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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-002031-23 (AM-000056-23)

ATLANTIC ER PHYSICIANS TEAM PEDIATRIC ASSOCIATES, PA, EMERGENCY CARE SERVICES OF NJ, PA, EMERGENCY PHYSICIAN ASSOCIATES OF NORTH JERSEY, PC, EMERGENCY PHYSICIAN ASSOCIATES OF SOUTH JERSEY, PC, EMERGENCY PHYSICIAN SERVICES OF NEW JERSEY, PA, MIDDLESEX EMERGENCY PHYSICIANS, PA, and PLAINFIELD EMERGENCY PHYSICIANS, PA, Plaintiffs, v. UNITEDHEALTH GROUP, INC., UNITEDHEALTHCARE INSURANCE COMPANY, OXFORD HEALTH PLANS (NJ), INC., MULTIPLAN, INC., and UMR, INC. Defendants.	Civil Action On Appeal from an Order of the Superior Court of New Jersey, Law Division, Gloucester County, Complex Business Litigation Part, Docket No. GLO-L-1196-20 Sat Below: Hon. James R. Swift, J.S.C. **MEMORANDUM OF LAW OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NEW JERSEY CIVIL JUSTICE INSTITUTE**

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INTRODUCTION

This brief is respectfully submitted on behalf of *amici curiae*, the Chamber of Commerce of the United States of America (the "Chamber"), the world's largest business federation, and the New Jersey Civil Justice Institute ("NJCJI"), a bipartisan, statewide group of businesses, individuals, not-for-profit groups, and professional organizations. These *amici* regularly participate in cases before this Court in order to address matters of concern to the business community, including issues of civil procedure that impact the professionals and businesses in this State.

The ESI Order at the heart of this appeal requires the parties to produce mountains of what all parties (and the trial court) agree are ***irrelevant*** electronic business records. Further, the trial court explicitly refused to permit the parties to screen their ESI productions for relevance, and failed to substantively address Defendants' objection to producing irrelevant documents, asserting instead that it was not the trial court's job to do so. And the trial court failed to weigh the purported benefits of producing the irrelevant documents against the burden of producing the irrelevant documents, especially Defendants' pre-production review of those documents to determine whether any are privileged or proprietary. This constellation of decisions ignores what is the cornerstone inquiry for production under our Court Rules: relevancy.

The ESI Order presents a new and dangerously broad approach to e-discovery, with the potential to significantly escalate litigants' discovery costs while providing no aid toward resolution of the litigation. *Amici* therefore urge this Court to vacate the ESI Order and reaffirm that litigants are required to produce only discovery "which is relevant to the subject matter involved in the pending action." N.J. Ct. R. 4:10-2(a).

PROCEDURAL HISTORY

On September 23, 2023, the Hon. James R. Swift, J.S.C., entered an order (the "ESI Order"), which directed the parties to produce all documents identified as "hits" in response to ESI search terms agreed upon by the parties. Da167. Over Defendants' objections, the ESI Order provided that the parties "may not withhold or redact non-privileged ESI documents even if the producing party believes the document is wholly non-responsive or that it contains only irrelevant information." *Id.* Although the ESI Order permitted the parties to withhold or redact ESI on grounds of privilege, the only other review permitted under the ESI Order was for a "small subset of ESI documents that contain information so proprietary that their production could result in business loss or disruption." *Id.*

The ESI Order, therefore, directs the parties to produce all ESI containing any of the agreed upon search terms, ***without the ability to review the material for relevancy or responsiveness***. The scope of the ESI Order represents a sea change in the operation of the Court Rules and scope of discovery – indeed, a complete inversion

of the American discovery system in which each party searches its own documents for discoverable material. The economic cost of expanding e-discovery to include the wholesale production of irrelevant documents is not hypothetical; in this case, compliance with the ESI Order will add $750,000 to discovery costs and create an additional 68,000 documents for review. These costs would spread to all parties who litigate in New Jersey if this type of ESI Order becomes standard practice, further driving up the costs of litigation.

