COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
COURT OF APPEALS, STATE OF COLORADO Case Number: 2012CA1251	
DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Case Number: 2011CV2218 The Hon. Ann B. Frick	▲COURT USE ONLY▲
Petitioners/Defendants: ANTERO RESOURCES CORPORATION, ANTERO RESOURCES PICEANCE CORPORATION, CALFRAC WELL SERVICES CORP., AND FRONTIER DRILLING LLC v. **Respondents/Plaintiffs:** WILLIAM G. STRUDLEY and BETH E. STRUDLEY, Individually, and as the Parents and Natural Guardians of WILLIAM STRUDLEY, a minor, and CHARLES STRUDLEY, a minor	Case No. 2013SC576
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OPENING BRIEF

Petitioners-Defendants Antero Resources Corporation, Antero Resources Piceance Corporation, Calfrac Well Services Corp., and Frontier Drilling LLC (collectively, the "Companies") respectfully submit their Opening Brief.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements. Specifically, I certify that:

■ **Word count.** The brief complies with C.A.R. 28(g) because it contains 9,460 words.

■ **Standard of Review.** This brief contains a separate section concerning the standard of review at the beginning of the Argument.

■ **Preservation.** A citation to the precise location in the record where the issues presented were raised and ruled on is not required in this case pursuant to C.A.R. 28(k)(2) because the issues presented do not involve any act or ruling for which the parties seeking relief must record an objection or perform some other act to preserve appellate review. Instead, the Companies appeal the ruling of the Court of Appeals.

s/ Daniel J. Dunn
Daniel J. Dunn

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1. Whether a district court is barred as a matter of law from entering a modified case management order requiring plaintiffs to produce evidence essential to their claims after initial disclosures but before further discovery.

2. Whether, if such modified case management orders are not prohibited as a matter of law, the district court in this case acted within its discretion in entering and enforcing such an order.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

Respondents-Plaintiffs (the "Strudleys") lived in Silt, Colorado near three natural gas well pads on which the Companies briefly conducted operations. Before filing this toxic tort suit, the Strudleys complained to the Colorado Oil and Gas Conservation Commission ("COGCC") that the Companies' operations had contaminated their property. The COGCC investigated the Strudleys' claims and issued a report finding no evidence of contamination due to oil and gas operations. Nevertheless, the Strudleys filed this lawsuit vaguely alleging that the Companies had contaminated the Strudleys' property and caused them "physical and personal injuries." The Strudleys failed, however, to specify any personal injury they supposedly suffered. Nor did they allege that any treating physician or other health

care provider had identified or diagnosed any personal injury. The complaint was also bereft of other critical information, such as when the alleged exposure occurred or whether the substances allegedly involved were even capable of causing injury to health.

The parties promptly exchanged disclosures under Rule 26(a)(1) of the Colorado Rules of Civil Procedure. The Strudleys' disclosures, however, failed to fill in the gaps left by their vague and incomplete complaint allegations. The disclosures were devoid of diagnoses of *any* injuries—let alone evidence of injuries caused by substances from the Companies' operations. In contrast, the Companies' disclosures contained roughly 50,000 pages of detailed information related to all aspects of their operations near Silt, including all available environmental monitoring data, drilling logs characterizing the subsurface geology, material safety data sheets describing the chemical substances used during operations, and other relevant information regarding the Companies' activities.

After the exchange of Rule 26 disclosures, the Companies apprised the district court of the COGCC investigation, the deficiencies in the Strudleys' disclosures, and many other facts that cast doubt on the validity of the Strudleys' claims. Based on this showing, the Companies asked the court to exercise its discretion to enter a modified case management order ("MCMO") requiring the

Strudleys to present prima facie evidence that they had suffered injuries attributable to the Companies' operations.

The district court granted the motion, finding the case was "a complex toxic tort action" that would "entail significant discovery at substantial cost to all parties" and "require expert testimony in numerous disciplines." E-Filed Record (hereinafter "Record") at 578-79 (ID40830706). In light of the COGCC report and other evidence the Companies presented that called into question the *bona fides* of the Strudleys' claims, the court found the costly and expert-intensive nature of the case justified "a more efficient procedure" than a standard case management order "for reaching a just, speedy, and inexpensive resolution." *Id*. at 579. Accordingly, the court issued an MCMO pursuant to Rule 16(c) of the Colorado Rules of Civil Procedure directing the Strudleys to provide prima facie evidence, supported by expert analysis, backing their conclusory allegations of exposure, injury, and causation.

The MCMO was fashioned after similar case management orders entered in toxic tort cases in numerous jurisdictions around the country. These orders are frequently called *Lone Pine* orders. In the seminal case of *Lore v. Lone Pine Corporation*, the plaintiffs claimed injuries resulting from contamination allegedly coming from a landfill. No. L-033606-85, 1986 WL 637507 (N.J. Sup. Ct. Nov.

18, 1986). When the defendants presented the court with a prior government investigation that found no offsite contamination from the landfill, the court required the plaintiffs to make a preliminary showing of exposure, injury, and causation before allowing full discovery to proceed. *See id.* Courts commonly enter *Lone Pine* orders in cases where serious doubt exists "over what medical condition or disease, if any, can be causally related to the toxic agent exposure alleged by each plaintiff." 2 Lawrence G. Cetrulo, *Toxic Torts Litigation Guide* § 13:49 (2013).

Here, the trial court allowed the Strudleys an initial period of 105 days to provide the evidence required by the MCMO and did not rule out a further extension. Although the Strudleys produced some additional information at the end of the 105-day period, they failed to produce the evidence required by the MCMO. The most notable absence from the Strudleys' showing was any opinion of a treating physician or other qualified health professional diagnosing any injuries or illnesses whatsoever—let alone linking any injury to the Companies' operations. The Strudleys did offer the opinion of a physician; but the physician never physically examined or diagnosed any of the Strudleys, apparently never considered the COGCC report or the Companies' disclosures, and limited his opinion to the sole conclusion that further discovery was warranted.

The Companies sought dismissal for noncompliance with the MCMO. The district court found the Strudleys had produced "neither sufficient data nor expert analysis stating with *any* level of probability that a causal connection does in fact exist" between the Strudleys' claimed injuries and the Companies' operations. Record at 1602 (ID44157743). Such "missing links in the chain of causation," the court concluded, "are exactly what the Court sought to remedy through the MCMO." *Id.* The district court thus concluded that dismissal with prejudice was appropriate.

The Strudleys appealed, and the Court of Appeals reversed, concluding as a matter of first impression that *Lone Pine* orders "are not permitted as a matter of Colorado law." Op. 8. According to the Court of Appeals, this Court's precedent prohibits a district court from requiring a plaintiff to make a preliminary showing of exposure, injury, and causation before engaging in full discovery. While the Court of Appeals acknowledged that the modern Colorado Rules of Civil Procedure give district courts discretion to modify standard case management procedures for good cause, it nonetheless concluded that such discretion "is not so broad as to allow courts to issue *Lone Pine* orders." *Id.* at 22. The Court of Appeals thus held that the "trial court erred as a matter of law . . . when it entered the *Lone Pine* order in this case." *Id.* at 28.

