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# IN THE SUPREME COURT OF PENNSYLVANIA

**COMMONWEALTH OF PENNSYLVANIA, acting by and through Philadelphia District Attorney Lawrence S. Krasner,**

**Petitioner,**

**v.**

**PURDUE PHARMA L.P., et al.,***

**Respondents.**

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**CITY OF PHILADELPHIA,**

**Petitioner,**

**v.**

**ALLERGAN PLC, et al.,****

**Respondents.**

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**CITY OF PHILADELPHIA,**

**Petitioner,**

**v.**

**PAR PHARMACEUTICAL, INC., et al.,*****

**Respondents.**

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**No. _____**

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| **CITY OF PHILADELPHIA,** | : |
| **Petitioner,** | : |
| **v.** | : |
| **ALLERGAN LTD., et al.,**[****] | : |
| **Respondents.** | : |
| **CITY OF PHILADELPHIA,** | : |
| **Petitioner,** | : |
| **v.** | : |
| **CVS INDIANA, LLC, et al.,**[*****] | : |
| **Respondents.** | : |

**APPLICATION FOR EXTRAORDINARY RELIEF UNDER**
**42 PA.C.S. §§ 502 AND 726 AND PA. R.A.P. 3309**


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*Note that certain Defendants in the underlying actions at issue in this Application are currently subject to bankruptcy proceedings: Purdue Pharma, Inc.; the Purdue Frederick Company, Inc.; Purdue Pharma, L.P.; Mallinckrodt LLC; and Specgx LLC. Pursuant to Orders of the Delaware County Court, these Defendants have been severed from the underlying actions and any action against them is stayed pending bankruptcy proceedings. Accordingly, these Defendants are not named as Respondents to this Application.*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes, Constitutional Provisions, and Rules**



**Other Authorities**

## INTRODUCTION

The addiction epidemic continues to burn with singular ferocity in the City of Philadelphia (the "City"), which suffered over 1,200 overdose deaths in 2020 and almost certainly surpassed that number in 2021.[1] While those numbers are staggering, there are countless others struggling with addiction, and, behind every one of them, their families. Finding out how to help the people behind the numbers has required the resources of virtually every part of the City, and there is still much work to be done.

Accordingly, the City of Philadelphia and the Philadelphia District Attorney's Office ("PDAO") both filed lawsuits in the Philadelphia County Court of Common Pleas in early 2018, seeking remedies that would provide meaningful relief at a scale that would match the size of the problem (collectively the "Philadelphia Cases"). Those cases (along with subsequent cases against other opioid defendants) were transferred to and coordinated in the Delaware County Court of Common Pleas ("Delaware County Court") pursuant to Pennsylvania Rule of Civil Procedure 213.1, ultimately to be returned to Philadelphia for trial. Now well into their fifth year, the cases continue to sit before the Delaware County Court with no deadlines in place,

[1] *See* Philadelphia Department of Public Health, *Update on Overdose Death Counts* (Dec. 2, 2021), https://www.phila.gov/2021-12-02-health-department-releases-update-on-2021-overdose-death-counts/ (last visited May 9, 2022).

no trial dates established,[2] and no return to the Philadelphia County Court of Common Pleas in sight. In fact, the Delaware County Court denied both the PDAO's request to return to Philadelphia after three years of extensive and excessive discovery and the City's request to lift the stay on its cases after it produced *three million documents* in the PDAO's case—in both instances citing unidentified additional discovery to come.

The City's cases are stayed. The PDAO's case, on the other hand, is mired in a directionless desert of unconstrained and abusive discovery. This is happening because the Delaware County Court has failed to apply the judicial tools needed to move complex cases expeditiously and efficiently toward trial. The Delaware County Court has held *two* conferences with counsel over the past two years, and only *six* conferences extending back to the initial filing of these cases in 2018. Substantial and important motions have remained undecided, sometimes for over a year. Important discovery disputes seeking sanctions and addressing the treatment of confidential law enforcement materials remain unresolved, leaving the PDAO in limbo on whether it will be required to produce additional millions of pages of

[2] *See* Aleeza Furman, *No Trial Dates in Sight: Four and a Half Years in, Pa.'s Opioid Cases are Struck in Delaware County*, The Legal Intelligencer (Feb. 24, 2022), *available at* https://www.law.com/thelegalintelligencer/2022/02/24/no-trial-dates-in-sight-four-and-a-half-years-in-pa-s-opioid-cases-are-stuck-in-delaware-county/.

documents and data. And three years into discovery, new discovery demands from Defendants continue to appear.

This is not to say the City and PDAO have not been working. Far from it. The PDAO's case is not stayed, and it has spent vast resources responding to Defendants' discovery demands. The City has likewise spent enormous resources responding to third-party subpoenas issued in the PDAO's case, even as the City has been unable to advance its own stayed cases toward trial. All told, the cost expended for these efforts stands in excess of $15 million dollars, an amount that does not include the tens of thousands of attorney hours involved. The Delaware County Court has required the PDAO and the City to carry these burdens even though the PDAO's complaint contains a single, deliberately narrow count under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 P.S. §§ 201-1–201-9.2)—a statutory cause of action available to Pennsylvania District Attorneys that depends only and entirely on a defendant's conduct, not on the conduct of the prosecuting office pursuing the claim.

