLC; FOUGERA PHARMACEUTICALS INC.; G&W LABORATORIES, INC.; GENERICS BIDCO I, LLC; GLENMARK PHARMACEUTICALS INC., USA; HI-TECH PHARMACAL CO., INC.; IMPAX LABORATORIES, INC.; LANNETT COMPANY, INC.; LUPIN PHARMACEUTICALS, INC.; MAYNE PHARMA INC.; MORTON GROVE PHARMACEUTICALS, INC.; MYLAN INC.; MYLAN N.V.; MYLAN PHARMACEUTICALS INC.; OCEANSIDE PHARMACEUTICALS, INC.; PAR PHARMACEUTICAL COMPANIES, INC.; PAR PHARMACEUTICAL, INC.; PERRIGO NEW YORK, INC.; SANDOZ INC.; SUN PHARMACEUTICALS INDUSTRIES, INC.; TARO PHARMACEUTICALS USA, INC.; TEVA PHARMACEUTICALS USA, INC.; UDL LABORATORIES, INC.; UPSHER-SMITH LABORATORIES, LLC; VALEANT PHARMACEUTICALS INTERNATIONAL; VALEANT PHARMACEUTICALS NORTH AMERICA, LLC; WOCKHARDT USA LLC; ZYDUS PHARMACEUTICALS (USA) INC.,

Petitioners.

On Petition for a Writ of Mandamus from the U.S. District Court for Eastern District of Pennsylvania (RELATED TO E.D. PA. CASE NO. 16-MD-2724)

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Chamber of Commerce of the United States of America respectfully submits this Corporate Disclosure Statement and states as follows: The Chamber of Commerce of the United States of America (the "Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia.

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTRODUCTION

Rule 26(b)(1) of the Federal Rules of Civil Procedure limits civil discovery to documents relevant to the claims and defenses at issue. Supporting its Special Master, the District Court lost sight of this express requirement and made a clear and indisputable error of law by compelling defendants to produce millions of irrelevant documents without *any* opportunity for relevance review. The Special Master attempted to justify such "extensive and broad-ranging Discovery" as "essential for any meaningful settlement." A10-11. But using discovery as a cudgel to coerce defendants into settling is an unlawful "abus[e of] the discovery process," not a laudable goal. *See Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000) (quoting H.R. Conf. Rep. No. 104–369, at 31 (1995)). Indeed, when signing a discovery request, an attorney by law implicitly represents that the request is "not interposed for any improper purpose, such as to . . . needlessly increase the cost of litigation." Fed. R. Civ. P. 26(g)(1)(B)(ii).

Electronic discovery has become so expensive that even large companies may choose to settle cases, rather than face the heavy cost of sorting through and producing voluminous documents that tend to increase with the size of the company. This unfortunate reality directly contradicts the Federal Rules' goal "to secure the just, speedy, and inexpensive determination of every action" on the

merits. Fed. R. Civ. P. 1; *cf. Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002) (discussing the purpose of the pleading rules).

For that reason alone, the massive costs of discovery are a serious problem—even where the discovery adheres to the limits of the Federal Rules. But where a district court orders discovery that ventures beyond the claims and defenses at issue, in clear violation of Rule 26(b), this Court should exercise its supervisory power. As Justice Stewart succinctly explained, "time-consuming and expensive pretrial discovery is burdensome enough, even when within the arguable bounds of Rule 26(b). But totally irrelevant pretrial discovery is intolerable." *Herbert v. Lando*, 441 U.S. 153, 202 (1979) (Stewart, J., dissenting) (quoting). Because the District Court denied the defendants any opportunity for document review and thus knowingly ordered them to produce reams of irrelevant and competitively sensitive material, the Court should grant their petition for writ of mandamus.

INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus curiae states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and

represents the interests of more than three million companies and organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The massive—and growing—burden of civil discovery deeply concerns the Chamber and its members. In this case, the Special Master and District Court ignored the limitations of the Federal Rules of Civil Procedure and ordered the defendants to turn over *all* documents, relevant or not, matching a list of broad search terms. Correcting such abusive discovery is quite important to the Chamber's members, who frequently face discovery costs that soar into millions of dollars. That discovery burden creates undue pressure to settle without regard to a case's merits.