The Companies ask this Court to reverse the Court of Appeals' ruling and rule that the district court properly exercised its discretion in entering the MCMO and dismissing the case after the Strudleys failed to comply with the order.

B. Statement of the Facts

1. The Wells

Three inoperative natural gas wells (the "Wells") are located near the Strudleys' former residence in Silt, Colorado. Each well was drilled, completed, tested, and shut in within a six-month period from August 2010 to February 2011. *See* Record at 326-27, ¶¶1-4; 344, ¶3 (ID39899685). Aside from limited testing, the Wells never produced natural gas. *Id.* at 326-28, ¶¶2-5. The Companies monitored operations of the Wells and the quality of the air and water surrounding them to ensure their operations satisfied all environmental, health, and safety requirements. *Id.* at 328, ¶¶6-10; 344, ¶2. No violation of these requirements occurred, and no residents in the area other than the Strudleys complained. *Id.* at 328, ¶¶6-10; 344-45, ¶¶2-6.

2. The COGCC Report

In response to the Strudleys' lone complaint, the COGCC performed field testing and laboratory analysis of the Strudleys' well water and compared the results to published state and federal health-based standards for groundwater and

drinking water. *See* Record at 331-41 (ID39899685). The COGCC issued a thorough report concluding that there are "no data that would indicate the water quality in [the Strudleys'] well has been impacted by nearby oil and natural gas drilling and operations." *Id.* at 341.

3. The Strudleys' Lawsuit

Despite the COGCC's conclusion of no contamination from oil and gas operations, the Strudleys filed this toxic tort action against the Companies in April 2011. Record at 30-32, ¶¶1, 12-13 (ID37328736). The Strudleys alleged that the "drilling, construction, and operation" of the Wells caused a laundry list of chemicals to contaminate their land, air, and well water. *Id.* at 36, ¶50. Their complaint, however, provided no details of the alleged injuries to persons or property. *See id.* at 32, 37, ¶¶13, 55c. The complaint merely alleged that the Strudleys had suffered unspecified "health injuries" as well as "diminution in value and enjoyment of their Property." *Id.* at 32, ¶13.

4. The Strudleys' Initial Disclosures

The parties timely exchanged discovery in the form of initial disclosures. *See* Record at 279-85 (ID39899685); 539-63 (ID40612852). Curiously, although the Strudleys disclosed documents in which they *themselves* described their alleged symptoms and stated their beliefs about what caused those alleged symptoms, they

provided no diagnoses of injury or illness by any treating physician or other qualified medical professional. *See* Record at 256-58 (ID39899685). Nor did they provide any evidence linking their claimed injuries to a specific chemical exposure or suggesting that any such exposure resulted from the Companies' activities.[1]

5. The Companies' Initial Disclosures

In sharp contrast to the Strudleys' disclosures, the Companies' respective disclosures listed documents related to all aspects of the Wells, including:

- environmental monitoring data;
- permits and permitting documents;
- drilling logs and well completion data;
- best management practices documents;
- health and safety information, including material safety data sheets ("MSDSs");[2]

[1] The Strudleys' disclosures did include a record of analysis of two air samples purportedly taken on their property in January 2011. The samples, however, were collected *after* the Strudleys had moved out of their residence, and the Strudleys never offered any evidence connecting the air data to their alleged injuries or the Companies' operations. *See* Record at 301-16 (ID39899685); 614, ¶8 (ID42697099); 318-23 (ID 39899685).

[2] MSDSs are documents employers are required to keep on site under the federal Occupational Safety and Health Act for all hazardous chemicals to which workers may be exposed. 29 C.F.R. § 1900.1200(g). MSDSs describe in detail chemical products' ingredients, physical characteristics, physical hazards associated with the chemicals, procedures for cleaning up spills and leaks, and other information.

- maps of the Wells, Well pads, and the surrounding areas;
- internal communications;
- correspondence with government agencies;
- correspondence between the Companies; and
- correspondence with third parties, including the public.

Record at 539-63 (ID40612852). Consistent with C.R.C.P. 26(a)(1)(B), each set of the Companies' disclosures stated that the listed documents were available for review at the Strudleys' request. Record at 544, 550, 561 (ID40612852). The Companies' disclosure documents spanned roughly 50,000 pages. *See* ID49984486 in 2012CA1251 at 5.

6. The MCMO

In the absence of any evidence connecting the Strudleys' unspecified injuries with the Companies' brief activity at the Wells, and faced with the prospect of expensive and burdensome fact and expert discovery, the Companies asked the district court to exercise its discretion, pursuant to Rule 16(c) of the Colorado Rules of Civil Procedure, to enter an MCMO staying further discovery until the Strudleys produced prima facie evidence supporting essential elements of their claims—exposure, injury, and causation. Record at 251-68 (ID39899685). In support of this request, the Companies pointed to an array of facts casting doubt on

the Strudleys' claims, including: (1) the lack of any medical diagnoses indicating the Strudleys had suffered any chemical injury, let alone injury attributable to the Companies' operations; (2) the independent COGCC investigation finding no evidence of contamination from oil and gas operations; (3) the comparison of Antero's testing of the Strudleys' water before the Wells were completed with the COGCC testing after completion showing no contamination; (4) the absence of complaints by other residents in the vicinity of the Wells; (5) the Companies' compliance with applicable laws and regulations, including the absence of any contrary finding by any regulatory authority; (6) the absence of any spill or unauthorized release of hydrocarbons or chemicals; and (7) the fact that prevailing winds blew away from the Strudleys' residence. *Id.* at 254-59.

After carefully considering the Companies' request and the Strudleys' opposition, the district court entered an MCMO. Record at 578-80 (ID40830706). As the court explained, the case would "entail significant discovery at substantial cost," *id.* at 578, such as "expert discovery in numerous disciplines, including well construction and completion engineering, contaminant fate and transport (which itself involves several sub-disciplines including air and groundwater modeling), medical causation, and real estate valuation," *id.* at 579. The court also indicated that the results of the COGCC investigation along with the other evidence

enumerated above cast doubt on the validity of the Strudleys' "vaguely describe[d]" injuries. *Id.* at 578-79. Citing *Lone Pine* and acknowledging the effort and expense posed by standard case management procedures in this case, the district court concluded that a "more efficient procedure" than the standard case management order was warranted, and that good cause existed to enter an MCMO deferring further discovery until the Strudleys came forward with basic evidence supporting core elements of their claims—exposure, injury, and causation. *Id.* at 579-80. With respect to claimed personal injuries, the court ordered the Strudleys to provide expert opinions, in the form required by C.R.C.P. 26(a)(2)(B)(I), to establish:

> (a) the identity of each hazardous substance from Defendants' activities to which [each Plaintiff] was exposed and which the Plaintiff claims caused him or her injury;
>
> (b) whether any and each of these substances can cause the type(s) of disease or illness that Plaintiffs claim (general causation);
>
> (c) the dose or other quantitative measurement of the concentration, timing and duration of his/her exposure to each substance;
>
> (d) if other than the Plaintiffs' residence, the precise location of any exposure;
>
> (e) an identification, by way of reference to a medically recognized diagnosis, of the specific disease or illness from which each Plaintiff allegedly suffers or for which medical monitoring is purportedly necessary; and

(f) a conclusion that such illness was in fact caused by such exposure (specific causation).[3]

Id.

