IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	
	:	
v.	:	
	:	Criminal No. 2:20-cr-200-RBS
TEVA PHARMACEUTICALS USA, INC., and GLENMARK PHARMACEUTICALS INC., USA,	:	
	:	
	:	
	:	
Defendants.	:	

EMERGENCY MOTION FOR RELIEF FROM COMPULSORY INTERVIEWS AND RELATED MISCONDUCT BY THE ANTITRUST DIVISION

Defendant Glenmark Pharmaceuticals Inc., USA ("Glenmark USA") and its parent company Glenmark Pharmaceuticals, Ltd. ("Glenmark India") (jointly, "Glenmark"), as well as undersigned counsel who represent both companies, come before this Court seeking all appropriate relief from ongoing misconduct by the Antitrust Division of the U.S. Department of Justice ("Antitrust Division"). The improper conduct relates to the Antitrust Division's efforts to cause senior Glenmark India executives to be interviewed, under compulsion, in furtherance of the government's trial preparation in this case, and without notice to or opportunity for objection by Glenmark's counsel.[1]

Pursuant to a request under a Mutual Legal Assistance Treaty ("MLAT"), the Antitrust Division has caused its counterpart in India to demand that Glenmark India produce three individuals, including two current senior company executives, for substantive interviews as soon as possible. The Indian investigative agency has informed Glenmark India that the interviews are being requested at the direction of the U.S. Department of Justice, that they are compulsory, that

[1] At this time, Glenmark and its counsel have no reason to believe that anyone in the U.S. Attorney's Office for the Eastern District of Pennsylvania was involved in, or aware of, the improper conduct described in this filing.

U.S. investigative agents and officials will be present and may participate in the interviews, and that everything gleaned from the interviews will be transmitted to the Department of Justice.

Before this outreach to Glenmark India, counsel for the Antitrust Division knew that the undersigned counsel represent both Glenmark entities, did not object to that, and even agreed that Glenmark's counsel could share and discuss the government's discovery in this case with both Glenmark entities "as if [Glenmark India] was a party/Defendant" (Stipulated Protective Order ¶3, ECF. No. 47). Yet the Antitrust Division failed to notify Glenmark's counsel before causing the interview demand to be issued. To make matters worse, when Glenmark's counsel learned of these improper contacts, the Antitrust Division refused to stand down, ignoring undersigned counsel's repeated representations that Glenmark India and its executives are represented parties, and taking the position that these matters are not the business of Glenmark's counsel. The Antitrust Division did so even though Glenmark's counsel explained that they had privileged and confidential conversations with the senior executives, that their statements could bind the company, and that they plainly fell within the no contact rule under Pennsylvania Rule of Professional Conduct 4.2.

The Antitrust Division's conduct violates ethical safeguards and limitations on prosecutorial power, for at least three reasons. (1) Represented parties cannot be contacted except through counsel—a prohibition that includes senior executives of represented organizations. (2) The government cannot use compulsory process after a case has been indicted to further its trial preparation—as opposed to gathering evidence to present to the Grand Jury, which is what the government told the Court the MLAT in question was for years ago. (3) While the executives have done nothing wrong and the government has not claimed otherwise, they have Fifth Amendment protection from compulsory interviews that would be jeopardized were the compulsory interviews in India to go forward.

Accordingly, as explained further below, Glenmark and its counsel ask the Court to order the Antitrust Division to halt all non-attorney contacts with represented parties, to cease and desist from causing compulsory interviews of senior Glenmark executives, and for any other relief necessary to bring government counsel into compliance with their ethical obligations and limitations on the use of post-indictment compulsory process.

I. BACKGROUND

On June 19, 2018, the government transmitted MLAT requests to India. *See* **Sealed Exhibit 1** at 14-15. In November of that year, the government applied for a suspension of the statute of limitations pursuant to 18 U.S.C. § 3292.[2] *Id.* at 3-7. In the order granting the application, the Court noted that the purpose of these pre-indictment MLAT requests was to seek evidence that could be presented to the Grand Jury. *See id*. at 1-2.

