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	**:**	

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT GLENMARK PHARMACEUTICALS INC., USA'S MOTION FOR RELIEF [DKT. 117] AND DEFENDANT TEVA PHARMACEUTICALS USA, INC.'S RESPONSE [DKT. 126]

Defendants attempt to wield the ethical rules to prevent the United States from furthering its ongoing investigation into widespread antitrust violations in the generic drug industry through properly executed foreign legal assistance requests. They lack standing to challenge foreign sovereign nations' executing legal assistance requests under valid treaties. Their requested relief is unnecessary, improper, and unripe. And they prematurely challenge tolling of the statute of limitations, which has been validly tolled by order of this district's Grand Jury Supervising Judge. The United States therefore respectfully requests that the Court deny Glenmark's motion and the relief sought in Teva's response, and enter an order permitting the United States to request that the Central Authority of India resume its lawful activities under a Mutual Legal Assistance Treaty between the two nations.

FACTUAL BACKGROUND

During the course of an ongoing investigation that led to this case—and to charges against five other companies and four executives for antitrust violations in the generic drug industry—the United States sought evidence located abroad. The United States learned that

certain U.S. generic drug manufacturers with foreign-located parent companies engaged in conspiracies to fix prices, rig bids, and allocate markets, and that certain of those foreign-located parent companies and their executives likely possessed foreign-located evidence of antitrust and related crimes in the U.S. generic drug industry.

The United States submitted requests to foreign nations—India and Israel—under Mutual Legal Assistance Treaties ("MLATs"). The United States transmitted a request to India in 2018, followed by a supplemental request in 2019. The United States sought India's assistance in interviewing three executives of Glenmark Pharmaceuticals, Ltd. ("Glenmark India"), the parent company of Defendant Glenmark Pharmaceuticals Inc., USA ("Glenmark USA" or "Glenmark"). It also sought an interview with an executive in no way affiliated with Glenmark India, Glenmark USA, or Teva.[1] The United States also sought documents from Glenmark India and other companies not charged in this case. Both requests to India were submitted for the purpose of obtaining evidence for use in a criminal investigation and any related criminal proceedings.

Also in 2018, the United States transmitted a Mutual Legal Assistance ("MLA") request to Israel, seeking documents and an interview with a former executive at Teva Pharmaceuticals Industries Ltd. ("Teva Israel"), the parent company of Defendant Teva Pharmaceuticals USA, Inc. ("Teva USA" or "Teva"). After being notified that Israel was poised to execute that request, Teva Israel offered to instead voluntarily provide certain documents and make the executive available for a voluntary interview in the United States. The United States accepted Teva

[1] The request related to this executive is outside the scope of Glenmark's Motion and this Court's Order regarding the MLA interview requests.

Israel's offer and conducted the interview voluntarily with counsel present. In light of these developments, the United States requested that the Israeli authorities suspend execution of the MLA request; the United States may seek to supplement or renew the MLA request as necessary.[2]

On July 14, 2020, a grand jury sitting in the Eastern District of Pennsylvania indicted Glenmark USA for its role in a conspiracy to fix prices of certain generic drugs in the United States. On August 5, 2020, the United States spoke with counsel to Glenmark USA regarding terms of a proposed protective order. Counsel indicated that they were in communication with Glenmark India and asked that they be allowed to continue speaking with Glenmark India without, as the proposed order contemplated, needing to repeatedly obtain signed acknowledgements under Federal Rule of Criminal Procedure 6(e). The United States agreed, and Glenmark India was carved out of that portion of the protective order proposed by the parties and ultimately entered by this Court (Dkt. 47). Counsel did not indicate that they represented Glenmark India or its executives.