ARGUMENT

THE ESI ORDER IS OVERLY BROAD AND DISREGARDS THE SCOPE OF DISCOVERY CODIFIED IN THE COURT RULES.

The breadth of the ESI Order is breathtaking, compelling the production of 68,000 admittedly irrelevant documents. Da126 ¶ 23. The problem is not just that the subject documents *might* not be relevant. Rather, the trial court expressly recognized that it was ordering the production of "a significant number of documents that are not relevant … there's going to be a large number, and it's argued that maybe sixty to seventy percent of the documents aren't going to be relevant." T6:11-17. *See also* T24:11-14 ("if in producing all the relevant documents there are fifty percent of them which are irrelevant, I don't see the harm.").

To be clear, the trial court did not *wrongly* determine the scope of relevancy. Rather, the court refused to engage in *any* relevancy analysis at all and dismissed such

relevancy concerns entirely, precluding Defendants from asserting that objection, even though it essential to *Rule* 4:10-2. *See* Pressler & Verniero, Current New Jersey Court Rules, Comment 1 to Rule 4:10-2 (Gann 2024) ("The general standard of discoverability [ ] is relevance"). The order is thus an abuse of discretion several times over and should be vacated.

A. The New Jersey Court Rules Promote Efficiency in ESI Discovery by Requiring Courts to Assess Relevance and Burden.

Relevance is the "touchstone" of discovery. *Estate of Lasiw v. Pereira*, 475 N.J. Super, 378 (App. Div. 2023).

Rule 4:10-2 accordingly limits the scope of discovery – both paper and electronic – to "any matter, not privileged, which is relevant to the subject matter involved in the pending action." *Rule* 4:10-2(a). On its face, therefore, the Rule excludes from the scope of discovery those documents which are not relevant to the case.

Further, the Court Rules recognize many circumstances in which even *relevant* discovery should be shielded from production: undue burden or expense, annoyance, embarrassment, oppression, that the requests are cumulative, duplicative, and that the burden outweighs the benefit. *Rule* 4:10-3, *Rule* 4:10-2(g). Under these circumstances, a court may grant the person from whom discovery is sought various forms of relief, including: "[t]hat the discovery not be had," "the discovery … be had only on specified terms and conditions," or "the scope of the discovery be limited to certain matters."

Rule 4:10-3(a), (b), and (d). *See Canlar v. Estate of Yacoub*, 2018 N.J. Super. Unpub. LEXIS 1764 (App. Div. July 24, 2018). These guardrails are in place "to avoid placing undue burdens upon litigants." *In re Pelvic Mesh/Gynecare Litigation*, 426 N.J. Super. 167, 196 (App. Div. 2012). Courts thus deny discovery when, "[a]fter assessing the needs of the case … there exists a likelihood that the resulting benefits would be outweighed by the burden or expenses imposed as a consequence of the proposed discovery." *Deibler v. Sanmedica Int'l, LLC*, 2021 U.S. Dist. LEXIS 247974, at *10 (D.N.J. Dec. 30, 2021) (citations omitted) (explaining "the goal of all parties should be to conduct discovery in the most efficient and cost-effective way possible").

Resting on these foundational principles, and given the burden that discovery of voluminous electronically stored records often present, the 2006 Report of the Supreme Court Committee on Civil Practice ("Committee Report") recommended that any rule "should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems." Committee Report at 6.[1] The concern for

[1] New Jersey's policy concerns surrounding the potential for ESI discovery to present enormous burdens on litigants, if ungoverned by sound rules of court, are generally shared by other states and the federal court system. *See* The Sedona Principles, Third Edition: *Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 65 (2018) ("When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and

burdensomeness was then memorialized in Rule 4:10-2(g), which limits the scope of discovery if "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." *Rule* 4:10-2(g)(3). That Rule provides a trial court with "express authority to limit discovery in the circumstances enumerated by the rule in an effort to curb the proliferating discovery abuses attending modern litigation practice." Pressler & Verniero, *Current N.J. Court Rules*, cmt. 8 on R. 4:10-2 (Gann 2007).