The Chamber and its members thus have a substantial interest in the enforcement of Rule 26's relevance and proportionality requirements and the judicial management of abusive discovery requests. *See* U.S. Chamber Inst. for Legal Reform, Public Comment to the Advisory Committee on Civil Rules

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no person other than amicus curiae, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

Concerning Proposed Amendments to the Federal Rules of Civil Procedure, at 1-7 (Nov. 7, 2013) (addressing the proposed amendment to Rule 26). The defendants' mandamus petition strongly implicates these interests.

The Chamber takes no position on the underlying merits of the antitrust claims or the defenses in this case.

ARGUMENT

I. Compelling the Production of Documents Identified Using Electronic Search Terms Without Allowing the Producing Party to First Screen the Documents for Responsiveness and Relevance Clearly and Indisputably Violates the Mandate of Rule 26(b)(1).

The district court's discovery order at issue here clearly violates Rule 26, which limits the "scope of discovery" to matters that are both "relevant to any party's claim or defense" and "proportional to the needs of the case." Fed. R. Civ. P. 26(b).[2] By contemplating broad search terms that inevitably would identify both relevant and irrelevant documents and ordering that defendants "may not withhold prior to production any documents based on relevance or responsiveness," the District Court completely ignored both the relevance and proportionality requirements. The court ordered the defendants to produce every non-privileged document identified by using a list of broad search terms, without determining

[2] Notably, Rule 26 grants discretion to the district court to further ***limit*** the scope of discovery, but a court is without power to expand the scope beyond what is authorized in the rules. *See* Fed. R. Civ. P. 26(b) (defining scope of discovery "[u]nless otherwise limited by court order").

whether the documents were relevant to any claim or defense. This Court should correct this clear violation of Rule 26(b)(1) and grant defendants' mandamus petition.

In its order, the District Court transformed search terms from an essential tool used to ***reduce*** the universe of electronically stored information (ESI) defendants will have to review for relevance and responsiveness into a determination that defendants produce all documents "hit" by any of the search terms. Thus, under the plaintiffs' proposed search terms, each defendant will be required to produce all documents referring to "coffee," "beer," "heads up," "women in the industry," "ask," "touch base," "reach," "tell," "speak," "spoke," and so on. *See* A360-68. This blunderbuss approach clearly violates Rule 26.

The District Court's discovery order does permit the defendants to "'clawback' . . . highly sensitive personal matters not relevant to the litigation." A11. But this clawback procedure does not make the order lawful. On the contrary, the order still turns Rule 26 on its head by forcing the defendants to turn over to the plaintiffs a large body of irrelevant, sensitive documents and then fight to reclaim them. Moreover, this unwarranted production carries an especially disproportionate risk of harm to the defendants, even beyond the logistical burden of collecting and producing tens of millions of documents. The defendants here

are all competitors, so forcing them to produce irrelevant but commercially sensitive documents to each other will cause them all serious competitive harm.

To be clear, the Chamber supports the use of carefully targeted search terms to limit the universe of documents a producing party must review for relevance and privilege. But the search terms used must respect Rule 26(b)(1)'s proportionality requirement by creating a reasonable probability that the documents identified as "hits" will be relevant to the claims and defenses at issue. And even then, there will always remain a chance that search-term "hits" will include irrelevant documents not subject to production under Rule 26(b)(1). As a result, Rule 26 still requires at least some pre-production review of all documents identifed by search terms—a review the District Court expressly and completely foreclosed here—because such review is the only means by which irrelevant documents can be sorted out and removed from the production.

The *amount of time* for pre-production review may be committed to a district court's sound discretion based on the breadth of the search terms and the potential harm of inadvertently disclosing sensitive, irrelevant information, among other factors. All else being equal, narrowly targeted search terms may require less time for review than broad terms. But Rule 26 leaves no discretion for district courts to eliminate pre-production review entirely. Since electronic search terms will never guarantee 100% relevant hits, Rule 26 clearly and indisputably mandates at least

some pre-production review by providing that discovery "must" be limited to relevant documents.

Ordering document production based solely on search terms without pre-production review may sometimes be appropriate as a *sanction* for parties that have committed misconduct or otherwise defied their discovery obligations. *See* Fed. R. Civ. P. 37(a)(2)(A) (allowing a court to "issue further just orders" when a party fails to produce documents ordered by the court). But under Rule 26 the default rule is always pre-production review. The Civil Rules also provide procedural protections to ensure that discovery sanctions are not abused. For example, a district court may only impose discovery sanctions if the court orders production of relevant documents and a party fails to comply. *See id.*

But here, the District Court made no findings that sanctionable discovery conduct occurred. Instead, the Special Master observed that imposing discovery costs on defendants was "essential for any meaningful settlement." A10-11. This is exactly what the Supreme Court sought to avoid in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), by closing the gates of discovery to weak claims. As the Court recognized in that case, the "threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id.* at 559.