A grand jury returned the Second Superseding Indictment on August 25, 2020, adding Teva USA as a defendant. Responding to discovery requests by the defendants, on February 2, 2021, the United States sent a letter to counsel for Teva USA and Glenmark USA informing them of the pending MLA requests. The letter specifically stated that the United States had requested interviews with individuals associated with Glenmark India. Counsel for Teva USA

[2] For example, Teva USA has declined to certify the authenticity of its corporate records. As a result, the United States may seek to issue a supplemental request for the permissible purpose of authenticating Teva USA documents to the extent those records are located in Israel and are in the possession of its parent company.

responded to the letter with questions regarding the pending MLA requests. Counsel for Glenmark USA made no objections and requested no further information regarding the MLA requests. Counsel for Glenmark USA made no representations regarding whether they represent or have ever entered into an attorney-client relationship with Glenmark India or its senior executives.

The United States understands that the Indian authorities reached out to Glenmark India on July 26, 2021, to schedule the interviews requested in the United States' October 2019 supplemental MLA request. Specifically, based on the email attached to Glenmark's Motion, the United States understands that India's Central Bureau of Investigation ("CBI") contacted Glenmark India via email to a general inbox for the Glenmark Foundation, the charitable arm of Glenmark India, requesting that the corporation make three named executives available for interviews. The United States further understands that one of the three Glenmark India executives whose interviews were sought is no longer employed by the corporation.[3]

On July 27, counsel informed the United States that they represent Glenmark India. With respect to the individuals sought for interviews, counsel suggested the parties should proceed as if counsel represented them. The United States informed counsel that the Glenmark India executives whose interviews were sought might have sufficiently divergent interests from the company that separate counsel was needed. The next day, Glenmark filed its motion for "emergency relief." On July 29, the United States transmitted this Court's Order entered on July

[3] This Response addresses Glenmark's arguments about Pennsylvania Rule of Professional Conduct 4.2 as applied only to the executives who are currently employed by Glenmark India. Rule 4.2 does not prohibit contacts with former employees of a represented organization, regardless of their former position within a represented organization. Pa. R.P.C. 4.2, cmt. 7 ("Consent of the organization's lawyer is not required for communication with a former constituent.").

28 (Dkt. 120) to the Indian authorities, who have since confirmed that they received the request and that their investigative steps related to the MLA request are paused.

DISCUSSION

I. Defendants do not have a cognizable claim for relief.

As an initial matter, Glenmark purports to file its motion on behalf of its parent company in India, but that entity is not a defendant in this case, has not sought to intervene, and has no standing to seek relief in this Court. *See Powers v. Ohio*, 499 U.S. 400, 411 (1991) (litigants must assert their own rights and ordinarily "cannot rest a claim to relief on the legal rights or interests of third parties."). That is equally true for Teva, which has no standing to seek relief on behalf of its Israel-based parent company, which is the subject of the MLA request to Israel.

To the extent that the defendants seek relief on their own behalf, those claims are not cognizable because the treaties at issue do not create private causes of action in US courts. That is typical of MLATs, which "generally do not create private rights or provide for a private cause of action in domestic courts." *Medellin v. Texas*, 552 U.S. 491 at n.3 (2008). Like most matters of foreign affairs, the Executive and Legislative branches are responsible for managing and enforcing MLATs. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). Without clear intention on the part of the treaty drafters to create private rights of action, "only the foreign sovereign has the right to protest." *United States v. Mann*, 829 F2d 849, 852 (2d Cir. 1987). The courts exercise "great caution" when considering whether treaties create private rights of action and have recognized a presumption against doing so absent express language to the contrary. *See, e.g., Mora v. New York*, 524 F.3d 183, 202 (2d Cir. 2008) (collecting cases), *cert. denied*, 555 U.S. 943 (2008); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir.

1979) ("Like private rights under law, a treaty may confer rights capable of enforcement, but this is not the general rule.").

The Treaty Between the Government of the United States of America and the Government of the Republic of India on Mutual Legal Assistance in Criminal Matters ("US-India MLAT") contains no language creating private rights. It expressly states the opposite: "This treaty is intended solely for mutual legal assistance between the Parties [the United States and India]. The provisions of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or *to impede the execution of a request*." Treaty Between the Government of the United States of America and the Government of the Republic of India on Mutual Legal Assistance in Criminal Matters, U.S.-India, Oct. 17, 2001, S. TREATY DOC. NO. 107-3 (2002), art. 1, ¶ 4 (emphasis added). The MLAT between the United States and Israel contains a nearly identical clause. *See* Treaty Between the Government of the United States of America and the Government of the State of Israel on Mutual Assistance in Criminal Matters, U.S.-Isr., Jan 26, 1998, S. TREATY DOC. NO. 105-40 (1998), art. 1 ¶ 4.