With respect to alleged property damage, the district court ordered the Strudleys to "identif[y] and quantif[y] the contamination of the Plaintiffs' real property attributable to Defendants' actions." *Id.* at 580.

The district court rejected the Strudleys' argument that they needed further discovery from the Companies in order to comply with the MCMO. *Id.* at 579; *see also* Record at 1600 (ID44157743). The district court found no prejudice to the Strudleys in asking them to come forward with threshold proof of exposure, injury, and causation because they would ultimately have to show such evidence to establish their claims.[4] Record at 579 (ID40830706). The court allowed the Strudleys 105 days to produce the evidence required by the MCMO. *Id.*

[3] Requiring a showing of both general and specific causation is consistent with cases applying Colorado law. *See, e.g.*, *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005) ("General causation is whether a substance is capable of causing a particular injury or condition in the general population and specific causation is whether a substance caused a particular individual's injury."); *Howell v. Centric Grp., LLC*, 508 F. App'x 834, 837 (10th Cir. 2013) (same); *accord* Restatement (Third) of Torts: Phys. & Emot. Harm § 28 (2010) ("The concepts of general causation and specific causation are widely accepted among courts confronting causation issues with toxic agents.").

[4] This finding is also consistent with cases applying Colorado law. *See, e.g.*, *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999) (stating that toxic tort plaintiffs "must prove level of the exposure using techniques subject to objective,

7. The Strudleys' Response to the MCMO

The Strudleys did not seek any extension of the initial 105-day period. Nor did they make any effort during that time to inspect the extensive documents listed in the Companies' Rule 26 disclosures, which contained a wealth of information concerning all aspects of the Wells' operations, including environmental, health, and safety data. Instead, the Strudleys responded to the MCMO by producing the affidavit of a single purported expert, Dr. Thomas Kurt. *See* Record at 608-18 (ID42697099). Dr. Kurt, however, failed to provide an expert opinion regarding *any* of the six topics required for each plaintiff under the MCMO. *Compare id.*, *with* Record at 580 (ID40830706). He merely concluded that "sufficient environmental exposure and health information exists to merit further substantive discovery." Record at 616, ¶12 (ID42697099).

Dr. Kurt based his opinion that further discovery was merited on a phone call that he had with Beth and William Strudley, a review of the Strudleys' initial disclosure documents, and his perusal of tests purportedly conducted on the Strudleys' air and water after the Wells were shut in and the Strudleys had moved out. *Id.* at 611-16, ¶¶4-11. Remarkably, Dr. Kurt never physically examined or

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independent validation in the scientific community"); *Howell*, 508 F. App'x at 837 ("[W]here an injury has multiple potential etiologies, expert testimony is necessary to establish causation.").

even met the Strudleys. *See id.* Nor did he diagnose them with any illness or attribute any health problem to the Companies' operations. *See id.* at 611-12, ¶4. Dr. Kurt made no mention of the COGCC report or any of the information contained in the Companies' initial disclosures—apparently because the Strudleys chose not to make that critical evidence available to him. *See id.* at 608-18.

Regarding property damage, the Strudleys did no more than provide a laundry list of hazardous substances they claimed were present on their property, along with the results of samples collected after they moved from Silt. *See* Record at 604-06, 788-818 (ID42697099); 971-75 (ID42697766). Contrary to the MCMO's requirement, the Strudleys failed to provide any evidence connecting those sample results to the Companies' operations. *Compare id.*, *with* Record at 580 (ID40830706).

8. The District Court's Dismissal Order

After initial briefing, a hearing,[5] and supplemental briefing, the district court entered an order dismissing the Strudleys' case with prejudice for noncompliance with the MCMO. Record at 1597-1603 (ID44157743). The court found the

[5] Shortly after the hearing, the Strudleys first requested and promptly received copies of the documents listed in the Companies' disclosures. *See* ID49984486 in 2012CA1251. The Strudleys did not thereafter request an opportunity to amend or otherwise supplement their response to the MCMO to include any of this information. On the contrary, they continued to insist their initial response was sufficient. *See, e.g.*, Record at 1564-68 (ID 43928860).

Strudleys had failed to provide an expert opinion "as to whether exposure was a contributing factor to [the Strudleys'] alleged injuries or illness." *Id.* at 1600. Dr. Kurt had at most identified only a temporal association between the drilling of the Wells and the Strudleys' undiagnosed injuries. *Id.* at 1602. But as the court explained, "[a] temporal relationship, by itself, provides no evidence of causation." *Id.* at 1601 n.1 (citing multiple Colorado cases). And given that the Strudleys themselves could testify to temporal association, Dr. Kurt's opinion fell far short of satisfying the MCMO's requirement of expert analysis.

The court found that Dr. Kurt's affidavit was "wholly lacking in the establishment of causation" and that he failed even to attempt to identify any disease or illness suffered by any of the Strudleys, let alone to link any such injuries to exposure to any substance. *Id.* at 1602-03. Likewise, the court found that, in contrast to the COGCC data (which were measured while the Strudleys lived in their home), the air and water testing data Dr. Kurt reviewed were not collected until after the Strudleys moved out of their Silt residence. *Id.* at 1601. Moreover, the court found that the air and water data the Strudleys proffered were not accompanied by any explanation (expert or otherwise) of what, if any, levels of the purportedly identified chemicals were necessary to cause the Strudleys' alleged symptoms. *Id.* at 1602.

The court emphasized that the Strudleys' "requested march towards discovery without some adequate proof of causation of injury is precisely what the MCMO was meant to curtail." *Id.* at 1600. In light of "the time allowed Plaintiffs to comply with the MCMO, and the clear mandates contained within the MCMO," the court concluded that the Strudleys failed to provide prima facie evidence of exposure, injury, or causation, and thus dismissed the Strudleys' claims with prejudice. *Id.* at 1603.

9. The Reversal

The Strudleys appealed. Concluding, on an issue of first impression, that *Lone Pine* orders "are not permitted as a matter of Colorado law," Op. 8, the Court of Appeals reversed the district court's dismissal. According to the Court of Appeals, a district court is *prohibited* from requiring a plaintiff to provide prima facie evidence of exposure, injury, and causation after disclosures but before further discovery. *Id.* at 11. The Court of Appeals acknowledged that the modern Colorado Rules of Civil Procedure permit a district court to modify the presumptive case management order for good cause, but nonetheless concluded that a district court's expanded discretion "is not so broad as to allow courts to issue *Lone Pine* orders." *Id.* at 22. The Court of Appeals thus concluded that the

"trial court erred as a matter of law . . . when it entered the *Lone Pine* order in this case." *Id.* at 28.

