

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

**IN RE: GENERIC PHARMACEUTICALS
PRICING ANTITRUST LITIGATION**

**MDL 2724
16-MD-2724**

THIS DOCUMENT RELATES TO:

HON. CYNTHIA M. RUFÉ

ALL ACTIONS

**PRETRIAL ORDER NO. 70
(APPROVING REPORT AND RECOMMENDED ORDER AND ADOPTING
PROTOCOL IMPLEMENTING THE COURT'S NOVEMBER 14, 2018 ORDER
REGARDING PRIVATE PLAINTIFFS' MOTION FOR ACCESS)**

AND NOW, this 31st day of January 2019, upon consideration of the attached Report and Recommended Order of Special Master David Marion and in light of the parties' agreement, it is hereby **ORDERED** that the Report and Recommendation is **APPROVED** and the Stipulated Protocol Implementing the Court's November 14, 2018 Order Regarding Private Plaintiffs' Motion for Access is **ADOPTED** as an Order of the Court.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.

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

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	:	CIVIL ACTION
	:	MDL 2724
	:	16-MD-2724
This Document Relates to:	:	HONORABLE CYNTHIA M. RUFÉ
ALL ACTIONS	:	

**REPORT AND RECOMMENDED ORDER SUBMITTED TO
HONORABLE CYNTHIA M. RUFÉ BY SPECIAL MASTER
DAVID H. MARION ON THE SUBJECT OF A PROTOCOL
GOVERNING DISCLOSURE TO THE PARTIES OF DOCUMENTS
SUBPOENAED AND COLLECTED BY THE STATES' ATTORNEYS GENERAL**

On November 14, 2018, this Court granted Private Plaintiffs' Motion for Access to certain documents and materials obtained by the State Plaintiffs, from certain named parties and non-parties. With the Court's approval, I undertook to assist the parties in developing a Protocol to govern the disclosures of such documents and to resolve a number of significant issues relating to such disclosures.

This effort involved a number of discussions and personal meetings with lead and liaison counsel and other attorneys for plaintiffs, defendants, the State Plaintiffs and the US Department of Justice. I requested that each side submit a proposed Protocol, and held a meeting to discuss the differences in their proposals. When it appeared that no compromise was likely on certain issues, I proposed to prepare an "informal recommendation" draft which could lead to further discussions both with and without the Special Master. After each side proposed changes to my "informal recommendation", we held another meeting during which I indicated clearly where I would come out were I required to recommend an order to the Court. We scheduled a final

meeting on January 29, 2019, before or at which the parties would make a final effort to agree – or at least come as close as they could to my suggestions. I made clear that my suggestions were based on (a) achieving the quickest possible turnover of documents, while (b) providing procedures to protect the legitimate rights and privileges of both parties and non-parties, and (c) adhering to the dictates of this Court’s Order granting access to such documents.

At the January 29 meeting, the parties presented a new draft Protocol to which they had agreed, but wanted to discuss with me paragraph by paragraph, with the thought that, if I agreed to their revised draft, it could be presented to the Court for approval. The parties further agreed that the various steps required therein would commence immediately.

Thus, having had that discussion, I now recommend to the Court for approval the parties jointly titled “Stipulated Protocol,” attached hereto as Exhibit “A”.

Respectfully submitted,

BY: 
David H. Marion, Special Master
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Dated: January 30, 2019

EXHIBIT “A”

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

**IN RE: GENERIC PHARMACEUTICALS
PRICING ANTITRUST LITIGATION**

**MDL2724
16-MD-2724
HON. CYNTHIA M. RUFÉ**

**THIS DOCUMENT RELATES TO:
*ALL ACTIONS***

**STIPULATED PROTOCOL IMPLEMENTING
THE COURT’S NOVEMBER 14, 2018 ORDER
REGARDING PRIVATE PLAINTIFFS’ MOTION FOR ACCESS**

1. On November 14, 2018, the Court granted Private Plaintiffs’ Motion for an Order Authorizing Access to ... Certain Materials Obtained by the State Plaintiffs. MDL Dkt. No. 758 (“Order”) at 11.

2. The State Attorneys General Plaintiffs (the “State Plaintiffs”) will “disclose to Private Plaintiffs¹ and Defendants all investigatory subpoenas served on or after the date of filing of the initial State Complaint” and on or before June 18, 2018, and will “disclose in writing whether documents or other information has been produced in response to such subpoenas,” as soon as practicable. Order at 11-12 ¶ 2(b).

3. “All AG Documents in the possession of the Connecticut Attorney General’s Office must be lodged with this Court under the procedures delineated by the Connecticut Supreme Court.” Id. at 11-12 ¶ 2(d). Given the impracticality of physically or electronically lodging millions of documents with the Court, the parties agree that the State

¹ “Private Plaintiffs” include Direct Purchaser Plaintiffs, End-Payer Plaintiffs, Indirect Reseller Plaintiffs and Kroger Plaintiffs.

Plaintiffs maintain custody of all documents subject to this Protocol and treat them as if they had been lodged with the Court under Connecticut Court Rule 7-4C. Accordingly, all such documents will be treated as temporarily “under seal” pending completion of the procedures outlined below. See Order at 11-12 & ¶¶ 2(d)-(e).

4. The provisions of PTO 53 regarding confidentiality will apply to all documents accessed under this Protocol. Order at 11. Unless otherwise agreed by the parties prior to the entry of this protocol, the following procedure will be followed with regard to the confidentiality of documents made accessible under this protocol. The State Plaintiffs will stamp all documents obtained from parties as “Outside Counsel Eyes Only Until 5/29/2019” (120 days from entry of the protocol). Promptly after stamping, the State Plaintiffs will provide Plaintiffs and Defendants access to the party documents hereunder. Defendants will have 120 days from entry of this protocol to make confidentiality designations that are compliant with PTO 53. They will make such designations, if any, by submitting overlays (i.e., images only) to Private Plaintiffs, State Plaintiffs and Defendants. Any documents that Defendants do not timely designate will become non-confidential.