The Philadelphia Cases have remained in this quagmire because the Delaware County Court has failed to execute and apply the basic but necessary case management tools that are applied every day in complex cases. Frequent conferences with the Court, timely resolution of discovery disputes (often within weeks or days), and the early establishment and consistent enforcement of discovery deadlines and

other pretrial milestones are notable examples of case management tools that courts throughout the country have used to move dozens of government opioid cases to trial. For example, the federal multidistrict *National Prescription Opiate Litigation* (MDL No. 1:17-MD-2804), managed by a single judge in the United States District Court for the Northern District of Ohio, and on which the Pennsylvania Coordinated Proceedings before the Delaware County Court are purportedly modeled,[3] has established and managed *eleven* different trial tracks, tried one case to verdict, and settled many others.[4] Nine tracks have been returned to their original jurisdictions for trial and yet, even given this substantial progress, on April 8, 2022, the Judicial Panel on Multidistrict Litigation entered an order *declining to transfer any new cases* to the MDL, holding that "MDL No. 2804 has reached the point where the benefits are outweighed by the effects of transferring new cases to this mature litigation."[5]

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[3] *See* Exhibit 1 (Case Management Order No. 1, ¶ 6) ("To achieve the efficiency, benefit and purpose of the Coordination Order, this Court intends to conform with the discovery, settlement and litigation procedures and protocols implemented for specific use in MDL 2804 in its case management of the Coordinated Cases.").

[4] *See* Jan Hoffman, *CVS, Walgreens and Walmart Fueled Opioid Crisis, Jury Finds*, The New York Times (Nov. 23, 2021), *available at* https://www.nytimes.com/2021/11/23/health/walmart-cvs-opioid-lawsuit-verdict.html; Jan Hoffman, *$260 Million Opioid Settlement Reached at Last Minute With Big Drug Companies*, The New York Times (Oct. 21, 2019), *available at* https://www.nytimes.com/2019/10/21/health/opioid-settlement.html.

[5] *See* Exhibit 2 (*In re: National Prescription Opiate Litigation*, MDL No. 2804, Order Denying Transfer and Vacating Conditional Transfer Order (ECF No.

Similarly, following a recent trial in the State of New York that resulted in a jury verdict on liability against certain opioid defendants, the State of New York Litigation Coordinating Panel *sua sponte* entered an order amending its prior coordination orders and coordinating the remaining 100-plus pending cases before a *different* principal Coordinating Judge in a *different* county, all in an effort to resolve the matters "in a timely manner." *See* Exhibit 3 at 3. The Panel was "[m]indful of the massive undertaking" that would be required to bring the Track 1 cases and remaining coordinated cases to resolution and was "particularly concerned about the risk that full coordination before a single judge . . . may unreasonably delay the progress, increase the expense, [and] complicate the processing of actions brought [elsewhere], thereby prejudicing plaintiffs' interests; cause inconvenience to plaintiffs, defendants and witnesses . . . , and result in an unmanageable caseload for a single coordinating judge . . . ." *Id.* at 3-5.

There is not, at this point, any reason to believe that the PDAO or City can change the Delaware County Court's handling of this matter. Both have filed numerous emergency motions with that court, to no avail. Petitioners respectfully request that instead this Court exercise its general powers of supervision over the

9586). The JPML also addressed anticipated concerns over the demands of future discovery in cases not transferred to, or otherwise pending in, the MDL. *Id.*

Delaware County Court, and put an end to this needless and harmful delay by returning the Philadelphia Cases to the Philadelphia County Court of Common Pleas.

Absent intervention by this Court, there is no timely and effective way to review the Delaware County Court's mismanagement of the Philadelphia Cases, regardless of whether one or more of the Delaware County Court's individual orders are in error. Importantly, while individual orders may be reviewable after the entry of final judgment, the Delaware County Court's failure to reach decisions and otherwise advance the litigation, are not.[6] This Court should act to remand the PDAO's case to Philadelphia, and lift the stay on the City's cases and remand it to Philadelphia as well.

## STATEMENT OF JURISDICTION

For the reasons discussed below, this Court has jurisdiction to take this case through its King's Bench or Extraordinary Jurisdiction. *See* Pa. Const. art. V, § 2(a); 42 Pa.C.S. §§ 502, 726; *Com. v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015).

[6] In Texas, where there is a procedure to establish statewide multidistrict litigation, the State MDL panel has the discretion under Texas MDL Rule 13.3(o) to retransfer cases in circumstances when retransfer will promote the just and efficient conduct of the cases. The first chair of the Texas MDL panel has remarked that retransfer would allow the panel to take an MDL away from a judge "who is not getting the job done." *See Hearing of the Supreme Court Advisory Committee* 8875-76 (Tex. 2003) (statement of Chief Justice Phillips), *available at*, https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/2003/transcripts/sc06212003.pdf.

## STATEMENT OF QUESTIONS INVOLVED

1. Has the Delaware County Court mismanaged the Philadelphia Cases, by failing to provide an end to three years of expensive and irrelevant fact discovery, failing to articulate events that will trigger remand of the PDAO's case to the Philadelphia County Court of Common Pleas, and failing to provide a benchmark for lifting the stay of the City of Philadelphia's cases?

*Suggested Answer: Yes*.

2. Given the Delaware County Court's mismanagement of the Philadelphia Cases, and the cases' immediate public importance, should this Court assume jurisdiction over the action pursuant to its King's Bench or Extraordinary Jurisdiction powers, and issue a case management order immediately: (a) remanding the PDAO's case back to the Philadelphia Court of Common Pleas, (b) lifting the stay of the City of Philadelphia's cases, and (c) remanding the City's cases to the Philadelphia Court of Common Pleas?

*Suggested Answer: Yes*.