The Court of Appeals then added that, even if *Lone Pine*-type case management orders were allowed under Colorado law, this particular case would not warrant such an order. *Id.* at 24-25. In making this statement, the Court of Appeals failed to show any deference to the district court's contrary finding that good cause supported entry of the MCMO.

SUMMARY OF THE ARGUMENT

Colorado trial courts are encouraged to manage each case actively in order to promote the just, speedy, and inexpensive resolution of disputes. Trial courts are required "to take an active role managing discovery" based on the unique facts and circumstances of each case. *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187, 1200 (Colo. 2013). The Court of Appeals' opinion impedes trial courts' efforts toward active management of the cases before them.

The Court of Appeals made several fundamental errors in its opinion. The first was comparing the district court's *Lone Pine* MCMO to discovery orders requested or granted in the cases of *Curtis, Inc. v. District Court*, 526 P.2d 1335 (Colo. 1974), and *Direct Sales Tire Co. v. District Court*, 686 P.2d 1316 (Colo. 1984). For one thing, those cases are not factually or procedurally analogous to

this case. The district court here issued its MCMO after and based on the exchange of mandatory disclosures, which are discovery, while the orders in *Direct Sales* and *Curtis* were issued in the absence of *any* disclosures or other discovery exchange. But the problems with relying on *Direct Sales* and *Curtis* go beyond this distinction. Since *Direct Sales* and *Curtis* were decided, the Colorado Rules of Civil Procedure have evolved markedly away from a rigid policy favoring unfettered discovery and toward a flexible policy favoring active judicial management of discovery, aimed at efficiently tailoring pretrial procedures to the unique contours of particular cases. The district court's entry of the *Lone Pine* MCMO in this case comported with this evolution toward active judicial management of discovery.

The Court of Appeals also erred in stating that, even if *Lone Pine* MCMOs were not barred as a matter of law, the district court's MCMO was in error. Quite to the contrary: the district court appropriately exercised its discretion and fulfilled its duty to actively manage pretrial proceedings in this case. The district court's issuance of the MCMO is in harmony with this Court's interpretation of Colorado's modernized discovery rules and with this Court's recent rulings reversing district courts that have taken an inflexible, hands-off approach to pretrial matters. In light of the COGCC's independent findings and other evidence

casting serious doubt on the factual basis for the Strudleys' claims, the MCMO fairly and reasonably focused post-disclosure discovery on the critical issues in dispute (exposure, injury, and causation) by ordering the parties bearing the burden of producing such evidence to show their hand.

The district court's decision to dismiss the Strudleys' case based on noncompliance with the MCMO was well within its discretion; indeed, dismissal was the only reasonable response under the circumstances. The Strudleys' failure to come forward with any diagnosis of illness or injury attributable to the Companies' actions revealed that their hand was a losing one, which no amount of further discovery could change. On this record, full and final dismissal was within the district court's discretion—and the correct result.

ARGUMENT

A. *Lone Pine* Orders Are Consistent with and Permitted Under Colorado Law.

1. Standard of Review

The first question in this case—whether a district court is barred as a matter of law from entering an MCMO requiring plaintiffs to produce evidence essential to their claims after initial disclosures but before further discovery—is a question of law subject to *de novo* review. *Garcia v. Schneider Energy Servs., Inc.*, 287 P.3d 112, 114 (Colo. 2012).

2. *Lone Pine* Case Management Orders Are Within a District Court's Broad Discretion to Actively Manage Discovery.

Under the Colorado rules, district courts have broad discretion to manage discovery, including by entering an MCMO requiring toxic tort plaintiffs to produce evidence essential to their claims after initial disclosures reveal an absence of evidentiary support for essential elements of their claims.

a. The Current Version of the Colorado Rules Favors Flexibility and Active Judicial Management of Litigation to Encourage Just, Speedy, and Inexpensive Resolution of Disputes.

The Court of Appeals' decision was based on an outmoded view of Colorado discovery policy. The Court of Appeals held "that the trial court erred as a matter of law, under *Direct Sales Tire Co.* and *Curtis*, when it entered the [MCMO] in this case." Op. 28. This ruling is wrong—on both the law and the facts. *Direct Sales* was decided in 1984; *Curtis* in 1974. Each case expressly endorsed the discovery policy then in place in Colorado: a " 'broad[] policy . . . that all conflicts should be resolved in favor of discovery.' " *Direct Sales*, 686 P.2d at 1320 (quoting *Curtis*, 526 P.2d at 1339). That policy resulted in the "virtually unlimited use" of discovery mechanisms. 4 S. Hyatt & S. Hess, Colo. Prac., Civil Rules Annotated R 26 (4th ed. 2013).

Times have changed. The Colorado rules no longer favor discovery over all other considerations. As this Court recently explained, the former—now superseded—discovery system fostered an "ingrained mindset of liberal discovery under the old standard." *DCP Midstream*, 303 P.3d at 1196 (citation and internal quotation marks omitted). But the discovery rules have since "evolved" and now "reflect a growing effort to require active judicial management of pretrial matters." *Id.* at 1194. Discovery is limited under this new system. C.R.C.P. 26 committee comment.

Colorado's modern discovery policy is enshrined throughout the rules; C.R.C.P. 1, 16, and 26 *all* vest trial courts with the latitude to vary from standard case management procedures. To begin with, the stated goal of the Colorado court system is that litigation be "just, speedy, and inexpensive." C.R.C.P. 1. And as this Court recently underscored, the 2002 amendments to the Colorado Rules of Civil Procedure further that goal by encouraging (and, in some instances, requiring) trial courts "to take an active role managing discovery" based on the unique facts and circumstances of each case. *DCP Midstream*, 303 P.3d at 1200.

Rule 16, in turn, vests trial courts with wide discretion to depart from standard case management procedures by customizing discovery based on the unique circumstances and needs of each case, particularly in cases involving

complex scientific or technical issues. *See* C.R.C.P. 16 committee comment ("[W]here a case is complex or requires special treatment, the Rules provide flexibility so that the parties and Court can alter the procedure."). And "[b]ecause each case is unique and deserves unique treatment, the reasonable needs of the case will necessarily vary." *DCP Midstream*, 303 P.3d at 1191.