5. The State Plaintiffs will take reasonable steps to ensure that no documents are “produced in a manner that discloses whether the documents were provided to the Department of Justice.” Order at 12 ¶ 2(f). In many instances, nothing will have to be done to accomplish this. Where something needs to be done, the Plaintiff States will coordinate with the Department of Justice (“DOJ”) to determine what is necessary. Order at 12 ¶ 2(f).

6. Subject to the subsequent “claw back” procedure discussed below, the State Plaintiffs promptly will provide Private Plaintiffs and Defendants access to all “AG Documents” (as defined in the Order at 3 ¶ 2) that the State Plaintiffs obtained on or before October 31, 2017, in the course of their investigation of the generic drug industry. Order at 11-12 ¶ 2 (c).

7. Unless otherwise agreed by the parties prior to the entry of this protocol, if Defendants believe the procedures outlined in paragraph 4 above and/or existing protective orders are insufficient to protect (a) competitively sensitive or trade secret information; (b) business information unrelated to allegations in any MDL pleading; or (c) personal or embarrassing information unrelated to any allegation in the MDL, Defendants can submit an objection to Plaintiffs seeking to “claw back” such documents. Absent good cause (including for such issues as document volume), objections will be made within 30 days after the provision of access to a Defendant’s documents. Objections shall identify the documents at issue, together with the grounds for objection. If Plaintiffs disagree with such an objection, it will be considered by the Special Master. Defendants may not seek to claw back documents based on grounds other than those described above or as set forth in PTO 53 pertaining to inadvertent production of privileged material.

8. Once the State Plaintiffs provide the parties to the MDL with copies of their investigative subpoenas under Paragraph 1 of this Protocol, the Private Plaintiffs will promptly notify all non-parties to the MDL who produced documents to the States on or before October 31, 2017, in the course of their investigation in the generic drug industry, that absent objection from such non-parties, their documents will be made available to

Private Plaintiffs and Defendants subject to existing restrictions on Discovery Material, including the limitation that such Discovery Material may be used solely for purposes of prosecuting, defending, or attempting to settle the MDL. Order at 12 ¶ 2(d). Such notice will be “sent by overnight mail to each nonparty’s last known address and by email, where known.” Order at 12 ¶ 2(d).

- a. Non-parties may file Objections to Access to their documents with the Special Master within 30 days of receiving notice under this Protocol. Objections to Access shall identify the documents at issue, together with the grounds for objection. If a non-party’s Objections to Access address whether or how production of certain categories of documents would result in identifying documents that were produced to DOJ, that portion of the Response shall be submitted to the Special Master and not served on any other party to the MDL other than the State Plaintiffs.
- b. Private Plaintiffs and/or Defendants may oppose such objections, which disputes will be resolved by the Special Master. The State Plaintiffs promptly will provide Private Plaintiffs and Defendants access to any non-party documents ordered to be provided by the Special Master. Order at 12 ¶ 2(d).
- c. If a State Plaintiff’s Response to Objections to Access includes information concerning disclosure to DOJ or discussion of particular content of specific documents, that portion of the Response shall be submitted to the Special Master and not served on any other party.

d. The State Plaintiffs will provide Private Plaintiffs and Defendants access to all documents originally produced by non-parties who do not timely file objections, promptly after expiration of the time to object. Order at 12 ¶ 2(d).

9. The Special Master and Special Discovery Master shall hold such arguments and/or conferences as may be necessary to resolve any disputes relating to the production of documents pursuant to the Order.

10. The parties, in coordination with the Special Master, will endeavor to maximize the speed, and minimize the burden, of providing access to documents and investigatory subpoenas pursuant to this Protocol. In that regard, the State Plaintiffs need only provide access to documents and investigatory subpoenas to one Private Plaintiff (to be selected by Private Plaintiffs) and one Defendant (to be selected by Defendants). The selected Private Plaintiff and Defendant will be responsible for providing access to the other parties on their side and for providing notice to all MDL parties regarding same. Order at 12 ¶ 2(c).

11. Any Defendant in the MDL that is not named as a defendant by the State Plaintiffs may apply to the Court to be considered a non-party pursuant to Paragraph 8 of this protocol, provided that Defendant notifies Private Plaintiffs and State Plaintiffs prior to entry of this protocol of its intention to do so. Any such application will be made no later than 14 days after entry of this protocol and will not delay access to the documents of any other Defendant. The provisions of Paragraph 4 above shall apply to all Defendants, including any Defendant who files an application under this paragraph; provided, however,

that State Plaintiffs will not provide access to materials produced by any Defendant that files an application under this paragraph until the application is resolved.

12. Access to certain documents created by a Party or Non-Party specifically for provision to the State Plaintiffs – such as transmittal letters to the State Plaintiffs, presentations to the State Plaintiffs, documents created by counsel for the purpose of aiding the State Plaintiffs’ investigation, white papers to the State Plaintiffs, and other correspondence with the State Plaintiffs regarding the investigation – will not be produced by the State Plaintiffs at this time and will be deferred until the resolution of a motion by Private Plaintiffs regarding the discoverability of such documents.

IT IS SO STIPULATED.

Dated: January 29, 2019

/s/ Roberta D. Liebenberg

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APPROVED, Subject to Court Approval:

/s/ David H. Marion
David H. Marion, Esquire
Special Master

APPROVED:

/s/ Cynthia M. Rufe

Cynthia M. Rufe, J.