## RELEVANT BACKGROUND

### I. The Philadelphia Cases Against the Opioid Defendants

The opioid crisis in Philadelphia was caused by corporate greed. Drug manufacturers spent decades falsely marketing the benefits of long-term prescription of opioid drugs, and convinced a generation of Philadelphia doctors to ignore two

thousand years of contrary experience. Seeing the money that could be made, opioid distributors and national pharmacy chains—companies charged under federal and state law to ensure that prescription opioids are not unlawfully diverted—abandoned those duties. As a result, from 2006 to 2014 alone, there were *518,013,833* prescription pain pills sent to Philadelphia, enough for 38 pills per person, per year.[7]

In early 2018, the City and the PDAO each filed their own lawsuits against manufacturers of prescription opioid drugs. *See* Exhibits 4 and 5. Later, both the PDAO (on November 14, 2018) and the City (on June 17, 2019) initiated actions against distributors of opioid drugs. *See* Exhibits 6 and 7. On June 23, 2021, the City filed a third opioid lawsuit against additional opioid manufacturers. *See* Exhibit 8. On September 28, 2021, the City filed a complaint against pharmacies that failed to stop suspicious orders or prevent dispensation of red flag prescriptions. *See* Exhibit 9.

## II. Coordination of the Pennsylvania Opioid Lawsuits in the Delaware County Court of Common Pleas

On March 26, 2018, pursuant to Pennsylvania Rule of Civil Procedure 213.1, the Philadelphia Cases were coordinated with other Pennsylvania opioid cases in the Delaware County Court; the collective proceedings became known as the

[7] *See The Opioid Files – Drilling into the DEA's Pain Pill Database*, Washington Post (updated Jan. 17, 2020), *available at*: https://www.washingtonpost.com/graphics/2019/investigations/dea-pain-pill-database/?utm_term=.f2463df9006f.

Coordinated Proceedings. *See Delaware County, Pennsylvania, et al. v. Purdue Pharma, L.P., et al.,* Case No. CV-2017-008095 (Del. Co. C.C.P.). Six months later, on September 14, 2018, the Delaware County Court issued Case Management Order No. 1, designating four bellwether cases, including the PDAO's lawsuit. *See* Exhibit 1.

The Delaware County Court largely denied Defendants' preliminary objections in the summer of 2019. On July 11, 2019, the court issued a discovery order which established the bellwethers as Track 1 Plaintiffs in the Coordinated Proceedings. The Track 1 Plaintiffs are: (1) Delaware County; (2) Carbon County; (3) Carpenters Health & Welfare Fund of Philadelphia & Vicinity; and (4) the PDAO. By contrast, the City's cases were not placed into Track 1 and have been stayed since they were filed and transferred to Delaware County.

## BASES FOR KING'S BENCH OR EXTRAORDINARY JURISDICTION

### I. This Court Should Exercise Its King's Bench or Extraordinary Jurisdiction Over the Philadelphia Cases Because the Delaware County Court's Failure to Manage the Cases Threatens the Meaningful Resolution of Litigation That Is a Matter of Immediate Public Importance.

#### A. The Delaware County Court Has Mismanaged the Philadelphia Cases and Intervention by This Court Via Its King's Bench Jurisdiction Is Necessary to Fix the Problem.

The Philadelphia Cases have been stuck in the black hole of the Delaware County Court for more than four years now and there is no end in sight. Under this

Court's King's Bench powers, this Court's "'power of general superintendency over inferior tribunals[]' may be exercised" even "where no matter is pending in a lower court." *In re Avellino*, 690 A.2d 1138, 1140 (Pa. 1997); *see also* 42 Pa. C.S. § 502 ("The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to . . . exercise the powers of the court . . . as the justices of the Court of King's Bench . . . could or might do on May 22, 1722."). As this Court stated in *In re Bruno*:

> [T]he Court cannot suffer the deleterious effect upon the public interest caused by delays incident to ordinary processes of law, or deficiencies in the ordinary process of law making those avenues inadequate for the exigencies of the moment. In short, King's Bench allows the Supreme Court to exercise authority commensurate with its "ultimate responsibility" for the proper administration and supervision of the judicial system.

101 A.3d 635, 670 (Pa. 2014); *see also Mun. Publ'ns, Inc. v. Ct. of Common Pleas of Philadelphia Cty.*, 489 A.2d 1286, 1288 (Pa. 1985) (observing that the Pennsylvania Supreme Court has the onus of general superintendence of the courts of this Commonwealth).

This Court has intervened in cases to frame the scope of appropriate discovery, or to correct a trial court's case or discovery mismanagement. *See, e.g.*, *In re Interbranch Comm'n on Juvenile Justice*, 988 A.2d 1269 (Pa. 2010) (exercising King's Bench jurisdiction to decide privilege and confidentiality issues in discovery); *Com. ex rel. Specter v. Shiomos*, 320 A.2d 134 (Pa. 1974) (granting

petition to correct a lower court's discovery errors and acknowledging the Court under its "King's Bench power has general supervisory and plenary power over all inferior tribunals") (citing *Com. v. Caplan*, 192 A.2d 894) (Pa. 1963)). The Court should likewise invoke its King's Bench supervisory authority here to finally expedite resolution of the Philadelphia Cases.

### 1. The Delaware County Court Has Failed to Actively Manage the Philadelphia Cases, Which Has Caused Great Inefficiency and Expense.

"A plaintiff's access to justice means the vindication of rights without delay, which renders the vindication meaningless, or expense, which makes the victory a Pyrrhic one."[8] To achieve that goal, complex cases require active management and require trial courts to contemplate how those cases will be resolved. *See generally* MANUAL FOR COMPLEX LITIGATION § 10.13 (4th ed. 2009) ("The judge's role is crucial in developing and monitoring an effective plan for the ordering conduct of pretrial and trial proceedings. Although elements and details of the plan will vary with the circumstances of the particular case, each plan must include an appropriate schedule for bringing the case to resolution.").