More than two years later, on June 30, 2020, the government filed an Information charging Glenmark USA with one count of conspiracy in violation of 15 U.S.C. § 1. ECF No. 1. On July 14, 2020, the Grand Jury returned a superseding indictment with a single count identical to the Information. First Superseding Indictment, ECF No. 14. A month later, on August 25, 2020, the government filed its Second Superseding Indictment ("SSI"). ECF. No. 28. The SSI is the operative indictment in this case and alleges three counts, of which Glenmark USA is only charged

[2] The initial MLAT requests to India made by the government did not name Glenmark as the company under investigation, instead targeting two other companies that did not manufacture pravastatin at the time. While Glenmark takes issue with the use of these MLAT requests against it, including whether the requests were a pretextual effort to toll the statute of limitations, it saves discussion of those issues for a later date. For purposes of this motion, what matters is that the requests were issued pre-indictment, to gather evidence to in support of the potential indictment, not in order to obtain evidence after the case has been charged.

in the first. The history of the SSI and the scope of the indictment are further set forth in Glenmark USA's Motion for Misjoinder and Severance. ECF No. 105.

On July 22, 2021, more than three years after the MLAT requests were made and more than a year after Glenmark USA was indicted, Glenmark India received correspondence from India's investigative authority seeking to compel the interviews of three individuals, including two current senior Glenmark executives. *See* **Exhibit 2**.[3] These executives are sufficiently senior to bind the company, and have been intimately involved in privileged strategy and trial preparation discussions with Glenmark's counsel throughout this case. The Indian regulator further indicated in conversation with Glenmark India personnel that the interviews are not related to any Indian investigation, but rather, are at the request of the U.S. Department of Justice in response to the MLAT request. The Indian regulator also indicated that U.S. officials, including investigative agents, would be present at and may participate in the interviews, and that any information obtained during the interviews would be shared with the U.S. Department of Justice. The Indian regulator has asked that the interviews take place in July or August, and has pressed for them to happen as soon as next week.

Counsel for Glenmark was informed of these compulsory interviews not by the U.S. Department of Justice, but by our client after it was inappropriately contacted. This is so even though the Antitrust Division was on notice that Glenmark's counsel represented both the American subsidiary and the Indian parent company. Indeed, in the Protective Order to which the

[3] Consistent with Department of Justice policy on not naming uncharged individuals in public filings, the names and titles of the senior executives have been redacted in the attached. *The Justice Manual*, § 9-27.760. Should the Antitrust Division fail to comply with this guidance in any response to or hearing on this motion, and disclose the identities in question, it would be further evidence of misconduct.

government stipulated, the parties agreed that Glenmark India could receive protected discovery materials and would be subject to the provisions of the Protective Order "as if it were a party/Defendant." Stipulated Protective Order ¶3. Despite its awareness that Glenmark India was represented by the undersigned counsel, the government never reached out to counsel to discuss the topic of foreign executive interviews, choosing instead to contact a represented party directly through a foreign regulator.[4]

Upon finding this out, counsel for Glenmark sent an urgent letter to the Antitrust Division, requesting an immediate discussion, in the hopes that the issue could be resolved without having to come before this Court. July 27, 2021 Letter to DOJ, **Exhibit 3**. Counsel for Glenmark and the Antitrust Division spoke twice on July 27. Counsel for Glenmark explained to the Antitrust Division how the compelled interviews violated ethical and legal requirements and requested that they be postponed until further notice.

In response, Antitrust Division attorneys offered no explanation of their breach of the no contact rule. Instead, they offered several astounding observations. First, they claimed they were still assessing whether the India-based executives had a right to *any* counsel—as if the Antitrust Division could somehow ignore their representation by Glenmark's counsel so they could be interviewed without the assistance of counsel. Second, they claimed not to know whether the interviews are compulsory—even though the Indian regulator has informed Glenmark that they

[4] Glenmark India had previously produced documents to Indian regulators in response to requests from the foreign authority made pursuant to the MLAT. Glenmark India's cooperation with Indian regulators with regard to document requests does not excuse the Antitrust Division's improper attempts to now force Glenmark to produce senior executives for interviews. Indeed, the document production shows that Glenmark India has gone out of its way to be cooperative when possible, without prejudice to the protections that it and its executives have from improper conduct by the U.S. Department of Justice.