The MLAT language is clear: a "private person" like Glenmark or Teva has no right to ask this Court to impede the execution of the United States' requests to India or Israel. *See United States v. Rommy*, 506 F.3d 108 (2d Cir. 2007) (holding US-Netherlands MLAT does not provide for private right of action), *cert. denied*, 552 U.S. 1260 (2008); *In re Request from the United Kingdom Pursuant to Treaty Between Government of U.S. and Government of U.K.*, 685 F.3d 1, 13 (1st Cir. 2012) (same under US-UK MLAT, and finding that Administrative Procedure Act does not provide standing in absence of clear intent written into treaty), *cert. denied*, 569 U.S. 942 (2013). This Court is not the appropriate forum to litigate an MLA request

being executed by a sovereign nation. Accordingly, while the United States takes no position on whether Glenmark India and Glenmark USA may attempt to obtain a remedy for their alleged injuries in India,[4] it is clear that they cannot do so in this Court. For the same reason, this Court should reject any attempt by Teva USA to litigate in this Court an MLA request being executed by Israel.

II. Glenmark USA asks for gratuitous relief that the Antitrust Division halt non-attorney contacts.

a. To date, no ethical violation was possible because the United States was unaware—until the day before Glenmark filed its Motion—that Glenmark India was represented.

Assuming arguendo that a foreign authority's sending an email to the inbox of a company located within the authority's jurisdiction could count as the United States' contacting represented persons, the applicable rule requires actual knowledge. The Pennsylvania ethical rules state that, subject to certain exceptions, "a lawyer shall not communicate about the subject of the representation with a person the lawyer *knows to be represented* by another lawyer in the matter." Pa. R. Prof'l Conduct 4.2. The United States had no knowledge that Glenmark India was represented until informed by counsel for Glenmark USA on July 27, 2021. Because the rule is premised on "actual knowledge of the fact of the representation," the United States could

[4] Requests under the US-India MLAT are executed by actors of the receiving nation in accordance with that nation's laws. Art. 5, ¶ 3. In this case, the nation of India is executing the MLA request. To the extent private actors have any right to challenge the execution of a request under the US-India MLAT, the appropriate venue to do so is the state in which the request is to be executed. This approach is consistent with the process as explained by one commentator: "[A] harmonious scheme is established: Evidence in Spain is obtained through proceedings in Spain, evidence in Great Britain is obtained through proceedings in Great Britain, and evidence in the United States is obtained through proceedings in the United States." Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Com. 1, 11 (1998) (discussing 28 U.S.C. § 1782, which may be used by United States prosecutors to execute MLA requests from foreign nations).

not have violated the rule when it transmitted an MLA request to India in 2018, when it supplemented that request in 2019, or when the Indian authorities contacted Glenmark India on July 26, 2021, seeking to execute it. Pa. R. Prof'l Conduct 4.2, cmt. 8. Counsel could have notified the United States that it represents Glenmark India as well as Glenmark USA in February 2021, when the United States told counsel that it had transmitted an MLA request seeking interviews with individuals associated with Glenmark India. But it did not. The United States did not have "actual knowledge" of the representation, nor could the representation have been "inferred from the circumstances." *Id*. The United States therefore cannot have been expected to coordinate with counsel to arrange the interviews.