Under Rule 16(c)(2), a court must find "good cause" to modify the standard case management order. That "good cause" finding is fact-specific and thus is entitled to deference on appeal. *See id.* at 1194 ("good cause" under Rule 26 is undefined but "meant to be flexible"); *accord Bond v. Dist. Ct.*, 682 P.2d 33, 40 (Colo. 1984); *see also People ex rel. J.R.T. v. Martinez*, 70 P.3d 474, 480 (Colo. 2003) ("[T]he factual findings of the trial court are entitled to deference on review, if supported by the record."). Here, however, the Court of Appeals bypassed that deferential standard. In ruling that it is *always* beyond a district court's discretion to enter a *Lone Pine*-type MCMO, the Court of Appeals swept aside a wealth of evidence casting doubt on the Strudleys' claims, which informed the district court's entry of the MCMO. That evidence included, among other facts, the COGCC report, the gaps in the Strudleys' disclosures on matters which they alone could provide evidence, and undisputed facts about the Companies' operations such as the absence of corroborating complaints or regulatory violations

concerning the Wells. The Court of Appeals' decision to ignore these facts and adhere to a rigid approach to case management runs contrary to this Court's endorsement of active judicial management, flexibility, and efficiency.

This Court has instructed Colorado district courts to " 'assertively lead the management of cases to ensure that justice is served.' " *See DCP Midstream*, 303 P.3d at 1190 (quoting C.R.C.P. 16 committee comment). Indeed, this Court in *DCP Midstream* reversed a district court for *failing* to actively manage discovery. 303 P.3d at 1197-98. Now this Court is confronted with the opposite issue: a Court of Appeals decision striking down a district court's discretionary decision to manage discovery. The opinion of the Court of Appeals removes an entire category of case management orders from district courts' active case management practices, and thus is in conflict with this Court's rules and rulings. Reversal is warranted.

b. Courts in Other Jurisdictions Endorse the Judicious Use of *Lone Pine* Orders.

The Court of Appeals' categorical ruling that *Lone Pine* orders are *never* appropriate in this State not only conflicts with the current discovery policy in Colorado, but also with the decisions of courts in other states that have held such *Lone Pine* orders to be legitimate and beneficial case management tools in

appropriate circumstances.[6] And although some courts in other jurisdictions have found *Lone Pine* orders to be inappropriate based on the particular facts of the cases before them, *see* Op. 14-16, the Companies are aware of *no* case (and the Court of Appeals cited none) in which an appellate court has gone as far as the Court of Appeals here to rule as a matter of law that such orders are *never* appropriate.

To be sure, *Lone Pine* orders should not be commonplace. As one court has put it, such orders "should issue only in an exceptional case and after the defendant has made a clear showing of significant evidence calling into question the plaintiffs' ability to bring forward necessary medical causation and other scientific information." *McManaway v. KBR, Inc.*, 265 F.R.D. 384, 388 (S.D. Ind. 2009).

[6] *See, e.g.*, *Schelske v. Creative Nail Design, Inc.*, 933 P.2d 799, 482 (Mont. 1997); *Adjemian v. Am. Smelting & Refining Co.*, No. 08-00-00336-CV, 2002 WL 358829, at *1-6 (Tex. App.—El Paso Mar. 7, 2002, no pet.); *Pinares v. United Techs. Corp.*, No. 10-80883-CIV, 2011 WL 240512, at *1 (S.D. Fla. Jan. 19, 2011); *Abbatiello v. Monsanto Co.*, 569 F. Supp. 2d 351, 353-54 (S.D.N.Y. 2008) *Wilcox v. Homestake Mining Co.*, No. Civ.534 JC/WDS, 2008 WL 4697013, at *1 (D.N.M. Oct. 23, 2008), *aff'd*, 619 F.3d 1165 (10th Cir. 2010); *Burns v. Univ. Crop Protection Alliance*, No. 4:07CV00535 SWW, 2007 WL 2811533, at *2-3 (E.D. Ark. Sept. 25, 2007); *In re 1994 Exxon Chem. Plant Fire*, No. 05-1639, 2005 WL 6252312, at *1-2 (M.D. La. Apr. 7, 2005); *Acuna v. Brown & Root, Inc.*, No. SA-96-CA-543-OG, 1998 WL 35283824, at *5-6 (W.D. Tex. Sept. 30, 1998), *aff'd*, 200 F.3d 335 (5th Cir. 2000); *Eggar v. Burlington N. R. Co.*, No. CV 89-159-BLG-JFB, 1991 WL 315487 (D. Mont. Dec. 18, 1991), *aff'd*, 29 F.3d 499 (9th Cir. 1994); *Lone Pine*, 1986 WL 637507, at *1-2.

This is that exceptional case. The Companies made a clear showing of significant evidence calling into question the Strudleys' ability to make even a prima facie showing of essential elements of their case. That evidence included the facts that the COGCC had already investigated and rejected the Strudleys' water contamination claim and that no treating physician or other medical professional had concluded the Strudleys suffered from any diagnosed illness or disease, much less from the Companies' operations. Courts in other jurisdictions have entered and affirmed *Lone Pine* orders where, as here, an investigation by an independent government agency indicated that a plaintiff's toxic tort claims lacked merit.[7] *See Cottle v. Superior Ct.*, 3 Cal. App. 4th 1367, 1372, 1388, 5 Cal. Rptr. 2d 882 (1992) (affirming entry of *Lone Pine* order after California Department of Health

[7] This Court has held that it is an abuse of discretion for a district court to overlook the impact of an investigatory report by a government agency on expert discovery. *See Burchett v. S. Denver Windustrial Co.*, 42 P.3d 19 (Colo. 2002). *Burchett* was a tort case arising out of an airplane crash. *Id.* at 20. The district court denied the parties' joint request to postpone expert disclosure deadlines and trial pending the completion of the National Transportation Safety Board's investigation of the cause of the crash, which the parties agreed would go to the heart of the factual disputes in the case. *Id.* The plaintiffs filed an unopposed C.A.R. 21 appeal, and this Court reversed, finding that the district court abused its discretion by rigidly adhering to its scheduling order. *Id.* at 20, 22-23.

Here, by contrast, the district court recognized that the COGCC's report went to the heart of the case and responded appropriately by focusing discovery on the fundamental questions raised by that report. The district court thus heeded *Burchett*'s lesson that fairness and efficiency require flexible case management because "each case is unique and deserves unique treatment." *See id.* at 21-22.

Services issued findings undermining basis for plaintiffs' toxic tort claims); *Lone Pine*, 1986 WL 637507, at *1, 3 (entering *Lone Pine* order where Environmental Protection Agency findings undermined basis for plaintiffs' toxic tort claims). Consistent with the Colorado Rules of Civil Procedure and *DCP Midstream*, Colorado courts must be allowed—indeed encouraged—to customize pre-trial procedure to account for such unique facts.

c. There Is No Relevant Difference Between Colorado Rule 16 and Federal Rule 16.

The Court of Appeals concluded that differences between C.R.C.P. 16 and its federal counterpart, Fed. R. Civ. P. 16, which federal courts sometimes cite as a basis for issuing *Lone Pine* case management orders,[8] supported the conclusion that *Lone Pine* orders are prohibited by Colorado law. *See* Op. 22-23. The distinction the Court of Appeals identified between the state and federal rules is one without a difference.