Thus, at its broadest, *Rule* 4:10-2 provides for ESI discovery into any matters "relevant" to the subject matter of the action, but makes no allowance for discovery into "irrelevant" matters. Further, even to the extent matters may be "relevant," ESI discovery is to be limited if the burden of production outweighs the benefit of the exchange. As this Court has explained, "when the burdens outweigh the benefits[,] the tools of discovery become, intentionally or unintentionally, weapons of oppression." *Trenton Renewable Power, LLC v. Denali Water Sols*., LLC, 470 N.J. Super. 218, 228 (App. Div. 2022) (quotations and citation omitted).

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whether the burden or expense of the proposed discovery outweighs its likely benefit.").

This Court recently affirmed that *Rule* 4:10-2's standard applies with equal force to paper and ESI discovery. *Estate of Lasiw v. Pereira*, 475 N.J. Super, 378 (App. Div. 2023). As with paper discovery, relevance is the "touchstone" for e-discovery. *Id.* at 405. The Court also examined the requirement that trial courts assess burden, which arises to some degree in responding to any discovery request, in its *Rule* 4:10-2 analysis: "[D]iscovery otherwise permitted may be limited by the court if it determines that the discovery sought is unreasonably cumulative or duplicative, or the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* at 383 (quotations and citations omitted). The analysis requires trial courts to "strive to avoid placing undue burdens upon litigants[.]" *Id.* (citation omitted).

This requirement exists for good reason. Left unchecked by the gatekeeping function of courts, ESI discovery costs will overwhelm litigants and prevent cases from being resolved on their merits. The costs of e-discovery are ***already*** astronomical and comprise the largest component of litigation spending. "By some estimates, discovery costs now comprise between 50 and 90 percent of the total litigation costs in a case." Beisner, "*Discovering A Better Way: The Need For Effective Civil Litigation Reform,*" 60 Duke L.J. 547, 549 (2010). As of 2010, "according to experts, 99 percent of the world's information is now generated electronically. Approximately 36.5 trillion emails are sent worldwide every year, with the average employee sending or receiving 135 emails each day." *Id.* at 564 (citations omitted). By way of example – and nearly

twenty years ago – "in 2005, ExxonMobil reported to the Federal Rules Advisory Committee that it was storing 500 terabytes of electronic information in the United States alone. This amounts to 250 billion typewritten pages." *Id*. *See*, *e.g.*, 8 Pace & Zakaras, RAND Institute for Civil Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, at 17 (2012) (finding that median e-discovery cost is $1.8 million); Lawyers for Civil Justice, Civil Justice Reform Grp. & U.S. Chamber Inst. for Legal Reform, Litigation Cost Survey of Major Companies at 3-4 (2010)[2] (between 2006 and 2008, high-end discovery costs were reported to be between $2.3 million and $9.7 million); Linzey Erickson, *Give us a Break: The (IN)Equity of Courts Imposing Severe Sanctions for Spoliation without a Finding of Bad Faith*, 60 Drake L. Rev. 887, 925 (2012) ("In many instances, the cost of litigation may be so high that companies are unwilling to try the case on the merits.").

The amount of ESI businesses generate will only continue to grow as more and more information is generated and retained electronically. It is thus of increasing concern to New Jersey's business community that trial courts adhere closely to *Rule* 4:10-2, and perform the gatekeeping analysis for relevance and burden that this Court outlined in *Pereira*. Conceptually, the narrower the search terms are, the more efficient

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2 https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf.

the discovery process will be, keeping costs down. No matter how precise the search term is, however, there is no guarantee that all the returns – the search "hits" – will be relevant to the pending dispute. *Rule* 4:10-2's "relevancy" standard applies to those irrelevant "hits" just as it applies to any discovery. The trial court erred in holding that *Rule* 4:10-2's relevancy standard does not apply to Defendants' production of ESI.

