

**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. 214
(RULING ON MOTION TO STAY CERTAIN DISCOVERY)**

The United States, as Intervenor, has moved to stay certain discovery through the end of the related criminal trials.¹ Plaintiffs oppose the motion. For the reasons set forth below, the motion will be granted in part and denied in part.

At the request of the United States, and until recently without substantial objection from any party, certain discovery relating to the criminal cases has been stayed since the inception of the MDL. In Pretrial Order No. (“PTO”) 188, after considerable input from the parties and the Special Discovery Master, the Court established a schedule for the bellwether cases, which provides for fact discovery to be completed no later than January 17, 2023.² After PTO 188 was entered, the United States sought to (1) stay the depositions of approximately 47 potential trial witnesses in two pending criminal prosecutions; (2) prohibit discovery that specifically relates to subpoenas by or communications to the Department of Justice as part of its criminal investigation into the generic pharmaceuticals industry; and (3) stay any disputed discovery until

¹ The criminal cases are *United States v. Aprahamian*, No. 20-cr-64 (E.D. Pa. filed Feb. 4, 2020), and *United States v. Glenmark Pharms. Inc., USA*, No. 20-cr-200 (E.D. Pa. filed Aug. 25, 2020).

² The bellwether cases are the State Plaintiff’s Dermatology Action, No. 20-3539, and the clobetasol and clomipramine proposed class actions brought by the Direct Purchaser Plaintiffs and End-Payer Plaintiffs, 16-CB-27241, 16-CB-27242, 16-CM-27241, 16-CB-27242. See PTO 171 [MDL Doc. No. 1769].

the dispute is resolved by the Special Discovery Master or the Court. Plaintiffs opposed the motion.

On April 11, 2022, the Court issued PTO 200, which determined after careful consideration of the parties' positions to extend the partial stay of discovery until July 17, 2022, six months before the close of fact discovery in the bellwether cases.³ PTO 200 also provided that the Court would "entertain appropriate motions to extend, curtail, or otherwise modify the stay based upon developments in the criminal cases."⁴ The United States now seeks to stay the depositions of nine individuals and to reinstate the following paragraphs of PTO 200 that expired on July 17, 2022:

7. The parties shall serve any written discovery requests and notices of deposition simultaneously on the parties and the United States Department of Justice. If the United States objects to any proposed written discovery request or notice of deposition, the United States will notify the party of the basis for the objection, and if necessary, bring that objection to Special Discovery Master Bruce Merenstein for resolution pursuant to the Revised Special Masters' Protocol (PTO No. 163). The proposed discovery shall be stayed pending resolution of the dispute.

8. Parties may not seek, and no person may respond to, discovery that specifically relates to how or what information was subpoenaed or communicated by—or provided or produced to—the Department of Justice as part of its criminal investigation into the generic pharmaceuticals industry, including in response to any grand jury subpoena or as part of a person's cooperation obligations with the Department of Justice.

9. A person responding to a discovery request in this MDL (e.g., a subpoena, request for production of documents, notice of deposition) ("Responding Person") shall not disclose in such response what documents or other information have 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 requires any modification of any document control number or other endorsement on a document, nor prohibits or excuses a

³ The Court also has issued a stay of the deposition of Defendant Ara Aprahamian that is not part of the current motion.

⁴ PTO 200 [MDL Doc. No. 2045] at 4.

Responding Person from providing documents or other information that previously had been provided to the Department of Justice.⁵

The United States seeks to have the partial stay continue until after the conclusion of the criminal trials. Significantly, the United States has reduced the number of witnesses at issue from 47 several months ago to nine today. The United States contends that although the disputed witnesses are critical to the criminal cases, they are not necessary for the bellwether cases,⁶ and that deposing these witnesses “would compromise their trial testimony and irreparably harm the United States’ pending criminal prosecutions.”⁷ The United States does not identify a specific harm, arguing that the limits on criminal discovery are “prophylactic, designed to prevent potential harms to the criminal justice system before they arise.”⁸ Plaintiffs disagree, arguing that the witnesses have knowledge important to several of the bellwether cases, knowledge that goes beyond the drugs at issue in the criminal cases to encompass many of the drugs in the bellwether cases. Moreover, Plaintiffs argue that the civil complaints include detailed allegations concerning these particular witnesses.

The United States of course does not determine the scheduling of the criminal cases. Trial in *United States v. Aprahmian* recently was listed for October 30, 2023.⁹ No trial date has been set for *United States v. Glenmark*. Thus, a renewed stay of depositions would remain in force for at least another year, even though all parties know the identities of the witnesses, and although the United States has explained why their testimony is important to the prosecution of the

⁵ PTO 200 [MDL Doc. No. 2045] at 4–5. The United States did not file the motion to stay until July 29, 2022, after the stay had expired. The parties agreed to a briefing schedule, and the partial stay in effect has continued pending this Order.