[8] Contrary to the Court of Appeals' suggestion, Rule 16 of the Federal Rules of Civil Procedure is *not* the only source of authority upon which courts rely when issuing *Lone Pine* orders. *Compare* Op. 23 & n.3, *with Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) (observing *Lone Pine* order "essentially required that information which plaintiffs should have had before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3)"); *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E.D. La. 2008) (stating *Lone Pine* order requires "[p]laintiffs to make a minimal showing consistent with Rule 26 that there is some kind of scientific basis" for their claims); *Cottle*, 3 Cal. App. 4th at 1377 (identifying a court's "inherent equity, supervisory and administrative powers as well as inherent power to control litigation before them" as a basis for a *Lone Pine* order).

Federal Rule 16(c)(2) lists sixteen matters a district court "may consider" at a mandatory pretrial conference. As the Court of Appeals noted, the list includes "formulating and simplifying the issues, and eliminating frivolous claims or defenses." Fed. R. Civ. P. 16(c)(2)(A); Op. 23 n.3. Although the Court of Appeals was correct that Colorado Rule 16 does not include this specific language, it inferred too much by suggesting that such omission signified that this Court, in adopting Rule 16, meant to bar district courts from actively tailoring case management procedures to fit the particular circumstances of the cases before them, including efforts to simplify the issues or focus on elimination of questionable claims early in the case. After all, *none* of the sixteen federal factors is mentioned in Colorado Rule 16, and no one would reasonably conclude based on that omission that Colorado district courts may not consider *any* of the sixteen factors in formulating case management orders.

The Court of Appeals also failed to recognize that the last of the sixteen factors in Federal Rule 16(c)—"facilitating in other ways the just, speedy, and inexpensive disposition of the action"—echoes the requirement that all of Colorado's procedural rules "be liberally construed to secure the just, speedy, and inexpensive determination of every action." *Compare* Fed. R. Civ. P. 16(c)(2)(P), *with* C.R.C.P. 1(a). To promote the just, speedy, and inexpensive resolution of

cases, Colorado Rule 16(c) establishes a presumptive case management order and leaves it to the parties to ask a district court to modify that order based on a showing of "good cause." *See* C.R.C.P. 16(c)(2), (d). A finding that "good cause" exists is discretionary in the same way that consideration of the Federal Rule 16(c)(2) factors is discretionary. As the commentary to Colorado Rule 16 explains, this discretion is broad: the "Rules provide flexibility so that the parties and Court can alter the procedure." C.R.C.P. 16 committee comment. The fact that Colorado Rule 16 lacks its federal counterpart's list of potential "matters for consideration" is irrelevant. At bottom, both systems require trial courts to manage their dockets in the most fair and efficient manner achievable. And both systems permit *Lone Pine* orders in appropriate circumstances.

d. *Curtis* and *Direct Sales* Are Distinguishable.

The Court of Appeals' decision also overlooked fundamental factual and procedural differences between this case and *Direct Sales* and *Curtis*.

In both *Direct Sales* and *Curtis*, a defendant or court sought—*before* initial disclosures or the exchange of other discovery—to impose a requirement that the plaintiff provide initial proof supporting its claim. *See Direct Sales*, 686 P.2d at 1321; *Curtis*, 526 P.2d at 1339. Here, by contrast, the Companies requested entry of the MCMO *after* the exchange of mandatory disclosures pursuant to Rule

26(a)(1). And, as this Court has recognized, under the system ushered in by the amendments to the Rules beginning in 1995, disclosures are a primary means of discovery.[9] Indeed, the Companies' request for the MCMO was expressly based on the troubling absence of evidence of exposure, injury, or causation in the Strudleys' disclosures. *See* Record at 256 (ID39899685) (explaining that the Strudleys' disclosures omitted evidence of "any personal injury suffered by any of the [Strudleys] as caused by the [Companies'] actions").

Direct Sales and *Curtis* are distinguishable in other ways. The plaintiff in *Direct Sales* alleged the defendant was selling gasoline below its costs. 686 P.2d at 1317. The plaintiff in *Curtis* alleged the defendant had copied the plaintiff's recordkeeping methods. 526 P.2d at 1336. In both *Direct Sales* and *Curtis*, the evidence essential to the plaintiffs' claims was within the exclusive control of the defendants. In this case, by contrast, evidence of exposure, injury, and causation was uniquely within the Strudleys' control.[10] Only the Strudleys and their doctors

[9] *See* C.R.C.P. 16 committee comment ("Because of mandatory disclosure, there should be substantially less need for discovery."); C.R.C.P. 26 committee comment ("Obviously, to the extent there is disclosure, discovery is unnecessary."); *see also Medhekar v. Dist. Ct.*, 99 F.3d 325, 326 (9th Cir. 1996) (interpreting Fed. R. Civ. P. 26(a)(1) and explaining that initial disclosures constituted discovery for purposes of federal statute restricting "discovery").

[10] The Strudleys have asserted that they needed information from the Companies in order to comply with the MCMO. That assertion is both unsupported and

could provide evidence of the Strudleys' injuries, yet the Strudleys produced neither medical diagnoses of any injury nor expert opinion attributing any injury to the Companies' operations. Likewise, only the Strudleys could show their real property was contaminated, yet they produced nothing linking the chemicals purportedly found on their properties to the Companies' operations.

Contrary to the Court of Appeals' ruling, *Direct Sales* and *Curtis* do not stand as a barrier to the entry of the MCMO below. Moreover, even if *Direct Sales* or *Curtis* could be read to curtail a district court's discretion to tailor or sequence discovery based on the unique contours of a case (and those cases cannot be so read), the tension between *Direct Sales* or *Curtis* and modern discovery rules should be resolved by this Court in favor of the modern view.

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incorrect: the Strudleys did not require additional discovery from the Companies to specify the injuries they claim the Companies caused. *See, e.g.*, *Lone Pine*, 1986 WL 637507, at *3 ("Certainly where there is personal injury or illness it is possible to obtain adequate reports of treating physicians and an opinion as to whether or not exposure to toxic materials was a contributing factor."); *Pinares*, 2011 WL 240512, at *2 ("Plaintiffs do not need discovery to be able to state whether their own properties are contaminated."). And in any event, notwithstanding that the Companies' disclosures were available to them prior to the MCMO deadline, the Strudleys failed to make any effort to inspect or seek the production of the Companies' initial disclosure documents until *after* they tendered their deficient response to the MCMO. *See, e.g.*, Record at 1520 n.2, 1531 (ID43843688).

B. The District Court Acted Within its Discretion in Entering and Enforcing its Modified Case Management Order.

After holding that *Lone Pine* case management orders are prohibited as a matter of Colorado law, the Court of Appeals added that, even if *Lone Pine* orders were allowed under Colorado law, this case would not warrant such an order. Op. 24-25. That statement fails to recognize the applicable standard of review and ignores the record upon which the district court based the MCMO.