B. The Trial Court Abused its Discretion by Failing to Consider Burden and Relevance in the ESI Order.

The trial court disregarded the burden of producing 68,000 irrelevant documents at a cost of $750,000 and failed to weigh that burden against any purported benefit of producing these irrelevant documents. Da105. The trial court expressed its reluctance "to review thousands of pages of documents" to resolve any relevancy disputes, which the court disclaimed as "not my function" and a task the court was "not equipped to do." T6:2-7, T22:10. The trial court also stated that it was not "equipped" to make relevancy rulings, because "I don't know what's relevant, not relevant." T6:2-7. In short, the court said, "I don't want to do it and I refuse to do it because it's not my function." T22:9-10.

But applying Rule 4:10-2(a)'s relevancy and burden standard to resolve discovery disputes is ***precisely*** a trial court's function. Here, the trial court did not need to review each document with an ESI term to resolve the dispute and determine if the overwhelming burden of production was justified; instead, it needed only to limit the parties' discovery productions to relevant material. A trial court abuses its discretion

when it fails to do so. *See Madlinger v. New Jersey Transit Corp*., 2017 N.J. Super. Unpub. LEXIS 2726, *9 (App. Div. Oct. 30, 2017) (vacating trial court's order denying request for *in camera* review and remanding for producing party to have opportunity to assert particularized objections to specific documents before production, and for the judge to assess those objections *in camera*); *Royzenshteyn v. Pathak*, 2020 N.J. Super. Unpub. LEXIS 1562, at *22 (App. Div. Aug. 6, 2020) (ordering trial court to engage in an "arduous *in camera* review" of 1,276 communications); *compare Bayer v. Township of Union*, 414 N.J. Super. 238 (App. Div. 2010) (finding no error in trial court's denial of motion to compel where "the court undertook an *in camera* review of all of the files and documents requested by plaintiff. The court concluded that nothing in the materials reviewed was relevant to plaintiff's claims").

In this case, the trial court failed to engage in any meaningful analysis and simply swept away concerns about relevancy, cost, and confidentiality. The harm to litigants from such a decision is immense, and the economic costs to a producing party are unjustifiable in the absence of a direct finding that the ESI at issue is "irrelevant." The cost is all the more indefensible where "sixty to seventy percent of the documents aren't going to be relevant." T6:14-17. The court's abdication of its role as a gatekeeper was an abuse of its discretion.

The trial court's responsibilities flow directly from the policies underlying the Rules. Unnecessarily burdening litigants with additional layers of review for privilege

and confidentiality to produce tens of thousands of irrelevant documents is anathematic to the cornerstone "relevancy" inquiry imposed by *Rule* 4:10-2. Here, the trial court ignored the burden of additional review for privilege and confidentiality placed on Defendants in the face of the court's own acknowledgment that the ESI contained a large percentage of irrelevant documents. Had the Court simply limited the discovery production to "relevant" records, Defendants could avoid the time and $750,000 expense of reviewing 68,000 irrelevant documents for privilege and confidentiality.

Rather than weigh the burdens of review and production against any perceived benefits of production, the trial court simply acknowledged the costly burden, acknowledged the documents were irrelevant, and ordered them to be produced. This abuse of discretion disregards the underlying construct of *Rule* 4:10-2 and its federal analogues – that relevancy is the cornerstone inquiry. *See, e.g., Dryer v. NFL,* 2012 U.S. Dist. LEXIS 194684, at *19 (D. Minn. May 21, 2012) (weighing burden against benefit for each of the five custodians from whom ESI was sought and denying request for ESI where "the burden of production for the Defendant to produce ESI of four of the five custodians outweighs the likely benefit"); *Lewis v. Bd. of Supervisors of La. State Univ*., 2023 U.S. Dist. LEXIS 214628, at *12 (M.D. La. Dec. 2, 2023) ("mere skepticism that an opposing party has not produced all relevant information" and "a mere desire to check that the opposition has been forthright in its discovery responses" do not suffice to "warrant drastic discovery measures").