This analysis makes sense in light of the purpose of Rule 4.2, which is to "prevent lawyers from taking advantage of uncounseled lay persons and to preserve the efficacy and sanctity of the lawyer-client relationship." *State Farm Mutual Automobile Insurance Company v. Sanders*, 975 F.Supp.2d 509, 511 (E.D. Pa. 2013). The contact made by the Indian authorities—which, to the United States' understanding, constituted a single email to a corporate email inbox requesting executives' availability for interviews—certainly did not "tak[e] advantage of uncounseled lay persons" or pose any potential harm to the sanctity of the lawyer-client relationship. *Id.*; *see also* Pa. R. Prof'l Conduct, Scope [14] ("The Rules of Professional Conduct are rules of reason.").

b. There is no risk related to Rule 4.2, because the United States has requested that the Indian authorities contact interviewees through their counsel.

Execution of the US-India MLAT is governed by the terms of the treaty, which is silent on whether witnesses interviewed by Indian authorities under the treaty are entitled to counsel. But regardless of what the MLAT, applicable law, and ethical rules would permit, the United

States will honor its obligations to an extent likely to exceed what is legally and ethically required. Having been informed on July 27 that Glenmark USA's counsel represents Glenmark India, the United States will not contact—or cause to be contacted—Glenmark India or its current executives except through their appropriate counsel.[5] The United States has requested that the Indian authorities not proceed with those interviews unless the interviewees have their counsel present, which moots any purported need for relief and avoids unnecessary protracted litigation.

The United States must of course remain cognizant of *all* applicable ethical rules when engaging with counsel for interviewees. The potential for liability faced by Glenmark India by and through its executives creates a potential divergence of interests between those executives and their employer. *See* Pa. R. Prof. Conduct 1.7 (noting that a lawyer may not represent a client if the representation involves a concurrent conflict of interest, absent informed consent of the affected clients in certain specified circumstances). As the United States explained to counsel on July 27, it is common practice for employers to obtain separate counsel for their employees when this situation arises to avoid any appearance of impropriety or conflicts of interest.

No violation of the Pennsylvania Rules of Professional Conduct 4.2 has occurred, and no violation will occur, so there is no relief to grant related to *ex parte* contact with represented parties.

III. Glenmark's requested relief that this Court enjoin the United States from "causing compulsory interviews" is unnecessary because no compulsory interviews will occur, and regardless is meritless and unripe.

[5] As noted above, former employees of a represented organization are not within the scope of Rule 4.2. Pa. R. Prof'l Conduct 4.2, cmt. 7. In addition, "[i]f a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule." *Id*.

Although the United States continues to seek additional information to confirm the specific procedures governing the interviews,[6] it understands that any interviews conducted with Glenmark India executives under the United States' MLA request will be voluntary, not compulsory. Accordingly, Glenmark USA's request that this Court enjoin the United States from "causing compulsory interviews," Motion at 3, is unnecessary. But even if the interviews were compulsory, that would not violate the executives' Fifth Amendment rights and any claim to the contrary Glenmark asserts is untimely.

Glenmark USA's assertion that conducting the interviews would infringe on the executives' Fifth Amendment privileges ignores the treaty, which provides a process by which the privilege will be protected. If an interviewee asserts "a claim of immunity, incapacity, or privilege under the laws of [the United States], the evidence shall nonetheless be taken and the claim made known to the [U.S. Department of Justice] for resolution by the authorities of that state." US-India MLAT, Art. 8, ¶ 4. This clause ensures that Indian authorities do not bear the burden of interpreting the United States Constitution, just as this Court does not bear the burden of interpreting Indian law.

The treaty acknowledges that an interviewee may invoke a privilege and will give evidence after doing so, and preserves the claim of privilege for resolution in accordance with the laws of the nation that requested the evidence be obtained. In the United States, the privilege against self-incrimination is a "fundamental trial right" of criminal defendants in United States

[6] Because of the significant time lag customarily associated with communications between the United States and foreign governments, the United States sought an extension of time to file this response (Dkt. 123) while it requested information from the Indian authorities about the procedures they would follow when conducting the interviews.

courts, and "a constitutional violation only occurs at trial." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); *see Chavez v. Martinez*, 538 U.S. 760, 767 (2003) ("Statements compelled by police interrogations of course may not be used against a defendant at trial … but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs."). Glenmark USA cannot litigate speculative trial rights of its parent company's executives on their behalf. Those individuals have not been interviewed and do not yet have any Fifth Amendment claims.