are. Third, Antitrust Division attorneys questioned whether Wilkinson Stekloff LLP could represent the executives and indicated they would only consider pausing the MLAT interviews if counsel for Glenmark would commit that the executives would retain separate counsel and discuss terms for voluntary interviews without the involvement of Glenmark's counsel. In so doing, the Antitrust Division declined to say that any of the individuals are targets of any investigation or provide a colorable explanation of any divergence of interest between the company and the executives. Instead, the Antitrust Division simply observed that the executives were involved in Glenmark's pricing decisions—which shows no divergence of interests, since companies are allowed to independently raise prices, and since any involvement by the executives in those independent company decisions would align their interests with the company.

II. DISCUSSION

A. Compulsory Interviews Violate "No Contact" Rules.

The Pennsylvania Rules of Professional Conduct include a "no contact" rule that prohibits attorneys from communicating "about the subject of a representation with a person the lawyer knows to be represented by another lawyer in the matter." Pa. R. Prof'l Conduct 4.2. So does guidance from the U.S. Department of Justice to all its trial attorneys. *The Justice Manual*, CRM § 296. This bar on contact applies not only to individuals but to represented organizations. Pa. R. Prof'l Conduct 4.2, Cmts. 7. The entity or individual contacted does not need to be a party to the litigation for the protection to apply. *Id.*, Cmts. 2 ("This Rule applies to communication with any person who is represented by counsel concerning the matter to which the communication relates."). And, with respect to a represented organization, "this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter

or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." *Id.*, Cmts. 7.

Glenmark India and its senior executives are protected by the no contact rule. And the Antitrust Division knew that when it pressed for the interviews without notice to counsel. Since the date of the parties Stipulated Protective Order, almost a full year ago, the government has been aware of Wilkinson Stekloff LLP's representation of Glenmark USA and its parent Glenmark India, including that counsel would share case materials and discuss case strategy with both related entities. The Antitrust Division's attempt to interview Glenmark India, via its senior executives who fall within Pa. R. Prof'l Conduct 4.2, Cmts. 2, is professional misconduct under the Pennsylvania rules. *See* Pa. R. Prof'l Conduct 8.4. Indeed, because the Antitrust Division has already caused Indian authorities to contact Glenmark to set up interviews on behalf of the U.S. Department of Justice, the misconduct has already occurred.

B. The Government Cannot Compel Interviews After A Case Has Been Indicted.

Glenmark USA was indicted more than a year ago. It is well accepted that "an investigation terminates once a suit has been filed." *United States v. Apodaca*, 251 F. Supp. 3d 1, 9 (D.D.C. 2017). "[O]nce a targeted individual has been indicted, the government must cease its use of the grand jury in preparing its case for trial." *Id.* Nor is it allowed to use other forms of compulsory process. *Id.* Department of Justice guidance confirms that government's attorneys cannot bolster their case by compelling witnesses to appear before the Grand Jury after an indictment is handed down. *See The Justice Manual* § 9-11.120 (after indictment, the grand jury can only be used if its investigation relates to indictment of additional defendants or additional crimes).

That U.S. agents and officials will attend these interviews and may participate directly in the questioning drives home the impropriety of the run-around the government is attempting here. The government cannot be allowed to use MLAT requests to accomplish in India what it is

disallowed from doing in the United States. In granting the government's § 3292 application many years ago, Judge Joel Slomsky noted that the purpose of procuring the evidence was to present it to the Grand Jury. At no time during the parties' telephonic conference on July 27, 2021, did the government indicate that the requested interviews are related to a legitimate, ongoing Grand Jury investigation. Instead, this appears to be a classic attempt to prepare for trial in a pending case.

Throughout the pre-charge discussions Glenmark held with the government, Glenmark explained that the raise in the price of pravastatin (the sole drug specified in Count 1 of the SSI) was not due to any collusion with competitors in the United States, but based on a pre-existing and independent business decision made in consultation with Glenmark India dating back to 2012. The government is now attempting to use these compelled interviews to test Glenmark's defense and better prepare for trial. The time for that has long passed. If these executives were in the United States today, the government could not subpoena them to testify before the Grand Jury without running afoul of the above limitations. The same is true in the circumstances presented here.