⁶ The Court has considered the *ex parte* and *in camera* submission by the United States dated July 29, 2022.

⁷ Mem. Supp. United States Mot. Stay [MDL Doc. No. 2187-1] at 1.

⁸ Reply Supp. United States Mot. Stay [MDL Doc. No. 2202] at 4.

⁹ Order Aug. 17, 2022 [Doc. No. 53], *U.S. v. Aprahmian*, No. 20-cr-64, (E.D. Pa. filed Feb. 4, 2020).

criminal cases, it has not shown that the deposition of these witnesses will impair its ability to prosecute the cases.

The United States argues that the criminal case must take precedence because of the “public interest in law enforcement”¹⁰ and that the civil and criminal cases “vindicate the same public interests in different ways, and therefore the civil claims have no superior claim to the public interest.”¹¹ The question is not which cases have a “superior” claim; both the MDL and the criminal prosecutions serve vital interests in allowing full development of the facts to determine whether there have been violations of federal and state antitrust laws and other state statutes. The MDL includes the interests of numerous state governments that have been investigating the alleged antitrust violations for years, some perhaps before the United States launched its criminal investigation. The question is of the practical manner in which to accommodate equally important interests. To the extent that the United States appears to intimate that the Court’s paramount interest is to keep the MDL schedule “on track,” this ignores the reality that this MDL Court determines the course of proceedings by balancing the interests of all parties based on the existing circumstances. This Court revised the bellwether selection in an effort to minimize the overlap with the criminal cases. The bellwether schedule was set after the presentation of detailed proposals to both the Special Master and the Court over a period of months, and the Court issued PTO 200 after extensive briefing and with due consideration of the interests of all parties including the United States as Intervenor.

¹⁰ Mem. Supp. United States Mot. Stay [MDL Doc. No. 2187-1] at 11 (quoting *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962)).

¹¹ Mem. Supp. United States Mot. Stay [MDL Doc. No. 2187-1] at 10.

Upon consideration, once again, of all relevant circumstances, the Court determines that the United States has not shown a basis for a resumed stay of the depositions.¹² To protect the criminal investigative process, the Court will impose a tailored limitation along similar lines to the earlier limited stays of discovery that prohibits the discovery of what information was previously subpoenaed by or provided to the Department of Justice during the course of its investigation, while still allowing for the information itself to be produced.

AND NOW, this 7th day of September 2022, for the reasons set forth above, it is hereby **ORDERED** that:

1. Intervenor United States of America's Motion for Scheduling Order and Response to Plaintiffs' July 1 Statement [MDL Doc. No. 2159], is **DISMISSED AS MOOT**.

2. Plaintiffs' Motions to Seal [MDL Doc. Nos. 2200 and 2207] are **GRANTED**.

3. Intervenor United States of America's Motion to Stay Discovery [MDL Doc. No. 2187] is **GRANTED in part and DENIED in part as follows**:

a. The Motion is **DENIED** to the extent it seeks to stay depositions of certain witnesses.

b. The Motion is **GRANTED** to the extent that:

i. Parties may not seek, and no person shall respond to, discovery as to what information (including documents), was previously subpoenaed by or provided to the Department of Justice in the course of its criminal investigation into the generic pharmaceuticals industry. Nothing in this paragraph requires any

¹² The recent decision in *Halman Aldubi Provident & Pension Funds Ltd. v. Teva Pharms. Indus. Ltd.*, No. 20-4660, 2022 WL 3042768 (E.D. Pa. Aug. 2, 2022) (Marston, J.) does not compel a different result. In that case, Defendants moved to stay most proceedings in a securities case pending the resolution of a civil enforcement action brought by the United States, in part because the trial was scheduled to begin within approximately one year, and the action was much further advanced than the civil litigation. The decision also evaluated the burden of concurrent litigation on the defendant, which has not been identified as an issue here.

modification of any document control number or other endorsement on a document, nor prohibits or excuses a responding person from providing documents or other information that previously had been provided to the Department of Justice.

ii. The parties shall serve any written discovery requests simultaneously on the parties and the United States Department of Justice. If the United States objects to any proposed written discovery request, the United States will notify the party of the basis for the objection, and if necessary, bring that objection to Special Discovery Master Bruce Merenstein for expedited resolution pursuant to the Revised Special Masters' Protocol (PTO 163).

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.