Even if the executives were compelled to participate in interviews and gave statements, were charged and extradited to the United States, and ultimately went to trial, any claim under the Fifth Amendment would only be timely upon the United States' attempting to introduce their statements as evidence against them in that trial. Only then could a court examine the admissibility of such statements, for example as Glenmark mentions, under *United States v. Allen*, 864 F.3d 63, 90 (2d Cir. 2017). If a court were to approach the issue as in *Allen*, then maybe a *Kastigar* hearing would be appropriate. Alternatively, as *Allen* noted, a court might examine statements disclosed at the request of foreign actors using a due-process analysis. *See id*. at n.121 (citing *United States v. Ghailani*, 743 F.Supp.2d 242 (S.D.N.Y. 2010)); *see Ghailani* at 258 (identifying evidence obtained through involuntary confession to U.S. and foreign actors overseas as a due process issue). Someday such a claim might be timely made and a court might need to examine it, but here no compulsion has occurred, no coercion has been applied, no valid claim of privilege has been made—indeed, no statement has been uttered—so this Court need not entertain such speculative remedies.

Moreover, Glenmark USA has no standing to bring this claim on behalf of the Glenmark

India executives who would be sitting for interviews. It is a long-established principle that the constitutional privilege against self-incrimination is "essentially a personal one, applying only to natural individuals." It "cannot be utilized by or on behalf of any organization, such as a corporation." *Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288-89 (1968) (citations omitted); *see Conestoga Wood Specialties Corp. v. Secretary of U.S. Dept. of Health and Human Services*, 724 F.3d 377, 383 (3d Cir. 2013) (noting that corporations are not entitled to the privilege against self-incrimination because it is a "purely personal" privilege) (rev'd on other grounds) (*citing First Nat'l Bank of Boston v. Belloti*, 435 U.S. 765, 778 n.14 (1978)); *Powers*, 400 U.S. at 411 (litigant must assert "his or her own legal rights and interests"). The fact that Glenmark USA appears to have no employment relationship with these executives further discredits its argument, but even Glenmark India lacks standing to invoke this privilege on behalf of its employees; the executives themselves must be the ones to invoke their privilege against self-incrimination if they so choose.

IV. The United States' use of MLA requests is appropriate at this stage in the proceedings.

The United States' investigation remains ongoing. The use of MLA requests to further that ongoing investigation is appropriate, as is clear from the MLAT, which states that the United States and India entered into the treaty with the express purpose of assisting one another with the "investigation, prosecution, and prevention of offenses." US-India MLAT, pg. 1. This assistance may include "taking the testimony or statements of persons" which may "be compelled, if necessary."[7] Art. 8, ¶ 1.

[7] As previously mentioned, the United States understands from CBI that the interviews will *not* be compulsory.

Glenmark baldly asserts that the United States' MLA request to India had the sole purpose of furthering an investigation into an indicted defendant. Even if it did, that would not only be permissible, it is specifically contemplated by the treaty. The US-India MLAT states that it was intended to provide a procedure for the nations to secure assistance in connection with "the investigation, prosecution, prevention and suppression of offenses, and in proceedings related to criminal matters." US-India MLAT art. 1, ¶ 1. Accordingly, the treaty itself confirms that its use is not restricted to the pre-indictment context. Courts follow the "clear statement of the intent of the treaty drafters," because to do otherwise would "imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Mora v. New York*, 524 F.3d 183, 201 (2d Cir. 2008), *cert. denied*, 555 U.S. 943 (2008); *see Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *United States v. Schneider*, 817 F.Supp.2d 586, 2019 WL 424637 at *17 (E.D. Pa. Sept. 6, 2019), *aff'd*, 801 F.2d 186 (3d Cir. 2015).

