Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of the PEOPLE OF THE STATE OF NEW YORK by LETITIA JAMES, Attorney General of the State of New York, Petitioner, For an order pursuant to C.P.L.R. § 2308(b) to compel compliance with a subpoena issued by the Attorney General -against- MALLINCKRODT LLC and SPECGX LLC, Respondents.	Index No. 450052/2019 IAS Part 59 Assigned Judge: Hon. Debra A. James

Brief of The Chamber of Commerce of the United States of America as *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*

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 represents the interests of more than three million companies and professional organizations of every size, in every industry, 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 both federal and state courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

Although the underlying dispute between the parties concerns litigation relating to the opioid epidemic, the Chamber is not participating because of that subject matter.[1] Rather, the Chamber files this brief because this proceeding raises the important question as to whether confidential communications with the U.S. Department of Justice made for settlement purposes may be discovered by third parties. The procedural question matters greatly to the broader business community, because businesses often engage in confidential communications with various governmental entities, including the U.S. Department of Justice. Indeed, the Chamber has participated as an *amicus curiae* in cases in other state courts concerning communications made by companies to the U.S. Department of Justice in a good-faith effort to settle federal enforcement proceedings. *See, e.g.*, Brief of the Chamber of Commerce of the United States of

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[1] The Chamber, through the U.S. Chamber of Commerce Foundation, has helped coordinate the business community's efforts to be part of the solution to the opioid epidemic. The Foundation established a resource page (https://sharingsolutions.us) to help businesses and individuals find the resources to address opioid addiction. On April 11, 2019, the Foundation launched a ten-city effort to help connect businesses in hard-hit regions with the critical resources they need to address opioid misuse. *See* https://www.uschamber.com/series/above-the-fold/businesses-the-frontlines-the-fight-against-opioid-misuse. The Chamber and its Foundation are committed to the belief that American business can help in tackling the opioid epidemic.

America, *et al*., *Shell Oil Co. v. Writt*, 464 S.W.3d 650 (Tex. 2015) (No. 13-0552), *available at* https://www.chamberlitigation.com/cases/shell-oil-co-et-al-v-writt. The Chamber submits this brief to weigh in on the discrete procedural question of whether settlement communications are discoverable.[2]

INTRODUCTION

New York maintains a strong public policy of facilitating settlements of disputes, as these are an efficient way to avoid protracted conflict, freeing up parties' resources to pursue other priorities. A settlement privilege serves that policy by allowing litigants to withhold communications made in furtherance of attempts to settle one lawsuit or investigation from discovery in follow-on litigation. The courts that have enforced a settlement privilege were right to do so. Enforcing the privilege encourages parties to speak freely and negotiate with candor. It also supports the government in its investigative efforts by promoting an environment in which investigative targets partner with government agencies, thus freeing up limited agency dollars for more productive uses. Further, the settlement privilege is consistent with the public's interest in the enforcement of contracts. And the privilege accomplishes these goals without impeding government investigators or private plaintiffs from obtaining the facts they deem relevant to their claims. The Court should uphold the privilege in this case.

ARGUMENT

I. NEW YORK PUBLIC POLICY ENCOURAGES SETTLEMENTS

Courts and commentators alike understand that voluntary settlement is an attractive, efficient alternative to protracted litigation or drawn-out government investigations. New York

[2] No counsel for a party authored this brief in whole or in part, and no person other than *Amicus*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

courts have recognized that "settlement[s] serve the interests of efficient dispute resolution, the proper management of court calendars and the integrity of the litigation process." *Rogers v. Malik*, 126 A.D.3d 874, 875 (2d Dep't 2015) (citing *Hallock v. State*, 64 N.Y.2d 224, 230 (1984)); *see also In re N.Y. Cty. Data Entry Work Prod. Liab. Litig.*, 162 Misc. 2d 263, 267–68 (N.Y. Sup. Ct., N.Y. Cty. 1994) ("A negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources; courts could not function if every dispute required a trial. In addition, there is a societal benefit in recognizing the autonomy of parties to shape their own solution to a controversy rather than having one judicially imposed." (internal citations omitted)).