The trial court's refusal to consider relevancy concerns here—including its complete disregard for Defendants' relevancy objection–was particularly puzzling given that a Special Discovery Adjudicator had *already* been appointed to assist the court in resolving such disputes. Da97-101 (Hon. Georgia Curio, J.S.C. (Ret.) vested with authority to "consider, hear, and recommend resolution of all discovery disputes between the parties"). The trial court's refusal to permit Defendants to screen their ESI production for relevancy, or, at a minimum, to review a sampling of the "irrelevant" documents *in camera* to weigh Defendants' relevancy and burden concerns, and instead to order the production of "a significant number of documents that are not relevant" (T6:11-14) was a clear-cut abuse of discretion. Pressler & Verniero, Comment 4.6 to Rule 4:10-2 (abuse of discretion when "trial court allows a party to rummage through irrelevant evidence").

The policy considerations underlying the trial court's obligations protect individual and business litigants by ensuring discovery proceeds efficiently and in aid of dispute resolution instead of ballooning into a boundless and costly fishing expedition. Were courts statewide to simply refuse to address the issue of relevancy, the most basic of objections and most efficient filtering process would be removed from discovery exchanges. Parties would be left – as they are in this case – to search through troves and troves of irrelevant material, overburdening both the producing party and the receiving party, each of whom must now spent time and money analyzing

records that are irrelevant to the proceedings. The producing party must not only disclose irrelevant records, but review each record to determine if it is privileged or contains confidential/proprietary information subject to withholding. Conversely, the receiving party will be forced to review each of the documents produced and waste its time looking at records that have no connection to the dispute. This Court should vacate the ESI Order to ensure that *Rule* 4:10-2 fulfills the Committee's purpose of discouraging "costly, speculative, duplicative, or unduly burdensome discovery" instead of making such discovery the norm.

C. The Trial Court Abused its Discretion by Equating Search Terms with Relevance.

The trial court's blunt "refus[al]" to "do [its] function" (T22:9-10) by assessing relevance and burden prior to issuing the ESI Order should resolve this appeal. However, the substance of the ESI Order also constitutes an abuse of discretion because it fundamentally misunderstands the role that search terms play in ESI discovery. The ESI Order requires United to produce all documents that hit on a search term, without permitting United to conduct a relevance review and withhold from production documents that are irrelevant to any claim in this action and not responsive to any request. But this Court recently explained that the Rules contemplate the producing party determining relevance *before* the documents are produced:

> [*Rule* 4:18-1] does not anticipate that the requesting party will be permitted to search through their opponents' electronic devices for responsive data, any more than it

> anticipates that the requesting party would be permitted to search through their opponent's filing cabinets for responsive documents.

Lipsky v. N.J. Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 468 (App. Div. 2023).

Lipsky did not break new ground. It is well-settled law, within and outside New Jersey, that a party producing ESI (as with paper discovery) determines relevance in the first instance, using their best efforts to cull responsive documents from a larger group of existing data. *See Enslin v. Coca-Cola Co*., 2016 U.S. Dist. LEXIS 193556, at *8 (E.D. Pa. June 8, 2016) ("There is no obligation on the part of a responding party to examine every scrap of paper in its potentially voluminous files, and in an era where vast amounts of electronic information is available for review, courts cannot and do not expect that any party can meet a standard of perfection."). This is fundamental to the basic structure of the American discovery system: Each party searches its own documents for discoverable material.

The facts of *Lipsky* are illustrative of the trial court's error in equating search with relevance. There, this Court found that a trial court abused its discretion by ordering the production of personal cell phones *after* the producing party had already searched the devices and produced relevant and responsive material. *Lipsky*, 474 N.J. Super. at 451. There, as here, the trial court had given *no* justification in ordering an overly broad production. "At most, there were disputes regarding the thoroughness of the searches.… However, those are run-of-the-mill concerns that could be raised with

respect to any document production." *Id.* at 469. Accordingly, this Court concluded that the "relevance" limitation on discovery would have little meaning if parties were required to produce their documents *en masse*, letting the opposing party review relevant and irrelevant documents alike. *Id.* at 464. The *Lipsky* order, like the ESI Order here, was therefore "unduly invasive and burdensome" and contravened *Rule* 4:10-2(g). *Id.* at 470.[3]