C. The Conduct In Question Raises Serious Fifth Amendment Concerns.

Interviews being compelled abroad, even by foreign entities, implicate the Fifth Amendment. *See United States v. Allen*, 864 F.3d 63, 90 (2d Cir. 2017) (applying the Fifth Amendment protection from self-incrimination to interviews conducted abroad by foreign entities). The participation of U.S. agents in a compelled interview abroad only strengthens the applicability of that protection. *See United States v. Karake*, 443 F. Supp. 2d 8, 13 n.2 (D.D.C. 2006) (government concession that participation of U.S. investigators in foreign interrogation of foreign nationals implicated the Fifth Amendment). And the individual being compelled to testify need not be a citizen, or even a resident, of the United States to be protected by the Fifth Amendment. *See id.*; *U.S. v. Bin Laden*, 132 F. Supp. 2d 168, 181-182 (S.D.N.Y. 2001) (holding that two non-resident aliens interrogated abroad were protected from self-incrimination by the

Fifth Amendment); *U.S. v. Rommy*, 506 F.3d 108, 131 (2d Cir. 2007) (noting that "neither in the district court nor on this appeal" did the government dispute the applicability of the Fifth Amendment to foreign nationals being interrogated outside the United States).

Allowing the interviews here to proceed risks depriving the Glenmark executives of their Fifth Amendment rights. They have done nothing wrong, but the Fifth Amendment does not discriminate between innocent and guilty individuals in its protections. Yet the government has decided to move ahead with these interviews in India through its foreign surrogate. While the Indian Constitution also contains a right against self-incrimination, that right only applies to individuals who have been charged. *See* INDIA CONST. (1950) art. 20(3) (stating that no person *accused of an offense* can be compelled to be a witness against himself). Counsel in India is concerned that, due to Indian procedure, the executives will not be allowed to decline to answer questions and will be compelled to provide information that the U.S. government could later attempt to use against them. Accordingly, by conducting these interviews in India with the assistance of their Indian counterparts, the Antitrust Division risks placing the executives in a setting where they will be deprived of their Fifth Amendment rights under the U.S. Constitution.

When the issue was raised on the parties' July 27, 2021 telephonic conference, the government took the position that it would not halt the interviews unless Glenmark's counsel committed to staying out of the issue and having the executives retain separate counsel who would arrange for voluntary interviews. The Antitrust Division provided no basis for this request, declining to comment on the status of the executives and merely noting that they had involvement in Glenmark's pricing decisions. Glenmark, of course, is free to price its products as it sees fit. The fact that it may have done so with the input of senior executives in India—rather than due to

any alleged conspiracy in the United States—lends no help to the Antitrust Division's position, and shows no diversity of interest between the executives and the company.

Worse than that, the government's tactics here suggest bad faith. The Antitrust Division did not reach out to Glenmark's counsel, as required by the Professional Rules, to request these interviews and raise the question of having separate counsel for the executives. Instead, the Antitrust Division broke the no contact rule and caused a demand to a represented party to produce its senior executives for compulsory interviews. Now that it has been caught, and even though government attorneys are still investigating whether they can interview the executives without *any* defense counsel present, they have come up with vague notions why those same executives—uncharged individuals in a foreign jurisdiction—should not be represented by counsel who have consulted with them throughout this matter. On this record, the government has no standing to object to Glenmark's counsel representing senior executives that the company is being compelled to produce for interview, and no power to bar Glenmark's counsel from representing them and the company which they can bind with their statements.

III. CONCLUSION

Glenmark and its counsel do not raise these issues lightly. But the conduct here, and the Antitrust Division's continued adherence to it, cannot go unchallenged. Glenmark and its counsel respectfully ask the Court to order the Antitrust Division to halt all non-attorney contacts with represented parties, to cease and desist from causing compulsory interviews of senior Glenmark executives, and for any other relief necessary to bring government counsel into compliance with their ethical obligations and limitations on the use of post-indictment compulsory process.