Academics and commentators agree. They have recognized that settlements are efficient, and likened litigation expenses to "deadweight losses" that parties "could avoid if they settled their cases." James D. Miller, *Using Lotteries to Expand the Range of Litigation Settlements*, 26 J. Legal Stud. 69, 69 (1997); William M. Landes, *An Economic Analysis of the Courts*, in *Essays in the Economics of Crime & Punishment*, 164, 168 (Gary S. Becker & William M. Landes, eds., 1974), *available online at* https://www.nber.org/chapters/c3629.pdf ("Scarce resources provide an incentive for the prosecutor to avoid a trial and negotiate a pretrial settlement with the defendant."); *see also id.* at 208–13 (discussing settlements in civil actions).

Given the benefits that settlements provide, New York law has long sought to "encourag[e] and facilitate[e] the settlement of legal controversies by compromise." *White v. Old Dominion S.S. Co.*, 102 N.Y. 660, 662 (1886); *see also, e.g.*, *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 23 (1922) ("The court should encourage and facilitate . . . settlements."); *Galusha v. Galusha*, 116 N.Y. 635, 646 (1889) ("The law looks favorably upon and encourages settlements made outside of court, between parties to a controversy.").

New York's policy of promoting settlements is reflected in both statutory and judge-made law. For example, C.P.L.R. § 4547 bars the introduction of evidence of parties' settlement negotiations to prove liability or the amount of damages. *82 Retail LLC v. Eight Two Condominium*, 117 A.D.3d 587, 589 (1st Dep't 2014). And General Obligations Law § 15-108 was enacted to supersede various rules regarding the contribution obligations of tortfeasors that "had an inhibiting effect on the settlement process." *Rock v. Reed-Prentice Div. of Package Mach. Co.*, 39 N.Y.2d 34, 40–41 (1976). Similarly, New York courts have concluded that judges who participate in settlement conferences cannot subsequently be called as witnesses in the dispute they tried to resolve. *Baghoomian v. Basquiat*, 167 A.D.2d 124, 125 (1st Dep't 1990). Finally, counsel and parties are presumptively protected from liability for slander and libel for statements made to their opponents in settlement negotiations. *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 182–83 (2d Dep't 1998).

In this case, the question presented is whether New York's longstanding policy of encouraging settlement should immunize confidential settlement communications from discovery. New York courts have precluded such discovery on a number of occasions. *See Crow-Crimmins-Wolff & Munier v. Westchester County*, 126 A.D.2d 696, 697 (2d Dep't 1987); *Randall Elec., Inc. v. State*, 150 A.D.2d 875, 876–77 (3d Dep't 1989). This Court should do the same.

II. THE SETTLEMENT PRIVILEGE SERVES THE PUBLIC INTEREST

A. The Settlement Privilege Encourages Voluntary Resolution of Disputes

Shielding confidential settlement communications from discovery furthers New York's policy of encouraging the voluntary settlement of disputes and—as relevant in this case—government investigations. Confidentiality, and the candor that it engenders, are indeed essential to the negotiated settlement of government investigations (and other disputes).

"In order for settlement talks to be effective, parties must feel uninhibited in their communications" and "must be able to abandon their adversarial tendencies to some degree." *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003). As the Sixth Circuit has explained, litigants in search of a compromise "must be able to make hypothetical concessions, offer creative *quid pro quos*, and generally make statements that would otherwise belie their litigation efforts." *Id.*; *see also* Landes, *An Economic Analysis of the Courts* at 208 (noting that "settlement is likely" where "both parties have similar expectations on the probability that the defendant will be found liable in a trial" and "both parties have similar estimates of damages"). And "[p]arties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of 'impeachment evidence,' by some future third party." *Goodyear*, 332 F.3d at 980. Put simply, confidentiality of settlement communications is essential to the dispute-resolution process.