"[A]ctive judicial management in specially targeted complex cases will reduce cost and delay. Such judicial involvement will enhance settlement

[8] Report of the Advisory Group of the United States District Court for the Eastern District of Pennsylvania 8-30 (Aug. 1, 1991), *reprinted in* 138 F.R.D. 167, 181 (1991).

possibilities, and require the parties to organize and focus their discovery early." 138 F.R.D. at 254. The elements most critical to a complex case's success are a judge's engagement in differentiated case management, involvement in pretrial process, setting firm trial dates, control over excessive discovery, establishing firm deadlines for dispositive motions, and facilitating alternate dispute resolution methods. *Id.* at 177-180. In doing so, "[j]udges should be sensitive to the impact that their practices and procedures have on cost of litigation, including delay in deciding motions, utilization of face-to-face conferences and filing requirements." *Id*. at 227.

Here, the Philadelphia Cases are complex, but have not been actively managed. Over the past four years, the Delaware County Court has done the bare minimum to shepherd the Philadelphia Cases.

For example, since the Pennsylvania opioid cases were coordinated in March 2018, the Delaware County Court has held *only six conferences* with counsel, the vast majority of which were 2019 hearings on Defendants' preliminary objections.[9] During the past two years, as the Coordinated Proceedings were supposed to be concluding discovery, the Delaware County Court held only *two* (in-person or

[9] The Delaware County Court held conferences on April 30, 2019 (to decide leadership); June 7, 2019 (to discuss disputes regarding a discovery order); June 18, 2019 (oral argument on preliminary objections); September 5, 2019 (continued argument on preliminary objections); November 15, 2019 (continued argument on preliminary objections); February 20, 2020 (status conference); and October 27, 2021 (discussion of a litany of pending motions and dozens of discovery disputes).

virtual) conferences with counsel, and, rather than resulting in decisions on the issues raised, those two conferences only resulted in more briefing.[10] Since the Delaware County Court decided Defendants' preliminary objections, virtually every motion, no matter how significant, has been decided without a hearing, often based on facts that, if they were ever true, were no longer so as of the date of the order. Even now there are substantial outstanding motions, including motions requesting trial dates and a motion for sanctions against the PDAO and certain City agencies[11] that the Delaware County Court refuses to remove from the docket, motions which have sat pending for years. Since discovery began, the discovery deadline has been extended four times,[12] and since December 7, 2021—*for nearly six months*—the parties have

[10] In October 2020 the Delaware County Court appointed a discovery Special Master, but it has not timely ruled on objections to the Special Master's rulings, resulting in yet another source of delay. *See* Exhibit 10 (Order of Appointment of Special Discovery Master).

[11] Even though the Delaware County Court recently acknowledged that "I have no reason to believe that any of the parties including the Philadelphia DA is in contempt of anything at this point it time" Exhibit 11 (Oct. 27, 2021 H'rg Tr. at 149:24-150:2), it has refused to remove the motion from the docket, concluding that "it's going to stay there a little bit longer until I feel comfortable that discovery has been completed." *Id.* at 150:22-24.

[12] Paragraph 10(a) of CMO No. 1 provided that all pretrial discovery was to completed by November 1, 2019. That deadline was extended to March 31, 2020 by Administrative Order dated September 27, 2019; to December 4, 2020 by Order Extending Track One Discovery Deadlines dated March 9, 2020; to June 5, 2021 by Order Extending Track One Discovery Deadlines dated August 6, 2020; and to December 7, 2021 by Order Extending Track One Discovery Deadlines dated December 8, 2020. *See* Exhibits 12-15.

operated with no deadline in place while they wait for the Delaware County Court to enter a case management order. And, as described below, nothing about the progression of the Philadelphia Cases before the Delaware County Court has been speedy or inexpensive.

### 2. The Delaware County Court's Refusal to End Fact Discovery in the Philadelphia Cases Has Resulted in Irrelevant, Disproportionate, and Harmful Discovery.

The coordination of discovery in Delaware County was supposed to effectuate efficient production, but it has done just the opposite. Due in large part to the Delaware County Court's failure to manage and provide an end to fact discovery in the PDAO's case, both the PDAO and fourteen different City of Philadelphia agencies—which are third parties in the PDAO's case[13]—have been forced to spend $15 million on producing discovery, which the Delaware County Court has admitted is legally irrelevant.

#### a. The Delaware County Court Ordered the Production of Legally Irrelevant Discovery.

Despite the broader language of Paragraphs b and c of the PDAO's Amended Complaint (Exhibit 6) the PDAO has made clear since the beginning of its litigation that it is seeking only civil penalties and disgorgement, and not compensatory

[13] Pennsylvania trial courts should protect third parties from unduly burdensome discovery. *See Simon v. Simon*, 6 Pa. D. & C.3d 196, 205 (Pa. Com. Pl. 1977) ("A person should be compelled to undergo greater burdens relative to a lawsuit to which he is a party than a stranger should be asked to undertake.").

damages on behalf of the City or any individual City agency. As early as the Delaware County Court's June 7, 2019 status conference, the PDAO declared that the case was a "law enforcement action that is brought under the CPL" and that the PDAO should not be subjected to the same discovery as other plaintiffs, "because they're not seeking damages in the traditional sense that the other Plaintiffs are." *See* Exhibit 16 (Jun. 7, 2019 Hr.'g Trans., Ex. C (pp. 99-100)); *see also* Exhibit 17 (Aug. 6, 2019 Letter to Rocco P. Imperatrice, III, *et al.*).[14]