Dated: July 28, 2021

Respectfully submitted,

/s/ Kosta S. Stojilkovic

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Attorneys for Defendant Glenmark Pharmaceuticals Inc., USA

CERTIFICATE OF SERVICE

I, Kosta S. Stojilkovic, do hereby certify that I have served a true and correct copy of the foregoing document upon all counsel/parties by electronic filing on July 28, 2021. This document has been filed electronically and is available for viewing and downloading from the ECF system.

/s/ Kosta S. Stojilkovic
Kosta S. Stojilkovic

EXHIBIT 1

FILED UNDER SEAL

EXHIBIT 2

From: [redacted]
Sent: 22 July 2021 16:32
To: Glenmark-CSR
Subject: Provide 2-3 convenient dates for Video Interview at CBI Mumbai Office

Sir,

Kindly provide 2-3 convenient dates for Video Interview of below mention person at CBI Office, Mumbai, which can be communicate to our higher authority for further necessary action.
you can provide any date as per your convenience between July to August.

Name of concern Person for Interview
1. [redacted]
2. [redacted]
3. [redacted]

Regards
[redacted]
Inspector of Police
BSFB, CBI, Mumbai
9571144302

EXHIBIT 3

2001 M Street NW, 10th Floor
Washington, DC 20036

WILKINSON STEKLOFF

WWW.WILKINSONSTEKLOFF.COM

A LIMITED LIABILITY PARTNERSHIP

July 27, 2021

Via E-mail

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Carol L. Sipperly, Esq.
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U.S. Department of Justice, Antitrust Division
450 5th Street, N.W., Ste. 11300
Washington, DC 20530

Re: *United States v. Teva Pharmaceuticals USA, Inc. and Glenmark Pharmaceuticals Inc., USA*, Criminal No. 20-200-RBS

Dear Counsel:

We write with an urgent matter. Our client Glenmark Pharmaceuticals, Ltd.—the parent company of our client Glenmark Pharmaceuticals Inc., USA—has informed us that India's Central Bureau of Investigation ("CBI") is seeking to compel the interviews of several senior Glenmark executives, including [redacted]. CBI personnel indicate that the interviews are not due to any Indian investigation, but rather *at the request of the U.S. Department of Justice*, in response to an MLAT request. CBI personnel also indicate that *U.S. officials including investigative agents may participate in the interviews*, and that any information obtained would be shared with the U.S. Department of Justice. To make matters worse, CBI is insisting that the interviews take place as soon as possible in July or August, and has pressed for them to happen next week.

We are deeply troubled by this turn of events. The Department of Justice cannot compel these interviews, directly or indirectly. In the interest of our professional relationship with you, and given the seriousness of the concerns expressed herein, we want to raise them with you before going to the Court.

First, to remove all doubt, we represent not only the American Glenmark subsidiary charged in the criminal case, but also Glenmark the parent company. We thought that was clear when we asked, and you agreed, to include the parent company in the protective order in this case, which expressly contemplates that we as counsel may share discovery with the parent company. *See* Stipulated Protective Order ¶3 (Dkt. No. 47).

As you know, the Pennsylvania Rules of Professional Conduct include a "no contact" rule that prohibits attorneys from communicating "about the subject of a representation with a person the lawyer knows to be represented by another lawyer in the matter." Pa. R. Prof'l Conduct 4.2.

So does *The Justice Manual*. CRM § 296. This bar extends to contacts with represented organizations. *Id.* The entity or individual contacted need not be a party to the litigation for the protection to apply. Pa. R. Prof'l Conduct 4.2, Cmts. 2 ("This Rule applies to communication with any person who is represented by counsel concerning the matter to which the communication relates."). And, with respect to a represented organization, "this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Pa. R. Prof'l Conduct 4.2, Cmts 7.

Thus, the Glenmark executives now facing compulsive interviews are clearly protected by the no contact rule. Any effort by you to have them interviewed must be raised with and coordinated through us. Violation of this protection constitutes professional misconduct under the Pennsylvania rules. Pa. R. Prof'l Conduct 8.4.