Glenmark offers a confused analogy between the MLA process and a grand jury. The rule that grand juries cannot be used for the "sole or dominant purpose of conducting discovery or preparing for trial under a pending indictment" exists because grand juries "operat[e] peculiarly under court supervision." *United States v. McLaughlin*, 910 F.Supp. 1054, 1062 (E.D. Pa. 1995); *Payden v. United States*, 767 F.2d 26, 29 (2d Cir. 1985) (citations omitted). In contrast, MLATs are broader tools provided to the executive branch of the government. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *see also* US-India MLAT, Art. 1, ¶ 4; Art. 2, ¶ 2. Therefore, unlike the use of a grand jury, there is no rule limiting the submission or execution of MLA requests by the United States to post-indictment investigations. *See United States v. Blech*, 208 F.R.D. 65, 68 (S.D.N.Y. 2002) (denying defense motion to restrict United

States' use of interviews conducted post-charging via US-Switzerland MLAT). Glenmark cites *United States v. Apodaca*, 251 F.Supp.3d 1 (D.D.C. 2017) for the proposition that the United States must cease all forms of compulsory process upon charging. But *Apodaca* is irrelevant here. Not only did the court in *Apodaca* ultimately permit post-indictment enforcement of administrative subpoenas, but it did so applying grand jury rules, which do not apply to the execution of international treaties.

V. Teva's Response to Glenmark's Motion Is Based on a Counterfactual Premise and a Legal Argument Contrary to 18 U.S.C. § 3292

Teva's Response in Support of Glenmark's Emergency Motion, which seeks analogous relief from the Court, is improper and unwarranted. As the United States made Teva aware in response to questions its counsel posed after Glenmark filed its motion, the Antitrust Division has no pending MLA requests for interviews of Teva Israel or Teva USA individuals. Teva therefore has no basis on which to seek any relief from the Court relating to any non-existent pending interviews. Teva advances a factually and legally baseless critique of the Justice Department,[8] indirectly challenging the charges against Teva on statute of limitations grounds without moving to dismiss. But contrary to Teva's taking aim at the Department's motives in seeking foreign assistance in its investigation, case law is clear that the United States' requests for foreign government assistance via MLA requests—and the reasons for those requests—are not subject to judicial inquiry. No relief is warranted.

a. Teva seeks relief it knows is unnecessary.

[8] *See United States v. Bases*, No. 18 CR 48, 2020 U.S. Dist. LEXIS 1850989, *10-11 (N.D. Ill., October 6, 2020); *United States v. Vorley*, No. 18 CR 35, 2020 WL 5512134 (N.D. Ill. Sept. 12, 2020) (denying similar attempts to attack DOJ's use of MLAT process and rejecting allegations of prosecutorial misconduct).

The United States informed counsel on July 30, 2021, that there were no pending interviews in Israel, which Teva acknowledges in its Response at 5. Despite being informed that the Antitrust Division has no pending interview requests of Teva US or Teva Israel company executives, Teva claims to need relief from the Court to stop such interviews from proceeding. The absurdity of Teva's claim illuminates the pretextual nature of its Response.

Moreover, Teva has been aware for two years that the Antitrust Division had sought assistance from the Israeli authorities in securing foreign-located evidence from Teva Israel, including an interview of a former Teva Israel executive. Teva acknowledges that former CEO Erez Vigodman submitted to an interview in the United States in 2019 (Teva's Response at 4) but fails to inform the Court that in August 2019, Teva counsel learned that Israeli authorities were prepared to execute an MLA request for that interview, and at that point offered to make the witness available for a voluntary interview in the United States. Counsel also voluntarily produced relevant documents to the United States, after being informed that the MLA request sought those foreign-located documents.

Teva knows that no interviews of Teva US or Teva Israel employees have been conducted or are pending in Israel. Teva has known of the MLA request since August 2019, including that the request sought an interview with a former Teva Israel executive. The situation from which Teva claims to need relief simply does not exist.

b. To the extent Teva's response is an attempt to challenge the statute of limitations, that issue is not properly before the Court.