In other contexts the Delaware County Court has consistently recognized the distinct nature of the PDAO's case. In denying Defendants' preliminary objections, it held that neither the Attorney General nor District Attorneys need plead or prove proximate causation under the UTPCPL. *See* Exhibit 18 (Order Denying Manufacturer Defendants' Preliminary Objections, ¶ 7) ("This Court also notes that when the Commonwealth brings a public law enforcement action under the UTPCPL, it is not required to allege proximate causation."). Similarly, in limiting

[14] Noting that, "[w]hile Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. §§ 201-1 to 201-9.3, permits the Commonwealth to seek a variety of remedies, in this action the Commonwealth intends to seek injunctive relief, civil penalties, and restitution in the nature of disgorgement. The Commonwealth is not seeking compensatory damages on behalf of the City of Philadelphia or on behalf of any person or entity in the City of Philadelphia. Furthermore, the restitution in the nature of disgorgement sought by the Commonwealth under the UTPCPL does not require proof of specific harms to the City or its residents, nor does it require evidence linking such harms to specific instances of misconduct.

the scope of Defendants' deposition of a PDAO designee, the Delaware County Court recognized that inquiries into the harms or damages suffered by the City of Philadelphia were not appropriate discovery topics in the PDAO case,[15] and urged all parties "to restrict the questioning at deposition to damages *related to the Commonwealth's remaining claim for restitution in the nature of disgorgement*." Exhibit 19 (Oct. 10, 2019 Order Granting in Part and Denying in Part Commonwealth's Motion for Protective Order) (emphasis added). Finally, the Delaware County Court granted the PDAO's motion to strike Defendants' requests for a jury demand, based on the "overwhelming precedent" that the nature of the relief afforded to the Attorney General and District Attorneys under the UTPCPL is equitable rather than legal in nature. *See* Exhibit 20.[16]

The scope of relief sought is unquestionably relevant to the scope of appropriate discovery. It is blackletter law that a party is only entitled to discovery that is relevant to the parties' claims and defenses (*see* Pa.R.C.P. 4003.1), and every discovery request must be proportional, requiring the court to analyze multiple

[15] The City has its own case in which it is seeking those damages.

[16] On this basis, the PDAO, on December 11, 2019, sought to amend the Amended Complaint's *ad damnum* clause to make the damages the PDAO sought under the UTPCPL crystal clear. *See* Exhibit 21 (Suppl. Memo in Supp. of PDAO Motions to Quash and for Protective Orders). Even though doing so reduced the scope of monetary relief sought, Defendants refused to consent to the PDAO's *ad damnum* amendment. *See* Exhibit 22 (Dec. 17, 2019 Letter to Delaware County Court).

factors to determine whether it is. *See PTSI, Inc. v. Haley*, 71 A.3d 304, 316 (Pa. Super. 2013) (quoting Pa.R.C.P. 4009.1 Explanatory Comment (2012), which outlines the factors to be considered when conducting a proportionality analysis).

In an opioid action filed by the City of Chicago against many of the same defendants in the PDAO's case, the U.S. District Court for the Northern District of Illinois held that, when Chicago filed an amended complaint to eliminate claims for damages (the same relief disclaimed by the PDAO here), discovery should be correspondingly limited. *See City of Chicago v. Purdue Pharma, L.P.*, No. 14 CV 4361, 2020 WL 3578497, at *2 (N.D. Ill. July 1, 2020). In so holding, the court rejected defendants' arguments that the discovery sought was necessary for them to defend themselves, holding that "because consumer injury is not a required factor . . . and the City only seeks civil penalties with respect to this claim, Defendants have not shown that the targeted discovery is relevant to the defense of that [consumer fraud] count." *Id.* at *3. Importantly, the district court held that, "*[d]efendants cannot demand discovery based on a proof element the opposing party does not accept as a required element*." *Id.* (emphasis added). And even if the discovery sought by defendants were relevant, the district court concluded it was no longer proportional. *Id.* at *4.[17]

[17] The proportionality requirement in Federal Rule of Civil Procedure 26(b)(1) is similar to the proportionality requirement in the Pennsylvania Rules of Civil Procedure. *See* Pa.R.C.P. 4011(b).

But despite knowing the unique nature of the PDAO's single claim and the limited scope of the relief sought, the Delaware County Court entered companion orders prohibiting the PDAO from withholding the production of any documents *on the basis of relevance* and ordering fourteen different City of Philadelphia agencies—whose damages the PDAO did not seek—to respond to broad third-party subpoenas served by Defendants. *See* Exhibit 23 (Jan. 10, 2020 Order Regarding Discovery Served on the Commonwealth of Pennsylvania Acting by and through District Attorney Lawrence S. Krasner); Exhibit 24 (Jan. 7, 2020 Agreed-Upon Order Regarding Defendants' Outstanding Third-Party Subpoenas).

As Defendants continued to pursue burdensome discovery from City agencies, the PDAO, to leave no question about the limited scope of its claim, renewed its request to amend its *ad damnum* clause by filing an emergency motion. Without holding a hearing, the Delaware County Court doubled down on the notion that City agencies should have to produce legally irrelevant discovery. Characterizing the PDAO's claim that the scope of discovery should be related to the relief sought as "bold," the Court held the PDAO could amend its *ad damnum* clause to limit the relief sought under the UTPCPL, but astoundingly noted that its order was "not intended to limit discovery." Exhibit 25 (Apr. 20, 2021 Order ¶¶ 3, 7).