Second, we fail to see how you can use an MLAT request to compel interviews of Glenmark executives given the current posture of the case. It is well accepted that "an investigation terminates once suit has been filed." *United States v. Apodaca*, 251 F. Supp. 3d 1, 9 (D.D.C. 2017). "[O]nce a targeted individual has been indicted, the government must cease its use of the grand jury in preparing its case for trial." *Id.* Here, the American subsidiary was indicted almost a year ago. You could not bolster your case against it now by compelling witnesses in the United States to appear before the Grand Jury. *See Justice Manual* § 9-11.120 (after indictment, the grand jury can only be used if its investigation relates to indictment of additional defendants or additional crimes). Using an MLAT to accomplish the same thing in India is equally inappropriate. In particular, we note that you have represented to the Court that you made an MLAT request to India for explicit purpose of procuring evidence to present to the Grand Jury. DOJ-ATR-0000016-17. The time for that has passed.

Third, we fail to see how these interviews could be in furtherance of a legitimate investigation rather than the pending criminal case. But even if they were, compelling them would run head-along into the Fifth Amendment. The Glenmark executives you wish to interview have done nothing wrong, but the Fifth Amendment protects innocent as well as guilty individuals from being compelled to testify—formally or informally—against themselves. That these interviews would be conducted abroad does not eliminate that protection. *See United States v. Allen*, 864 F.3d 63, 90 (2d Cir. 2017) (applying Fifth Amendment protection from self-incrimination to an interview conducted abroad by foreign authorities at the request of the Department of Justice). The participation of U.S. agents in these interviews strengthens the applicability of that protection. *See United States v. Karake*, 443 F. Supp. 2d 8, 13 n.2 (D.D.C. 2006) (government concession that participation of U.S. investigators in interrogation of foreign nationals implicates the Fifth Amendment). Finally, lack of American citizenship does not eliminate Fifth Amendment protections. *See id.*; *U.S. v. Bin Laden*, 132 F. Supp. 2d 168, 181-182 (S.D.N.Y. 2001) (holding that two non-resident aliens interrogated abroad were protected by the Fifth Amendment from self-incrimination); *U.S. v. Rommy*, 506 F.3d 108, 131 (2d Cir. 2007) (noting that "neither in the district court nor on this appeal" did the government dispute the applicability of the Fifth Amendment to foreign nationals outside the United States).

Simply put, if you wanted to interview someone related to the pending criminal case in the United States, you could only do so if you approached them through their counsel and they agreed to a voluntary interview on such terms and conditions as you are able to negotiate. Glenmark and its executives are entitled to the same protections. Indeed, because of Glenmark's relationship with the charged American subsidiary, and the participation of senior Glenmark executives in our confidential discussions and trial preparation for this case, the legal and ethical implications of any effort to compel their interviews are particularly stark.

We request a teleconference with you ***today*** to discuss this matter further. Our hope is that after that conversation you will agree to inform CBI immediately—and confirm to us in writing—that CBI should not move forward with these interviews. Short of such action on your part, we will be forced to initiate emergency motions practice with the Court.

Sincerely,

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Beth Wilkinson
Brian Stekloff
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2001 M St. NW, 10th Floor
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
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v.	:	
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TEVA PHARMACEUTICALS USA, INC., and GLENMARK PHARMACEUTICALS INC., USA,	:	
	:	
	:	
	:	
Defendants.	:	

ORDER

Upon consideration of Defendant Glenmark's Emergency Motion for Relief from Compulsory Interviews, it is hereby **ORDERED** that said Motion is **GRANTED**. The United States and its counsel are ordered to halt all non-attorney contacts with represented parties in this matter, and to cease and desist from causing Glenmark or its senior executives to be interviewed under compulsion in India, pending any further order of the Court. The United States and its counsel are further ordered to transmit this order to their Indian counterparts. The United States and its counsel will confirm in writing to this Court that such transmission has occurred.

IT IS SO ORDERED

DATE: _____

_____
THE HONORABLE R. BARCLAY SURRICK
UNITED STATES DISTRICT COURT JUDGE