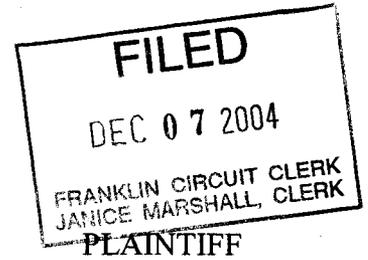


COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT - DIV. II  
CIVIL ACTION NO. 03-CI-1134  
CIVIL ACTION NO. 03-CI-1135



COMMONWEALTH OF KENTUCKY,  
*ex rel.* GREGORY D. STUMBO, ATTORNEY GENERAL

v.

ABBOTT LABORATORIES, INC.

DEFENDANT

and

COMMONWEALTH OF KENTUCKY,  
*ex rel.* GREGORY D. STUMBO, ATTORNEY GENERAL

PLAINTIFF

v.

WARRICK PHARMACEUTICALS CORPORATION,  
SCHERING-PLOUGH CORPORATION,  
SCHERING CORPORATION and DEY, INC.

DEFENDANTS

**MEMORANDUM IN SUPPORT OF  
AMENDED MOTION FOR QUALIFIED PROTECTIVE ORDER**

The Commonwealth of Kentucky, by its Attorney General Gregory D. Stumbo (“the Commonwealth”), submits the following memorandum of law in support of its Amended Motion for Qualified Protective Order in this matter.

**INTRODUCTION**

On November 8, 2004, the parties appeared before the Court for oral arguments on the Commonwealth’s Motion for Qualified Protective Order. The main point of contention between the Commonwealth and the Defendants was the Commonwealth’s ability to share confidential

information with other law enforcement agencies without notifying the Defendants.<sup>1</sup> The following day, on November 9, 2004, the Travis County, Texas, District Court entered a Protective Order in a similar pharmaceutical pricing fraud case brought by the Attorney General of Texas.<sup>2</sup> The Order permits the Texas Attorney General to share confidential information with other states that have filed similar lawsuits or have investigations pending and requires the Attorney General to notify the Defendants when it has done so. After reviewing the Texas Order, the Commonwealth is persuaded that the approach adopted by the Texas Court is more reasoned and practical than the approach originally briefed and argued by the Commonwealth. Accordingly, the Commonwealth seeks leave of Court to amend its original Motion for Qualified Protective Order to permit the Commonwealth to share confidential information only with those Attorneys General and state and federal law enforcement agencies that have filed similar lawsuits or have active official pharmaceutical pricing fraud investigations pending. The Amended Qualified Protective Order tendered herewith also provides for notification to the Defendants when the Commonwealth furnishes allegedly confidential information to other law enforcement agencies. The Commonwealth believes that such a process of shared discovery will provide an efficient and cost-effective means to insure full and fair disclosure in these actions without forcing the Commonwealth to engage in expensive and repetitive discovery to obtain information that is already of record in other similar cases.

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<sup>1</sup> Paragraphs 9 and 12 of the Commonwealth's original tendered Qualified Protective Order permits the Office of the Attorney General ("OAG") to share confidential information with other law enforcement agencies in response to subpoena or civil investigative demand without notifying the defendants that the OAG had received subpoena or civil investigative request from any law enforcement official or that they are the subject of an official investigation or inquiry.

<sup>2</sup> For the Court's convenience, a copy of the Consent Protective Order entered in the Texas litigation is attached hereto as Exhibit A.

## ARGUMENT

At least seventeen other states have filed pharmaceutical pricing fraud cases similar to the one before the Court. Tens of thousands of documents have been produced in some of those cases. Through shared discovery with other Attorneys General and the United States Department of Justice, the Commonwealth was able to obtain copies of "hot" documents produced by these Defendants in other cases. These "hot" documents were obtained subject to protective orders which require the Commonwealth to maintain the confidentiality of the information and otherwise abide by the terms of the protective orders of the courts that issued them.

A number of courts have recognized that shared discovery in cases that involve the same parties and similar issues is far more efficient and less costly than the repetitive system of discovery that the Defendants urge the Court to adopt in these cases. For example, in *Garcia v. Peebles*, 734 S.W.2d 343 (Tex. 1987), the plaintiff in an automobile design defect case sought to modify a protective order to permit him to share his discovery with plaintiffs in other similar cases.<sup>3</sup> Citing the United States Supreme Court in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958), the Texas Supreme Court recognized that the discovery rules were designed to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Garcia, supra* 743 S.W.2d at 347. The Court also recognized that the ultimate purpose of discovery - to seek the truth - is often frustrated by an adversarial approach to discovery:

The "rules of the game" encourage parties to hinder opponents by forcing them to utilize repetitive and expensive methods to find out the facts. W. Brazil, *The*

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<sup>3</sup> For the Court's convenience, a copy of the *Garcia v. Peebles* opinion is attached hereto as Exhibit B.

*Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand. L. R. 1295, 1303-15 (1978). The truth about relevant matters is often kept submerged beneath the surface of glossy denials and formal challenges to requests until an opponent unknowingly utters some magic phrase to cause the facts to rise. Courts across the nation have commented on the lack of candor during discovery in complicated litigation [Citations omitted].  
*Garcia, supra*, 734 S.W.2d at 47.

Accordingly, the Court granted plaintiff's petition in mandamus and modified the original discovery order (which barred such sharing) to allow the plaintiff to share his discovery. The Court explained its holding this way:

Shared Discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses. *See Buehler v. Whalen*, 374 N.E.2d at 467; S. Baldwin, F. Hare, F. McGowen, *The Preparation of a Product Liability Case* § 5.2.5 (1981).

In addition to making discovery more truthful, the *Garcia* Court recognized that shared discovery also makes the legal system itself more efficient:

The current discovery process forces similarly situated parties to go through the same discovery process time and time again, even though the issues involved are virtually identical. Benefitting from restrictions on discovery, one party facing a number of adversaries can require his opponents to duplicate another's discovery efforts, even though the opponents share similar discovery needs and will litigate similar issues. Discovery costs are no small part of the overall trial expense. Order Amending Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Powell, J., dissenting); *Brazil*, 31 Vand.L.R. 1295, 1358; Note, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovery Material Covered by a Protective Order*, 60 N.Y.U.L.Rev. 1137, 1140 (1985).

*Garcia, supra*, 734 S.W.2d at 347.

In *Koval v. General Motors Corporation*, 610 N.E. 2d 1199 (Ohio Co. Pl. 1990), the Ohio Court of Common Pleas for Cuyahoga County denied a motion for protective order sought by

General Motors in a products liability action.<sup>4</sup> The Court found that the “driving force” behind the motion was not the alleged confidentiality of the documents, but rather General Motors’ fear that the documents might fall into the hands of similarly situated plaintiffs who want to sue General Motors in a different forum. The Court found that the fact that other similarly-situated plaintiffs might use the documents to sue General Motors was insufficient to warrant the issuance of a protective order. Rather, the Court recognized that there exists much case law in support of shared discovery:

These and other courts have noted the efficiencies, in terms of time and cost, that are created when two similarly situated litigants share discovery and have further noted that such sharing imposes on the producing party, such as General Motors, the duty to provide full, fair and consistent disclosure to each similarly situated plaintiff . . . The court finds that the sharing of documents is beneficial, and that requiring the return of these documents would hamper such practice, and, of utmost importance, that the decisions and the denial of this motion comport with the spirit of our Civil Rules. As Civ. R.1(B) states: “These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense, and all other impediments to the expeditious administration of justice.

*Koval v. General Motors Corporation, supra*, 610 N.E. 2d at 1202. Or, as the Court remarked in *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D.Colo. 1982), “Each plaintiff should not have to undertake to discovery [sic] anew the basic evidence that other plaintiffs have uncovered. To so require would be tantamount to holding that each litigant who wished to ride a taxi to court must undertake the expense of inventing the wheel.”

Federal courts have overwhelmingly recognized that allowing shared discovery is far more efficient than the repetitive system now employed. For example, in *Wilk v. American Medical Association*, 635 F.2d 1295 (7<sup>th</sup> Cir. 1981), five chiropractors filed suit in Illinois against the

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<sup>4</sup> For the Court’s convenience, a copy of the *Koval v. General Motors Corporation* opinion is attached hereto as Exhibit C.

American Medical Association and other medical organizations, alleging a conspiracy to violate federal antitrust laws.<sup>5</sup> Similar suits were brought across the country, including one filed in New York, by the State of New York. Though the causes of action were not identical, the cases were all directed at similar wrongdoings. Massive discovery had already taken place in the Illinois action, with upwards to 100,000 documents having been produced and over 100 depositions having been taken. However, the court had previously entered a protective order prohibiting the plaintiff-chiropractors from sharing materials that the defendants had identified as confidential with other similarly-situated litigants. The State of New York requested that the Illinois court modify the protective order to allow it access to discovery materials. The district court denied the motion and New York appealed.

The United States Court of Appeals for the Seventh Circuit reversed, holding that the State of New York was a bona fide collateral litigant and had a right to use those materials already discovered by plaintiff in the Illinois action that were relevant in its collateral litigation, subject to the same restrictions as plaintiffs in the Illinois action. The Court first expressed approval of the general rule that discovery should take place in public and the parties should not be forced to engage in costly, wasteful, duplicative discovery:

(A)s a general proposition, pre-trial discovery must take place in the (sic ) public unless compelling reasons exist for denying the public access to the proceedings." *Grady*, 594 F.2d at 596. This presumption should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process. Particularly in litigation of this magnitude, we, like the Multidistrict Panel, are impressed with the wastefulness of requiring the

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<sup>5</sup> For the Court's convenience, a copy of the *Wilk v. American Medical Association* opinion is attached hereto as Exhibit D.