The Delaware County Court remarked that the discovery from City agencies was "necessary and required to provide affirmative and mitigating evidence, evidence serving the prayers of relief or defense, and provide a matrix to measure civil penalties and for relief being requested, otherwise judgment may be arbitrary and capricious." *Id.* But the Delaware County Court did not describe what "affirmative and mitigating" evidence documents from City agencies could provide, and did not identify the "prayers of relief or defense" or the "matrix to measure civil penalties" the discovery could purportedly aid. And, since the Delaware County Court never held a hearing on the PDAO's emergency motion, neither the PDAO nor the City agencies from which discovery was ordered were permitted to contest these conclusions.

Ultimately, the Delaware County Court's authorization of irrelevant discovery resulted in the following:

- The PDAO amended its responses to Manufacturer and Distributor Defendants' interrogatories seven times, such that the PDAO's responses now total 224 pages with nearly 50,000 pages of appendices.[18] *See, e.g.*, Exhibit 26 (Jun. 25, 2020 Discovery Dispute

[18] The Delaware County Court never analyzed the reasonableness of the interrogatories posed, which included requests that asked the PDAO to "Identify every Person in Philadelphia and the Commonwealth who allegedly became addicted to prescription opioids and then turned to illicit drug-use because of that addiction, as referenced in Paragraph 383 of the Complaint" (Manufacturer Interrogatory No. 7); "Identify each Person whose use of Prescription Opioids resulted in expenditures by You for which You seek relief," (Distributor Interrogatory No. 9); and "Identify every pharmacy, clinic, or hospital inside or outside Philadelphia's geographic boundaries whose conduct with respect to

Order Pertaining to Distributors and Manufacturer Demand for More Specific Responses to Interrogatories).

- The PDAO produced 253,139 documents, including the files of eighteen custodians, the large majority of which were assistant district attorneys. *See* Exhibit 23 (Jan. 10, 2020 Discovery Order).

- The PDAO produced agreed portions of the PDAO's Preliminary Arraignment Reporting System ("PARS") database which contains records from over 500,000 arrests and includes records extending back before 2009. That database totaled 33.9 MBs of data, and contains 79 fields, 13 tables, and more than 530,000 rows.

- The PDAO produced agreed portions of the PDAO's DAO-CMS (Case Management System) database, which totals 7.51 GBs of data, and contains 496 fields, 27 tables and over 40 million rows.

- Fourteen third-party City of Philadelphia agencies produced *three million documents* in response to Defendants' subpoenas.

**b. The Delaware County Court's Discovery Orders Ignored the Sensitive Nature of the Documents the PDAO Was Required to Produce.**

In ordering ever-increasing amounts of discovery, the Delaware County Court has ignored the nature of the documents the PDAO collected, reviewed, redacted, and produced. The PDAO is an active law enforcement office that prosecutes many different crimes, many of which touch prescription opioid and illicit drugs in some way. Some of the PDAO documents contained grand jury materials, identified

Prescription Opioids You believe, suspect, or contend caused harm within Philadelphia's geographic boundaries." (Distributor Interrogatory No. 31). *See* Exhibits 27 and 28 (excluding attachments).

confidential informants, disclosed wiretap targets, contained law enforcement privileges and information protected by Pennsylvania's Criminal History Records Information Act, 18 Pa. C.S. §§ 9101, *et. seq*. ("CHRIA"), and were littered with communications protected by the attorney-client, work-product, or law enforcement investigation privileges. Review and production of these documents took extraordinary care and expense. Yet not one of the Delaware County Court's orders reflected recognition of the nature of the PDAO documents Defendants sought or acknowledged the corresponding expense that producing such materials would cause the PDAO to incur.

While this Court cannot give back the millions of dollars the PDAO and City have already spent, it can finally return the Philadelphia Cases to Philadelphia to ensure that the exorbitant expenses incurred by these government agencies will at least give them a day in court. The Delaware County Court is not done with the PDAO and its discovery obligations yet. In a tentative order issued eight months after the original dispute was submitted to the Delaware County Court, the Discovery Special Master recommended that, after the PDAO had substantially completed its document production, the PDAO would also be required to: (a) reproduce its entire document production with District Control Numbers ("DC

Numbers") unredacted;[19] and (b) produce documents pertaining to convictions that are on appeal and convictions that are being reviewed by the PDAO's Conviction Integrity Unit, a unit that assesses certain convictions to determine whether or not they were tainted by police or prosecutorial misconduct.

The Special Master also recommended that the PDAO be required, at its own expense, to begin the process of loading its 39 Megabyte PARS database to prepare to meet and confer with Defendants about producing narrative text fields contained in that database. *See* Exhibit 29 (Special Master Recommended Order). These narrative text fields are notes written by police officers, not PDAO personnel, and their location within a database (as opposed to word processing documents) makes the necessary redaction work impracticable and extremely expensive. Yet the Special Discovery Master recommended that the PDAO be required to begin the process of producing these fields without any analysis of whether the work was proportional, and without considering the sizable and expensive document productions had already been completed months before.

Lest this Court think that such discovery is or has been routinely or lightly authorized in other opioid litigation pending around the country, it has not.

[19] DC Numbers are a unique identifier created by the Philadelphia Police Department ("PPD") almost every time a citizen has an interaction with PPD. For arrests that result in prosecution, a DC Number may be connected to a case name, and therefore to an individual, through the Pennsylvania Unified Judicial System's public website.