The trial court's error blurs the lines between documents containing agreed-upon search terms and the smaller universe of documents that are actually relevant to the case. If repeated, this error would make New Jersey a uniquely inefficient forum for litigation. An agreement between parties upon search terms represents a consensus on how to first cull a voluminous set of ESI records, and is *not* an agreement to produce every electronic record containing the terms. Litigants' agreement on search terms (prior to assessing relevance) is essential to controlling discovery costs; the search terms allow the parties to efficiently exclude all documents that do not contain a responsive word or phrase, without the need for an attorney to run up billable hours by

[3] Courts in other states have similarly denied requests for large-scale productions of irrelevant material. *E.g. Carlson v. Jerousek*, 68 N.E.3d 520, 537-38 (Ill. App. Ct. 2016) ("The low probative value of the information being sought does not justify a broad and intrusive method of obtaining that information that is likely to sweep in substantial amounts of irrelevant information. A party may not dredge an ocean of electronically stored information and records in an effort to capture a few elusive, perhaps non-existent, fish") (citation omitted).

reading each of these records. The attorney can then review the documents responsive to the search terms to determine whether they are in fact relevant, while withholding from production documents that contain search terms but bear no relevance to the case.

It's little wonder that trial courts throughout the country recognize this critical distinction between agreement on search terms and agreement on the universe of relevant documents. *See FlowRider Surf, Ltd. v. Pac. Surf Designs, Inc*., 2016 U.S. Dist. LEXIS 153563, at *27-28 (S.D. Cal. Nov. 3, 2016) ("Plaintiffs' agreement to run a search using the parties' agreed-upon terms does not constitute Plaintiffs' acquiescence to produce all resulting documents."); *Willmore v. Savvas Learning Co. LLC*, 2023 U.S. Dist. LEXIS 166813, at *28 (D. Kan. Sep. 19, 2023) (rejecting an argument that "all hits are presumptively relevant and responsive" and holding that the plaintiff could not demand that the defendant "bypass a relevance review"). This Court should adhere to its relevance precedent and to the policy interests underlying *Rule* 4:10-2 in reaching the same conclusion.

The ESI Order further turns the *Rules* on their head by eliminating relevancy objections—an essential component of discovery. Parties' discovery obligations would be expanded to include every document under the sun that contains a search term, regardless of the context in which that term arises. It would become impossible for companies to craft reasonable preservation orders, as *all documents* would be required for production, not just relevant documents; deleting any document would thus lead to

a spoliation claim, because relevancy would no longer be the appropriate inquiry. This rule could be extended to require corporations to retain all documents they create, for all time, and then to produce enormous quantities of irrelevant records each time they become involved in a lawsuit.

Discovery orders that are "unduly invasive and burdensome" are subject to reversal. *Lipsky*, 474 N.J. Super. at 470. Here, the ESI Order is unduly invasive and burdensome because it will require Defendants to expend hundreds of thousands of dollars on additional rounds of privilege and confidentiality review for 68,000 irrelevant documents and will also force Defendants to produce this irrelevant material that is not just unrelated to the subject matter of the litigation, but may also contain proprietary business information which Plaintiffs have no business reviewing.

The numbers speak for themselves. The ESI Order requires Defendants to produce 30,500 responsive documents, and 68,000 non-responsive documents. Da125-126; T35-37. Nothing in the ESI Order or the Protective Order (Da89) eliminates the harms caused by this overbroad directive. Defendants estimate an additional $750,000 in costs to comply with the ESI Order, *i.e.*, to review the 68,000 irrelevant documents for privilege and confidentiality (which would not be necessary if those documents were screened for relevance). Da126 ¶ 23. That number is astonishing, particularly where the trial court undertook no effort to utilize a "convenient, less burdensome, and less expensive" means of acquiring relevant data. *See Horizon Blue Cross Blue Shield*

of N.J. v. State, 425 N.J. Super. 1, 29, (App. Div. 2012) (citing *Rule* 4:10-2(g)); *see also Rule* 4:10-2(f)(2) ("party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.").