B. Permitting Discovery of Settlement Communications Disserves the Public

1. To allow the Attorney General to discover the contents of confidential settlement communications would inevitably chill the settlement of future disputes. *See, e.g.*, *Goodyear*, 332 F.3d at 980. It is easy to see why. If parties to litigation or targets of investigations fear that their confidential settlement communications will be uncovered and used against them by third parties (whether other governmental entities or private plaintiffs), they "will not negotiate earnestly or candidly," for fear of revealing their strategy, understanding of the facts, and assessments and models of potential liability. *United States ex rel. Underwood v. Genentech, Inc.*, No. 03-3983, 2010 WL 8917474, at *2 (E.D. Pa. Oct. 7, 2010 ("Granting [the discovery] request would discourage settlements for no good reason."); *see also, e.g.*, *Software Tree, LLC v.*

Red Hat, Inc., No. 6:09-CV-097, 2010 WL 2788202, at *4 (E.D. Tex. June 24, 2010); *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 424 (D.N.J. 2009) ("[T]he Court notes that the disclosure of [settlement] negotiations . . . could tend to have a chilling effect on negotiations between government entities, be they federal or state, and potentially responsible parties."). In short, "[w]ithout a privilege, parties would more often forego negotiations for the relative formality of trial." *Goodyear*, 332 F.3d at 980.

2. The public interest in maintaining the confidentiality of settlement communications is particularly pronounced when the materials concern a government investigation, as the United States Department of Justice has recognized. In *Genentech*, the Department of Justice intervened to oppose an attempt by a *qui tam* relator to obtain, in a False Claims Act suit, confidential settlement negotiations between the defendant (Genentech) and the federal government, pointing out that "compelling disclosure of attorney work product created for purposes of settlement discussions [with] the United States . . . could have a serious negative impact on the government's ability to investigate and settle . . . cases in the future." The United States of America's Statement of Interest in Response to Genentech, Inc.'s Motion for Protective Order and Relator's Motion to Compel (Statement of Interest), *United States ex rel. Underwood v. Genentech, Inc.*, E.D. Pa. Case No. 2:03-cv-3983-PD, Doc. No. 137 at 2 (Sept. 28, 2010).

That is so for two key reasons. *First*, as the Department of Justice explained in *Genentech*, "the government relies on" its ability to have "a candid discussion of both the facts and the legal arguments" with the targets of its investigations, and often relies on them to conduct parts of the investigation. *Id.* at 4. But, if settlement communications are later discoverable, "defendants might withhold written submissions," justifiably fearing "that even if such submissions were persuasive to the government," they would be turned over to other

adversaries "and any admissions, work product, or other information might be used against the defendant." *Id.* at 2. *Second*, allowing discovery into settlement communications, the DOJ noted, would also hamper the government's ability to settle actions, because the government would be discouraged from memorializing its positions "if it believed that everything it stated to the defendant would ultimately be turned over" to other litigants or the public. *Id.*

These dynamics, although identified by a federal agency in *Genentech*, are not unique to the federal government; they are manifest in nearly every government investigation. Thus, without the confidential flow of information between the targets of investigations and the government, "settlement negotiations [will] be truncated and active litigation [will] ensue in matter that may have been resolved had there been a more fulsome exchange of positions." *Id.* at 2.

3. More generally, the settlement privilege for government investigations protects the ability of federal and state agencies to do their work efficiently. Government agencies have limited resources. If, because of its inability to engage in constructive discussions with its counterparty, a government body is forced to contribute substantial resources to investigate or try cases that could have settled, it will be foreclosed from investigating other potential wrongdoing and pursuing other bad actors. *Id.*; *see also* Landes, *An Economic Analysis of the Courts* at 168 n.5 (noting that "[a] settlement that releases resources from any one case will increase the [return on investment] in other cases").

Indeed, government agencies, both state and federal, frequently "'partner[]' with [corporate] internal investigators," and count on the targets of their investigation to do some of the work. Lisa K. Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 341–42 (2011) (discussing the federal government's practice of relying

on materials developed by its targets); *see also, e.g.*, William R. McLucas, Howard M. Shapiro & Julie J. Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. Crim. L. & Criminology 621, 639 & n.69 (2006) (noting the modern trend wherein "private lawyers are effectively 'deputized' in many internal investigations"). But private parties will be less willing to do the legwork of investigating their employees' wrongdoing (and to self-report, another pillar of the modern enforcement regime, *see* John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 Cornell L. Rev. 310, 326 (2004)) if settlement conversations become discoverable in related suits. The upshot will be to make it less likely that the government will uncover wrongdoing.

Moreover, when wrongdoing is uncovered, litigation will be more likely, and the litigation that does ensue will be more protracted and wasteful. Without the ability to have an honest exchange of positions with its targets, the government will be forced to make decisions about case strategy (including, in some actions, whether to pursue the matter at all) on the basis of incomplete information, and is likely to miss opportunities to expeditiously resolve matters. Statement of Interest at 4. Society at large, and the public fisc, will bear the associated "deadweight loss[]." Miller, 26 J. Legal Stud. at 69. The settlement privilege avoids these harms.