1. Standard of Review

Matters of pretrial procedure are committed to the sound discretion of the district court. *J.P. v. Dist. Ct.*, 873 P.2d 745, 751 (Colo. 1994), *superseded on other grounds as stated in Todd v. Bear Valley Village Apartments*, 980 P.2d 973, 978-79 (Colo. 1999); *accord In re Vioxx Prods. Liab. Litig.*, 388 F. App'x 391, 397 (5th Cir. 2010) ("A district court's adoption of a *Lone Pine* order and decision to dismiss a case for failing to comply with a *Lone Pine* order are reviewed for abuse of discretion."). "A trial court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair." *Averyt v. Wal-Mart Stores, Inc.*, 265 P.3d 456, 459 (Colo. 2011).

2. Good Cause Existed for the MCMO, and Dismissal for Failure to Comply with the MCMO Was Within the District Court's Authority and Discretion.

a. Good Cause Existed to Enter the MCMO.

As detailed above, Colorado's modern discovery rules and this Court's rulings vest trial courts with ample discretion to tailor pretrial procedures to suit the unique contours of a case. *See, e.g.*, C.R.C.P. 16 committee comment; *DCP Midstream*, 303 P.3d at 1191. Thus, upon a showing of "good cause," trial courts may modify the standard case management procedures. C.R.C.P. 16(c)(2). A finding of "good cause" is fact-specific, *DCP Midstream*, 303 P.3d at 1194; *Bond*, 682 P.2d at 40, and thus entitled to deference on appeal, *Martinez*, 70 P.3d at 480.

Here, the district court made a finding of good cause after thorough briefing by the Companies that highlighted the stark differences between the Strudleys' claims, on one hand, and the lack of support for basic elements of those claims in the Strudleys' disclosures, the COGCC report, and evidence showing that the Companies' operations were legally complaint, on the other. *See* Record at 255-59 (ID39899685); 501-03 (ID40612852); 579-80 (ID40830706). Courts presented with similar independent government reports undermining plaintiffs' claims have entered and affirmed *Lone Pine* orders. *See Cottle*, 3 Cal. App. 4th at 1372, 1388; *Lone Pine*, 1986 WL 637507, at *1, 3. Entry of the MCMO here is consistent with

Lone Pine precedent because it is a rare case where plaintiffs choose to sue notwithstanding independent findings from the responsible regulatory agency concluding that their claims lack foundation. In such unusual circumstances, it is not unreasonable or unfair to require plaintiffs to come forward with prima facie evidence of exposure, injury, and causation to corroborate their claims. Such an approach is consistent with a district court's discretion and duty to "closely control and manage" discovery. *See DCP Midstream*, 303 P.3d at 1194, 1197 (holding trial court abused its discretion by failing to "take an active role managing discovery").

The burden of meeting the MCMO's requirements was not onerous. *See* Record at 1600 (ID44157743) (" 'Certainly where there is personal injury or illness it is possible to obtain adequate reports of treating physicians and an opinion as to whether or not exposure to toxic materials was a contributing factor.' ") (quoting *Lone Pine*, 1986 WL 635707, at *3). The MCMO did not require the Strudleys to prove their case. Consistent with countless other *Lone Pine* orders, the district court merely required the Strudleys to provide sufficient evidence to establish rebuttable presumptions of exposure, injury, and causation. *See Stamp v. Vail Corp.*, 172 P.3d 437, 449 (Colo. 2007) ("Prima facie evidence is evidence that, unless rebutted, is sufficient to establish a fact."); Black's Law Dictionary (9th ed.

2009) (defining "prima facie" as "[a]t first sight; on first appearance but subject to further evidence or information"). That the MCMO required the Strudleys to make a preliminary showing of causation by way of an expert opinion was also reasonable because, as the trial court noted, expert evidence is required to prove causation in toxic tort cases. *See* Record at 579 (ID4083070706); *accord Mitchell*, 165 F.3d at 781 (stating that toxic tort plaintiffs "must prove level of the exposure using techniques subject to objective, independent validation in the scientific community"); *Howell*, 508 F. App'x at 837 ("[W]here an injury has multiple potential etiologies, expert testimony is necessary to establish causation."); *see also McManaway*, 265 F.R.D. at 389 (observing that the requirement of an expert opinion concerning exposure, injury, and causation is common to *Lone Pine* orders).

Finally, through their initial disclosures, the Companies made available voluminous documents that detailed all aspects of their operations, including all available environmental monitoring data, the volume and chemical composition of the substances used during operations, and drilling logs depicting the geologic formations encountered during drilling. Record at 539-63 (ID40612852). Coupled with the information that was uniquely in the Strudleys' possession (such as the nature of their injuries and any contamination of their property), the disclosures

were more than sufficient for the Strudleys and their experts to have made the required preliminary showing, if their claims had any merit.[11]

Lone Pine orders have been entered most frequently in toxic tort cases where the parties are more numerous than in this case. *See, e.g.*, *Roth v. Cabot Oil & Gas Corp.*, 287 F.R.D. 293, 297 (M.D. Pa. 2012) (collecting cases). But the fewer number of plaintiffs here does not mean that the district court abused its discretion. In fact, a number of other courts have entered and affirmed *Lone Pine* orders in cases involving relatively few parties. *See Pinares*, 2011 WL 240512, at *1 (granting *Lone Pine* motion in case involving two plaintiffs and one defendant); *Schelske*, 933 P.2d at 802 (affirming entry of *Lone Pine* order in case involving two plaintiffs and a handful of defendants, finding that "[t]he District Court's issuance of the CMO was wholly within its discretion as a management tool contemplated by [Montana] Rule [of Civil Procedure] 16").

[11] Without any explanation, citation to the record, or other stated support, the Court of Appeals reached a factual conclusion that the Companies' disclosures were "insufficient" to allow the Strudleys to make a prima facie showing of exposure, injury, or causation. Op. 19. The Court of Appeals also found that the case was not sufficiently complex to warrant a *Lone Pine* order. *See id.* at 24-25. In so ruling, the Court of Appeals failed to afford any of the requisite deference to the district court's contrary finding that the case was "a complex tort action." *See* Record at 578-79 (ID40830706) (detailing the "significant" discovery and "numerous" expert disciplines implicated by the Strudleys' claims); *see also Martinez*, 70 P.3d at 480.

Here, the district court issued the MCMO because it recognized the case was "complex" and would "entail significant discovery," including "expert testimony in numerous disciplines, including well construction and completion engineering, contaminant fate and transport (which itself involves several sub-disciplines . . .), medical causation, and real estate valuation." Record at 578-79 (ID40830706). The high cost of such complicated discovery and expert analysis gives plaintiffs significant leverage to extract early settlements, regardless of the merits of their cases. *DCP Midstream*, 303 P.3d at 1194; *accord* C.R.C.P. 16 committee comment.