Defendants in the Delaware County Court have justified demanding the production of databases of arrests, prosecutors' case management records and investigative files on the grounds that they want to match a John Doe in one database to the same individual referenced in another PDAO document. But when defendants in related opioid litigation pending in California state court sought the production of hundreds of millions of records from California's prescription drug monitoring program database, called the Controlled Substance Utilization Review and Evaluation System ("CURES") database, the California Court of Appeals issued a writ of mandamus vacating orders compelling that production, holding:

> Defendants emphasize their desire to link CURES data to other datasets, but they do not explain why such a link is necessary beyond generalities like the need to 'measure trends and test causal relationships.' Such generalities are insufficient to justify such a vast production of medical information from the nonparties here.

*Bd. of Registered Nursing v. Superior Ct. of Orange Cty.*, 59 Cal. App. 5th 1011, 1045-46, 273 Cal. Rptr. 3d 889, 913-14 (2021) (internal citations omitted), *reh'g denied* (Feb. 3, 2021), *review denied* (Apr. 21, 2021); *see also Cty. of Los Angeles v. Superior Ct.*, 65 Cal. App. 5th 621, 654, 280 Cal. Rptr. 3d 85, 114 (2021) (in opioid related litigation, refusing to order discovery because of "defendants' failure to provide *any* discussion of the elements of plaintiffs' causes of action or any case law bearing on such causes of action to attempt to demonstrate a theory of discoverability of the sensitive medical information at issue in these writ

proceedings." (internal citation omitted). Identical reasoning applies to Defendants' efforts to get the PDAO to unmask individual law enforcement files and records.

### 3. The Delaware County Court Has Failed to Create a Mechanism to Get the PDAO's Case to Trial or a Benchmark for Lifting the Stay in the City's Case.

The runaway fact discovery permitted by the Delaware County Court has been particularly prejudicial because, despite presiding over the Coordinated Cases for four-and-a-half years, the Delaware County Court has failed to establish a mechanism to return the Track 1 Plaintiffs to their home jurisdictions for trial or a benchmark for identifying plaintiffs to pursue later "tracks."

Even though coordinated proceedings may foster centralization and promote global settlements, establishing a mechanism for returning cases to their original jurisdictions is an essential component of fairly managing complex litigation. As the United States Court of Appeals for the Sixth Circuit just recognized in granting a petition for writ of mandamus requiring the federal MDL—which has navigated *eleven* different tracks—to decide pending motions to remand, "we are no longer at the outset of this litigation, and Petitioners' motions have been pending an unduly long time." *See* Exhibit 30 (*In re: Harris County, TX, et al.*, No. 21-3637, ECF No. 6-1 at 4 (6th Cir. 2022)).

Pennsylvania Rule of Civil Procedure 213.1—which governs the coordination of actions in different counties—relies almost exclusively on a judge's discretion to

determine when cases are ready to return to their home jurisdictions. *See* Pa.R.C.P. 213.1. Accordingly, the PDAO and another Track 1 Plaintiff filed a joint motion to remand their cases on May 14, 2021. Even though that motion was fully briefed as of July 12, 2021, the Delaware County Court did not hold a hearing until October 27, 2021, and did not issue an order denying the joint motion until March 11, 2022, noting that "as quickly as discovery is substantially completed, remand, as well as this Courts consideration of the selection of additional Track cases or the modification and/or end of coordination will be timely considered." Exhibit 31 (Mar. 11, 2022 Order). The Delaware County Court did not identify when discovery would be substantially completed, or what discovery remained to be completed. Leaving the possibility of remand subject to open-ended discovery has had predictable consequences. For example, on March 22, 2022, the Distributor Defendants filed yet another discovery dispute letter against the PDAO, seeking to compel the PDAO to supplement responses to interrogatories served over a year ago, even though the information is equally ascertainable from one of the PDAO's voluminous productions. *See* Exhibit 32 (Mar. 22, 2022 Letter by Defendant AmerisourceBergen Drug Corporation). Put plainly, as long as the Delaware County Court delays remands pending the conclusion of unidentified discovery, discovery will never end.

The Delaware County Court has also failed to identify a benchmark it will use to lift the stay of the City of Philadelphia's case. After the Delaware County Court

required City agencies to spend millions of dollars and thousands of hours to produce three million documents, and allowed Defendants to take depositions of City agency employees, the City of Philadelphia moved on August 6, 2021 to lift the four-year stay of its cases. *See* Exhibit 33. Seven months after the motion was filed, on March 4, 2022, the Delaware County Court denied the motion without prejudice, determining—again without holding a hearing—that "[d]iscovery, including significant requests for Information [sic], depositions and third-party discovery of Track One cases remain." Exhibit 34 (Mar. 4, 2022 Order ¶ 2). The Delaware County Court so held even though several months before it acknowledged that it had never really "thought about" the fundamental unfairness of requiring the City to spend millions of dollars to essentially complete all of its case-related discovery while refusing to lift the stay in place for the City's cases.[20] As a result of the Delaware County Court's thoughtlessness, Defendants continue to pursue virtually unlimited discovery from the City, which has no choice but to beg this Court for the opportunity to prosecute its cases.

[20] *See* Exhibit 11 (Oct. 27, 2021 Hr'g Tr. at 107:22-108:4) ("I frankly had never thought about this, the fact that, you know, we're prodding, pushing, and poking the City of Philadelphia by way of discovery, and they're sort of standing in the sideline waiting to get going with their case. And I never really thought of that aspect before, and that's a good point.").

### B. The Philadelphia Cases Are Matters of Immediate Public Importance and Thus Provides This Court a Basis to Exercise Its King's Bench or Extraordinary Jurisdiction.