For all these reasons, "the requirement of Rule 26(b)(1) that the material sought in discovery must be 'relevant' should be firmly applied and the district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (Maj. Op.) (quoting Fed. R. Civ. P. 26(b)). Where, as here, a district court has refused to enforce the limits of Rule 26(b), this Court should join its sister Circuits and remedy the error by mandamus. *See In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003) (granting mandamus petition where district court allowed plaintiff "access to information that would not—and should not—otherwise be discoverable without Ford first having had an opportunity to object."); *see also* Mandamus Pet. at 15-17.

II. The District Court's Order Endorses Exactly the Sort of Burdensome Discovery Abuse the 2015 Amendments to Rule 26 Intended to Foreclose.

The District Court's discovery urgently requires correction by mandamus. Proportionality is a key element of Rule 26(b)(1)'s boundaries imposed on discovery. Where massive discovery without an assurance of relevance is permitted, the producing party bears a disproportionate burden. That burden is particularly onerous in cases like this one where the court would require competitors to share competitively sensitive and irrelevant documents.

Voluminous electronically stored information is a significant cause of recurring problems in federal civil discovery. The amount of information created and retained on electronic storage media has grown exponentially due to technological changes, cloud computing, and the declining cost of storage. All of this information is potentially discoverable, with its volume alone creating a massive increase in the burden of searching for and producing documents in litigation. And yet, experienced trial lawyers recognize the gulf between the documents produced in litigation and the far smaller universe of documents that ever become part of the trial record.

Against this backdrop, the Federal Rules of Civil Procedure were amended in 2015 to cabin the growing costs and other burdens associated with the discovery process. As Chief Justice Roberts explained, amended Rule 26(b)(1) "crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality." 2015 Year End Report on the Federal Judiciary, at 6 (Dec. 31. 2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf; *see also* Fed. R. Civ. P. 26 cmt. (2015 Amendment). The amendments follow years of scholarship tracking rising discovery costs and the observation that the outcome of these cases is often based on these costs—as opposed to the cases' merits. *See, e.g.*, Nicholas M. Pace & Laura Zakaras, RAND Institute for Civil Justice, *Where the Money Goes: Understanding Litigant*

Expenditures for Producing Electronic Discovery, at 17 (2012) (finding that median e-discovery cost is $1.8 million); Lawyers for Civil Justice, Civil Justice Reform Grp. & U.S. Chamber Inst. for Legal Reform, *Litigation Cost Survey of Major Companies* at 3-4 (2010), https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf (between 2006-2008, high end discovery costs were reported to be between $2.3 million and $9.7 million); Linzey Erickson, *Give us a Break: The (IN)Equity of Courts Imposing Severe Sanctions for Spoliation without a Finding of Bad Faith*, 60 Drake L. Rev. 887, 925 (2012) ("In many instances, the cost of litigation may be so high that companies are unwilling to try the case on the merits.").

The determination of search terms which define the universe of documents to be reviewed for relevance under Rule 26 is a critical determinant of proportionality. While using the broadest possible terms may arguably avoid missing a possibly relevant document, the court must consider whether the burden of an all-out search would violate the requirement of proportionality and Rule 1's mandate "to secure the just, speedy and inexpensive determination" of the proceeding. Fed. R. Civ. P. 1. The pre-production relevance review required by Rule 26(b)(1)—completely foreclosed here—disciplines the court's discretion in managing the discovery process by highlighting the delay inherent in screening masses of documents. That discipline cannot be avoided by foreclosing relevance

review without unlawfully ignoring the mandate of Rule 26(b)(1). Mandamus is accordingly required here to enforce that rule and preserve the integrity of the discovery process.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to grant defendants' petition for writ of mandamus.

Respectfully submitted,

Dated: November 7, 2019

By: */s/ Bert W. Rein*

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) and 29(a)(5). This brief contains 2,285 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B). Microsoft Word for Office 365 was used to calculate the word count.

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), (6) and the type style requirements of Third Cir. R. 32.2. This brief has been prepared in a proportionally-spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman type style.

Dated: November 7, 2019

By: */s/ Wesley E. Weeks*

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was electronically filed with the Court via its CM/ECF system, which will cause copies of the same to be served on all counsel of record.

Dated: November 7, 2019

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