The district court appears to have perceived the potential for abuse in this case and understood that a later motion for summary judgment would not be the best tool to remedy such abuse, and so the court opted for "a more efficient procedure than that set out in the standard case management order." Record at 579 (ID40830706). The MCMO here exhibits the sort of early, active case management this Court has endorsed. *See DCP Midstream*, 303 P.3d at 1190 ("The civil rules, and our cases interpreting them, reflect an evolving effort to require active judicial management of pretrial matters to curb discovery abuses, reduce delay, and decrease litigation costs."). Entry of the MCMO fell squarely within the district court's broad discretion to actively manage this case.

b. The District Court Appropriately Exercised its Discretion to Dismiss the Case for Failure to Comply with the MCMO.

The district court expressly stated in the MCMO that failure to comply with its terms could result in the dismissal of the Strudleys' case. Record at 579 (ID40830706); *see also* C.R.C.P. 37(b)(2) (authorizing imposition of sanctions including dismissal for noncompliance with discovery order); C.R.C.P. 41(b)(1) (authorizing dismissal for failure "to comply with these Rules or any order of court"). The Strudleys nonetheless failed to come forward with evidence to make the required prima facie showing. *See* Record at 1603 (ID44157743).

As the district court explained, instead of submitting an expert opinion and other evidence identifying the Strudleys' injuries and connecting them causally to the Companies' operations—information they arguably should have had in hand before filing their complaint—the Strudleys responded to the MCMO with a hodgepodge of nonresponsive documents. The only expert opinion among them, Dr. Kurt's affidavit, was "wholly lacking in the establishment of causation." *Id*. at 1602. The district court correctly concluded that this submission fell far short of the MCMO's requirements. *See id.* Specifically, the Strudleys:

- offered no medical diagnosis of any injury, illness, or disease, Record at 580, ¶9.a.i (ID40830706);
- offered no expert opinion on general causation, *id.*;

- offered no expert opinion on specific causation linking their air and water quality results to any alleged injury, illness, or disease, *id.*;

- ignored the COGCC investigation that showed no impact to their well water, *id.* at 579, ¶5;

- offered no evidence showing that their air and water quality test results meant their property was damaged, *id.* at 580, ¶¶9.a.ii, 9.a.iv;

- offered only a temporal relationship to try to link their air and water quality testing and alleged injuries to the Companies' operations, *id.* at 580, ¶9.a.i.

After exhaustively detailing these and other failures, the district court found that the Strudleys' "requested march towards discovery without some adequate proof of causation of injury is precisely what the MCMO was meant to curtail," and thus dismissed the Strudleys' claims with prejudice. Record at 1600, 1603 (ID44157743). This outcome was in keeping with this Court's instruction to trial courts to actively manage their cases "to curb discovery abuses, reduce delay, and decrease litigation costs." *DCP Midstream*, 303 P.3d at 1190. If the district court had overlooked the Strudleys' disregard for its order and opened the door to further discovery, the parties would have expended a great deal of time and money on costly fact and expert discovery. And after all that cost and effort, the case would have resolved based on the same absence of evidence of exposure, injury, and causation. The district court foresaw the waste that standard case management

procedures would entail and took action to ensure the "just, speedy, and inexpensive" resolution of the case. *See* C.R.C.P. 1(a); *see also In re Vioxx*, 557 F. Supp. 2d at 743 ("The basic purpose of a *Lone Pine* order is to identify and cull potentially meritless claims and streamline litigation in complex cases.") (citation omitted).

In its dismissal order, the district court did not cite to any particular procedural rule as the basis for dismissal. Nor did it need to. Trial courts possess ample authority from a variety of sources to enforce their orders, and "[t]he choice of the sanction appropriate for the failure to comply with the court order is within the discretion of the trial court." *McRill v. Guar. Fed. Sav. & Loan Ass'n*, 682 P.2d 498, 499 (Colo. Ct. App. 1984) (affirming dismissal under C.R.C.P. 37(b)(2)); *Arias v. DynCorp*, No. 13-7044, 2014 WL 2219109, at *3 (D.C. Cir. May 30, 2014) (affirming dismissal under Fed. R. Civ. P. 37(b) for noncompliance with *Lone Pine* order); *see also* C.R.C.P. 41(b)(1) (authorizing dismissal "[f]or failure of a plaintiff . . . to comply with these Rules or any order of court"); 4 S. Hyatt & S. Hess, Colo. Prac., Civil Rules Annotated R 41 (4th ed. 2013) (stating dismissal under Rule 41(b)(1) is appropriate where rules otherwise make no provision for sanctions for noncompliance); *Town of Minturn v. Sensible Hous. Co., Inc.*, 273 P.3d 1154, 1159 (Colo. 2012) (recognizing "power inherent in every

court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants") (citations omitted). As long as the district court reached the right result, the decision should be affirmed, whether the authority arises under Rule 37, Rule 41, Rule 56, the inherent authority of the court, or any other source of law. *See Biel v. Alcott*, 876 P.2d 60, 64 (Colo. Ct. App. 1993) (stating appellate court will affirm if trial court reaches the right result, even in the absence of reasoning).

Lone Pine case management orders function "to identify and cull potentially meritless claims." *In re Vioxx*, 557 F. Supp. 2d at 743; *accord* Record at 579 (ID40830706) (warning that failure to comply with MCMO "may eliminate or sharply curtail this case"). In service of this purpose, the MCMO directed the Strudleys to come forward with evidence of exposure, injury, and causation. The Strudleys failed to do so. Under these circumstances, the district court did not abuse its discretion by dismissing their case.[12]

[12] *See, e.g.*, *Arias*, 2014 WL 2219109, at *3 (holding that trial court did not commit an abuse of discretion in dismissing plaintiffs' claims for failure to comply with *Lone Pine* order); *Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 832 (9th Cir. 2011) (same); *In re Vioxx*, 388 F. App'x at 398 (same); *Acuna*, 200 F.3d at 340-41 (same); *Bell v. ExxonMobil Corp.*, No. 01-04-00171-CV, 2005 WL 497295 (Tex. App.—Houston [1st Dist.] Mar. 3, 2005, pet. denied 2006) (same); *Adjemian*, 2002 WL 358829 (same); *see also Schelske*, 933 P.2d at 806 (affirming trial court's grant of summary judgment based on noncompliance with *Lone Pine* order); *Cottle*, 3 Cal. App. 4th at 1388 (affirming exclusion of evidence of personal

An order such as the MCMO is not appropriate in most cases. But the district court here, consistent with this Court's direction in *DCP Midstream*, undertook to inform itself of the particularities of the case at the outset and then carefully tailored discovery to the case's unique contours. This judicious exercise of discretion should not be disturbed on appeal. It is precisely the sort of active management required of district courts in Colorado.

CONCLUSION

WHEREFORE, Antero Resources Corporation, Antero Resources Piceance Corporation, Calfrac Well Services Corp., and Frontier Drilling LLC respectfully request that the Court reverse the Court of Appeals' ruling and reinstate the district court's order of dismissal.

Respectfully submitted this 18th day of June, 2014.

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injuries at trial based on noncompliance with *Lone Pine* order, and noting "what the court eliminated was essentially a nonexistent claim, as causation must be established by expert testimony").

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