C. The Settlement Privilege Also Promotes The Public's Interest In Contracts

Shielding settlement communications between government agencies and targets of their investigations also serves the public interest in protecting the freedom to contract. Indeed, "when a confidentiality agreement facilitates settlement, a later court should hesitate to undermine the bargain, for if the effectiveness of the protective order cannot be relied on, its

capacity to motivate settlement will be compromised." Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 486–87 (1991).

In this case, as in many cases, the target of the investigation and the federal government bargained for secrecy: Although the settlement and "information about" it could be disclosed to the public, the parties' settlement agreement expressly prohibited the sharing of any "information designated as confidential." Doc. No. 40 ¶ 7. New York courts take such agreements seriously. *See Emp'rs Ins. Co. of Wausau v. Am. Home Prods. Corp.*, 238 A.D.2d 154, 154–55 (1st Dep't 1997) (mem.) (affirming the Supreme Court of New York County's conclusion "that the settlement documents" sought to be discovered "were, as marked, confidential and, thus . . . not discoverable" because "the need for disclosure is outweighed by the policy interest in confidentiality for the sake of settlement"); *In re N.Y. Cty. Data Entry Work Product Liab. Litig.*, 162 Misc.2d at 267. So do federal courts. *See GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 132–33 (S.D.N.Y. 1976) (enforcing the provisions of a confidentiality agreement to bar the plaintiff in a civil suit from turning documents over to the Antitrust Division of the Department of Justice).

There is good reason the law respects such agreements. In the settlement context, in particular, "[t]here is a price for secrecy," and "[a] defendant is often willing to pay more to a plaintiff" to secure some measure of confidentiality. Erik S. Knutsen, *Keeping Settlements Secret*, 37 Fla. St. U. L. Rev. 945, 951 (2010). This may be exactly to the plaintiff's or investigating entity's liking—for example, it is entirely possible that a government entity would choose to allow one of its targets to keep some documents under seal in exchange for more settlement consideration (whether more detailed admissions or a greater settlement payment).

The investigating government entity and the target of its investigation are best positioned to make that bargain, and courts are not well positioned to re-trade the deal.

D. The Settlement Privilege Will Not Impede Discovery

Finally, the settlement privilege does not unnecessarily impede follow-on government investigations or discovery in related actions. As applied in New York, the privilege protects communications made specifically for the purpose of seeking a potential settlement, but not facts. *Crow-Crimmins-Wolff*, 126 A.D.2d at 697; *Randall Elec.*, 150 A.D.2d at 876–77.

Thus, while the settlement privilege will prevent an investigating government entity (such as the Attorney General in this case) or a follow-on plaintiff from obtaining confidential settlement communications from a prior matter (and the negotiating positions and mental impressions that those communications contain), it will not prevent parties in later litigation from accessing any otherwise-discoverable facts or documents, or from obtaining the building blocks they need to make out their claims. *See Goodyear*, 332 F.3d at 981–82 ("Thus, as with other privileges, the relationship itself is not privileged, but only the underlying communications."); *see also, e.g.*, *Thornton v. State Farm Mut. Auto Ins. Co., Inc.*, No. 1:06-CV-00018, 2006 WL 3699986, at *3 (N.D. Ohio Dec. 5, 2006) (noting that under *Goodyear*, "the privilege does not apply to any document simply because it is exchanged during settlement negotiations"). Nor will it preclude the follow-on investigative agency from having their own confidential conversation about the case with a target.

This case well illustrates the point. Respondents have produced over 1.4 million documents to the Attorney General including—according to Respondents—"all of the underlying facts relevant to" the documents over which privilege has been asserted. Doc. No. 38 at 4, 20. Because no facts have been withheld from the Attorney General, the settlement privilege here

has served New York's public policy of encouraging settlements without burdening government agencies or private plaintiffs.

CONCLUSION

The Court should deny the Attorney General's motion to compel compliance with the November 26, 2018 investigative subpoena issued to Mallinckrodt LLC and SpecGx LLC.

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April 12, 2019

Respectfully submitted,

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