"King's Bench authority [may be] invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law." *Com. v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015) (citing *In re Bruno*, 101 A.3d at 670). Similarly, Section 726 of the Judicial Code provides that this Court may "exercise plenary jurisdiction 'in any matter . . . involving an issue of immediate public importance' pending before an inferior tribunal at any stage, for the purposes of 'enter[ing] a final order or otherwise caus[ing] right and justice to be done.'" *In re Bruno*, 101 A.3d at 668 (citing 42 Pa. C.S. § 726). The PDAO's ability to hold opioid manufacturers and distributors accountable for their role in causing the opioid epidemic in Philadelphia is a matter of immediate public importance for two reasons.

*First*, the opioid epidemic created by Defendants continues to ravage families and communities across the City, which is plainly a matter of immediate public importance. This Court should invoke jurisdiction because of the immediate danger to public health involved in this case. *See Friends of Danny DeVito*, 227 A.3d 872 (Pa. 2020) (King's Bench jurisdiction granted in matter implicating public health via Commonwealth ordered COVID-19 regulations); *Gass v. 52nd Judicial District, Lebanon Cty.*, 223 A.3d 212 (Pa. 2019) (invoking King's Bench jurisdiction in case

that concerned public health and use of medical marijuana); *Weeks v. Dep't of Human Servs.*, 222 A.3d 722 (Pa. 2019) (extraordinary jurisdiction granted because the litigation "involves a matter of immediately public importance").

*Second*, the Court should not allow the prospect of never-ending irrelevant and oppressive fact discovery to fundamentally deny the relief authorized by the legislature. The UTPCPL explicitly empowers "the Attorney General or a District Attorney" to "bring an action in the name of the Commonwealth . . . to restrain by temporary or permanent injunction" an unfair or deceptive practice within the UTPCPL. 73 P.S. § 201-4; *see also id.* § 201-8 (providing for civil penalties). Defendants continue to propound endless and irrelevant discovery requests, and the Delaware County Court refuses to serve as a check and balance on those requests. Allowing this discovery to continue without this Court's intervention will effectively deny the PDAO its day in court. It will encourage defendants in future UTPCPL actions to employ similar tactics, thereby discouraging the very law enforcement efforts the legislature expressly authorized in the UTPCPL.

In *Commonwealth v. Williams*, this Court asserted its King's Bench jurisdiction because the Governor's exercise of executive reprieve power "encroached upon this Court's final judgment in Williams' case and has attempted to negate unilaterally the proscribed sanction in all cases where this Court has affirmed the death penalty." 129 A.3d at 1206. This Court concluded that its "broad

King's Bench authority . . . embrace[d] such a forceful challenge to the integrity of the judicial process." *Id.* at 1207. In this case, Defendants' and the Delaware County Court's conduct poses a challenge to the integrity of the judicial process—a matter of immediate public importance.

## CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the PDAO and the City of Philadelphia respectfully request that this Court exercise jurisdiction over the Philadelphia Cases pending before the Delaware County Court of Common Pleas in the Pennsylvania Coordinated Proceedings to immediately: (1) remand the PDAO's case to the Philadelphia County Court of Common Pleas; (2) lift the stay in the City of Philadelphia's cases; and (3) remand those cases to Philadelphia as well.

Respectfully submitted,

By: /s/ *Jerry R. DeSiderato*

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26 EM 2022

# IN THE SUPREME COURT OF PENNSYLVANIA

: New Case
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## PROOF OF SERVICE

I hereby certify that this 11th day of May, 2022, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

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## IN THE SUPREME COURT OF PENNSYLVANIA

## PROOF OF SERVICE

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## IN THE SUPREME COURT OF PENNSYLVANIA

## PROOF OF SERVICE

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## IN THE SUPREME COURT OF PENNSYLVANIA

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## IN THE SUPREME COURT OF PENNSYLVANIA

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## IN THE SUPREME COURT OF PENNSYLVANIA

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| Address: | 117 N Olive St<br>Media, PA 19063 |
| Phone: | 610-742-9770 |
| Representing: | Respondent Actavis Elizabeth LLC<br>Respondent Actavis Kadian LLC<br>Respondent Actavis Laboratories UT, Inc.<br>Respondent Actavis LLC<br>Respondent Actavis Mid Atlantic LLC<br>Respondent Actavis Pharma, Inc.<br>Respondent Actavis South Atlantic LLC<br>Respondent Actavis Totowa LLC<br>Respondent Cephalon, Inc.<br>Respondent Teva Pharmaceutical Industries, Ltd.<br>Respondent Teva Pharmaceuticals USA, Inc.<br>Respondent Warner Chilcott Company, LLC<br>Respondent Watson Laboratories, Inc. |

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|---|---|
| Served: | Tiffany Joy Giangiulio |
| Service Method: | First Class Mail |
| Service Date: | 5/12/2022 |
| Address: | Marshall Dennehey Warner Coleman & Goggin<br>2000 Market St Ste 2300<br>Philadelphia, PA 19103 |
| Phone: | 215-575-2799 |
| Representing: | Respondent Allergan Finance LLC<br>Respondent Allergan Ltd.<br>Respondent Allergan PLC<br>Respondent Allergan Sales, LLC<br>Respondent Allergan USA, Inc. |

## IN THE SUPREME COURT OF PENNSYLVANIA

/s/ Jerry Robert DeSiderato

*(Signature of Person Serving)*

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|---|---|
| Person Serving: | DeSiderato, Jerry Robert |
| Attorney Registration No: | 201097 |
| Law Firm: | |
| Address: | Dilworth Paxson Llp<br>1500 Market St Ste 3500<br>Philadelphia, PA 19102 |
| Representing: | Petitioner City of Philadelphia<br>Petitioner Commonwealth of Pennsylvania, acting by and through the Philadelphia Dist. Atty. Lawrenc |