Moreover, no justification was proffered by the trial court (or by Plaintiffs) as to the purpose of producing 68,000 irrelevant documents. "Broad as modern discovery may be, it is not unbridled and not unlimited." *Berrie v. Berrie*, 188 N.J. Super. 274, 282 (Ch. Div. 1983) (quashing subpoena for financial information). "Parties' discovery rights are not unlimited, and claims of privilege or confidentially are not the only reasons supporting good cause justifying non-production." *Trenton*, 470 N.J. Super. at 226 (quotation and citation omitted); *Hammock v. Hoffmann-LaRoche, Inc.*, 142 N.J. 356, 383 (1995) ("Confidential and proprietary information, while not privileged, is also entitled to protection from disclosure.").

D. The Cases Plaintiffs Cite Do Not Support the Trial Court's Decision.

The federal appellate court's decision in *In re Actavis*, 2019 U.S. App. LEXIS 39254 (3d. Cir. Dec, 6, 2019) provides no support for the ESI Order. The *Actavis* court did not address the merits of whether the federal district court's discovery order in that case constituted an abuse of discretion. *Actavis* at *8. There, without deciding if the trial court abused its discretion, the Third Circuit found that petitioner had failed to satisfy the rigorous standard for extraordinary mandamus relief. *Actavis* at *8. *See also*

Hollingsworth v. Perry, 558 U.S. 183, 190, 130 S. Ct. 705, 175 L. Ed. 2d 657 (2010) ("Before a writ of mandamus may issue, a party must establish that (1) no other adequate means [exist] to attain the relief he desires, (2) the party's right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstances.") (citation and internal quotations omitted); *see also In re Diet Drugs Prods. Liab. Litig.*, 418 F.3d 372, 378 (3d Cir. 2005) (mandamus is a drastic remedy available only in extraordinary circumstances).

The *Actavis* trial court, however, unlike the trial court in this case, had better addressed the producing parties' relevancy objection by imposing safeguards, including a 120-day period for claw back of "unrelated business information and unrelated personal or embarrassing information." *Id.* Thus, the court there had at least partially addressed its obligation to consider relevance in its discovery order in a way the trial court here simply declined to.

Notably, Circuit Judge Peter J. Phipps dissented from the *Actavis* court's denial of mandamus relief and would have held that the district court clearly erred, observing:

> [N]othing in the civil rules permits a court to compel production of non-responsive and irrelevant documents at any time, much less before the producing party has had an opportunity to screen those documents…. A court does not spontaneously gain authority to compel production of non-responsive, irrelevant documents simply by establishing a period of time afterwards for the review and potential return of the documents produced.

Actavis at *8, n.1. As Judge Phipps explained, "the sequence of events in discovery is important, and the rules of civil procedure allow for a review for responsiveness and relevance *before* production." *Id.,* citing Fed. R. Civ. P. 26(b)(1), 34(b)(2)(C). *See also In re Zostavax Litigation ESI Protocol*, MCL No. 629, MID-L-4999-18 (Mar. 22, 2019) ("Nothing contained herein is intended to or shall serve to limit a Party's right to conduct a review of ESI, documents, or information (including metadata) for responsiveness, relevance and/or segregation of privileged and/or protected information before production"). The principles Judge Phipps cites in dissent align with those expressed by the Committee, which underpin *Rule* 4:10-2. That the *Actavis* court declined to grant extraordinary relief where a trial court had paid substantially greater care to relevance than the court here did should not dissuade this Court from concluding that the ESI Order is an abuse of discretion.

Further, the cases cited in *Actavis* that Plaintiffs now rely upon are not persuasive and in no way displace the New Jersey precedent that compels reversal. In *Consumer Fin. Pro. Bureau v. Navient Corp.*, 2018 U.S. Dist. LEXIS 215146 (M.D. Pa. Dec. 21, 2018) (cited in *Actavis* at *8), the court ordered the CFPB to produce all documents that mentioned the terms "Navient" or "Pioneer."[4] But this directive was not given in a vacuum; rather, the Court limited the time period for production, and out of a total of 336,000 documents, roughly 15% were to be produced – 32,000 containing the word

[4] Pioneer refers to codefendant Pioneer Credit Recovery, Inc.