State of New York to duplicate discovery already made. *Grady*, 594 F.2d at 597.  
See also Manual for Complex Litigation P 3.11 (1978).

*Wilk v. American Medical Association, supra*, 635 F.2d at 1299.

Recognizing that Rule 1 of the Federal Rules of Civil Procedure requires that the Rules be construed “to secure the just, speedy, and inexpensive determination of every action,” the Court agreed with the result reached by “every other appellate court which has considered the issue” and held that where a protective order can be modified to “place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification [citations omitted]. *Wilk v. American Medical Association, supra*, 635 F.2d at 1299.

Similarly, in *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114 (6<sup>th</sup> Cir. 1981), the United States Court of Appeals for the Sixth Circuit upheld the amendment of protective orders so as to allow use of discovery materials obtained in federal multi-district litigation by plaintiffs in collateral state and federal actions.<sup>6</sup> The opinion concluded thusly, “[w]hile we do not believe that she was obligated to require sharing of discovery with litigants not a party to the multidistrict litigation, it was within her discretion to do so, especially where she perceived that cooperation in this respect would promote the efficient exchange of discovery information . . .”<sup>7</sup>

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<sup>6</sup> For the Court's convenience, a copy of the *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation* opinion is attached hereto as Exhibit E.

<sup>7</sup> See also, *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854 (7<sup>th</sup> Cir. 1994) [protective order modified to allow use of deposition in collateral proceedings before Federal Trade Commission]; *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7<sup>th</sup> Cir. 1994) [consumers were entitled to modify protective order so as to avoid duplicative discovery in collateral litigation]; *Miller v. General Motors Corporation*, 192 F.R.D. 230 (E.D. Tenn. 2000) [protective order issued permitting plaintiff's counsel to share information with plaintiff's counsel involved in similar litigation around the country without advance notice to the defendants]; *Cohabaco Cigar Company v. United States*

Resonating throughout these cases is a preference by the courts for public discovery and shared discovery in the aid of collateral litigation on similar issues. Access to shared discovery by collateral litigants materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy and expensive discovery process. "We are impressed with the wastefulness of requiring government counsel to duplicate the analyses and discovery already made." *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 597 (7<sup>th</sup> Cir. 1979). The entry of the Amended Qualified Protective Order tendered by the Commonwealth will provide an efficient and cost-effective means to insure full and fair disclosure in these actions. The Commonwealth has been the beneficiary of shared discovery from other Attorneys General who are prosecuting similar pharmaceutical pricing fraud cases. To some extent, this has permitted the Commonwealth to avoid engaging in expensive and duplicative methods to obtain information that is already in its possession. The sharing of documents produced in this case with other states who are prosecuting similar pharmaceutical pricing fraud cases will result in a similar saving of scarce judicial and government resources.

### CONCLUSION

For all of the foregoing reasons, the Commonwealth of Kentucky submits that the interest of justice requires that the Court enter the Amended Qualified Protective Order tendered herewith. The tendered Qualified Protective Order will provide an efficient and cost-effective means to insure full and fair disclosure in these actions. It will also result in the conservation of

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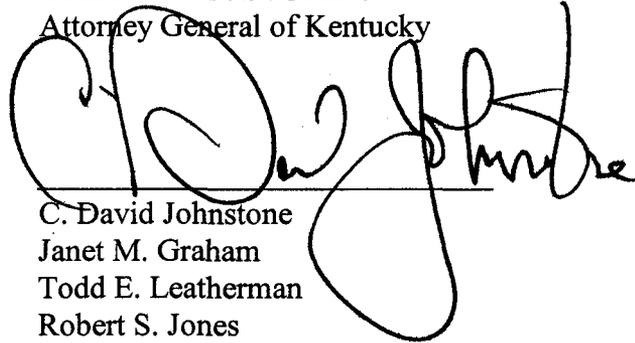
*Tobacco Company*, 1999 WL 632899 (N.D. Ill. 1999) [protective order modified to permit plaintiffs in collateral action to have access to documents and deposition transcripts produced by defendants]; *Kerasotes Michigan Theater, Inc. v. National Amusements, Inc.*, 139 F.R.D. 102 (E.D. Mich. 1991) [protective order modified to allow discovery of deposition transcripts of certain defendants' employees and expert witnesses in a similar anti-trust action].

scarce judicial and government resources for other states who are prosecuting similar pharmaceutical pricing fraud cases.

Respectfully submitted,

GREGORY D. STUMBO  
Attorney General of Kentucky

By:

A large, stylized handwritten signature in black ink, appearing to read 'C. David Johnstone', is written over a horizontal line. The signature is highly cursive and loops around itself.

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