"Navient" and 23,000 containing the word "Pioneer." *Id.* at *8. Further, Navient had claimed that in prior productions, "CFPB has defined relevance in such a narrow way, so that issues that relate to [Navient's] defenses were not produced." *Id.* at *9. As such, the court found it appropriate to order CFPB to produce those documents containing the defendants' names. *Id.*

There are no analogous facts in this matter. To the contrary, the trial court ordered the production of 68,000 irrelevant documents (recognizing that the irrelevant documents outnumbered the relevant documents by two-to-one), many of which were known to contain highly sensitive and proprietary business information. Da125-26 ¶ 22. *See also Purdue Pharm. Products v. Actavis Elizabeth*, 2015 U.S. Dist. Lexis 111363, at *2 (D.N.J. Aug. 24, 2015) (recognizing party's interest in protecting information where "revealing the confidential business information to the public and competitors to the parties to this action would injure the parties' business interests"); *In re Gabapentin Patent Litig.*, 312 F. Supp. 2d 653, 658 (D.N.J. 2004) ("[t]he presence of trade secrets or other confidential information weighs against public access and, accordingly, documents containing such information may be protected from disclosure."). By way of example, in this case, unlike in *Navient*, United has identified specific additional expenses – namely, more than $750,000 in additional costs associated with the review of 68,000 irrelevant documents – in complying with the ESI Order. Da126 ¶ 23.

In *UPMC v. Highmark*, 2013 U.S. Dist. LEXIS 196362 (W.D. Pa. Jan. 22, 2013) (cited in *Actavis* at *8), a Special Adjudicator addressed two disputed discovery demands. As to the first demand, the Special Adjudicator noted that not only had the requesting party "provided a reasonable explanation as to why *all of the requested material* is relevant," *id.* at *10 (emphasis added), but the producing party had neither claimed that there were "any concrete subject areas that are not relevant" nor "suggested any feasible way of separating arguably irrelevant material from relevant material." *Id.* at *11.

This case is not remotely analogous; United has explained that the ESI Order would require the production of approximately 68,000 irrelevant documents, representing "sixty to seventy percent of the documents" to be produced. Da105; T6:14-17. Indeed, the concern in this case is concrete and Defendants cited several examples of irrelevant documents that hit the search terms and would need to be produced despite being entirely irrelevant. Da 158; *see also* Da125 ¶ 21. Plaintiffs did not dispute this calculation, and the trial court simply accepted that there would be an overproduction of irrelevant documents. T20:24-21:1 ("we all recognize that there are going to be a lot of irrelevant documents" with "these particular searches"). The broad terms encompassed by the ESI Order include phrases such as "New Jersey," "out of network," "reimbursement," "review," and "overview" – words that simply do not

target relevant facts – and all parties agree that much of the material subject to the ESI Order is not relevant.

As to the second *Highmark* demand, for all documents concerning the termination of certain employees, the Special Adjudicator found the requested documents to be *relevant* to the pending dispute before compelling production. *Id.* at *14. Thus, the Special Adjudicator conducted precisely the analysis that the trial court here disclaimed as "not my function." *Highmark*, therefore, provides no support for the argument that the ESI Order's exclusion of relevancy as a consideration was appropriate. To the contrary, the *Highmark* Special Adjudicator built into his ruling a relevancy objection, and took on the role of reviewing any individual documents to which there was a relevancy objection (*Highmark* at *17)—precisely the process this Court should compel here.

CONCLUSION

Pretrial discovery "is not limitless." *HD Supply Waterworks Grp., Inc. v. Dir., Div. of Taxation*, 29 N.J. Tax 573, 583 (2017). Relevancy is a fundamental prerequisite and has been codified in our Court Rules to eliminate overly burdensome and costly discovery exercises. Imposing unlimited discovery burdens on parties would not only increase the already high cost of litigation, but it would also chill parties' willingness to participate in the legal system.

Our Court Rules limit the production of discovery to relevant materials. Amici curiae therefore urge this Court to vacate the ESI Order.

Respectfully submitted,

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