Teva cannot challenge the indictment on statute of limitations grounds without moving to

dismiss.[9] To allow otherwise would circumvent Rule 12 of the Federal Rules of Criminal Procedure and Rule 12.1 of the Local Rules of the Eastern District of Pennsylvania. Teva acknowledges that it anticipates moving to dismiss on these grounds "at the appropriate time," Response at 5, and it should not be permitted an end-run around filing a motion to dismiss, which would deprive the Court of full briefing on the issue.

c. So long as the United States meets the statutory requirements of 18 U.S.C. § 3292, its motivations in seeking foreign assistance through an MLAT are irrelevant.

Congress has authorized the extension of statutes of limitation when the United States makes an official request for the production of evidence located abroad "without regard to the government's need for that evidence or its diligence in pursuing that evidence." *United States v. Vorley*, No. 18 CR 35, 2020 WL 5512134 at *8 (N.D. Ill. 2020); *see* 18 U.S.C. § 3292. Teva baldly asserts that the Division's 2018 MLA request to Israel was "merely to evade" the statute of limitations. Response at 5. Leaving aside that Teva's Response to Glenmark's motion is an improper place to address the issue, case law is clear that whether the United States uses an MLA request as a pretext is not a proper inquiry in relation to analyzing the statute of limitations.

As the Third Circuit set forth in *United States v. Atiyeh*, 402 F.3d 354, 363 (3d Cir. 2005), "[t]here are three distinct events contemplated by § 3292 with regard to an order suspending the statute of limitations[:] . . . (1) the Government's request to a foreign country for evidence located in that country (made under a Mutual Legal Assistance Treaty ('MLAT') . . .

[9] Likewise, both Glenmark and Teva untimely and improperly raise "constructive amendment" challenges to the Second Superseding Indictment in their Reply and Supplemental Response briefs, respectively. The Surreply accompanying the United States' Motion for Leave to File Surreply (Dkt. 132) briefly addresses this issue.

(2) the Government's application to the Grand Jury Supervising Judge to suspend the statute of limitations, which must be made 'before [the] return of an indictment'; and (3) the Supervising Judge's action on the Government's application." (*citing* 18 U.S.C. § 3292(a)(1)), *cert. denied*, 546 U.S. 1068 (2005).[10]

So long as the statutory requirements of 18 U.S.C. § 3292 are met, the United States' motivation for the request for assistance from a foreign government is irrelevant:

> "It follows then that, so long as the government has established the two statutory requirements—presence of information abroad and a request for it—the government's motivation behind the MLAT request is not relevant to whether the applicable statute of limitations should be tolled; it must."

Bases, 2020 U.S. Dist. LEXIS 1850989, *10-11, *citing United States v. Chen*, No. 1–12–CR–350–03–SCJ, 2014 WL 5307518 at *13 (N.D. Ga. Oct. 15, 2014) (denying defendant's challenge to § 3292 tolling order, noting that the defendant "offers no case law supporting her argument that a pretextual MLAT request voids any otherwise valid request."); *see also United States v. Kachkar*, No. 16-20595-CR, 2018 U.S. Dist. LEXIS 218453 (S.D. Fla. Dec. 19, 2018) (rejecting that a tolling order under § 3292 is invalid even assuming that the government's pursuit of foreign evidence "was merely a pretext, designed to forestall the expiration of the statute of limitations").

Exhibit A (filed under seal) to Teva's Response makes plain that the United States followed the required procedures of 18 U.S.C. § 3292. The United States applied to a court in this district for an order suspending the statute of limitations pursuant to 18 U.S.C. § 3292 (filed

[10] In *Atiyeh*, the Third Circuit addressed whether an order suspending the statute of limitations under 18 U.S.C. § 3292 is valid where the government's application for suspension is filed after it has received all requested foreign evidence from foreign authorities, *see* Atiyah at 362-63, which is not at issue here.

ex parte and under seal), which the court granted. In reviewing that application, the court's role was "limited to two considerations: 1) whether an official request was made; and 2) whether that official request was made for evidence that reasonably appears to be in the country to which the request was made." *United States v. Broughton*, 689 F.3d 1260, 1273 (11th Cir. 2012). A "district court's inquiry is constrained by the boundaries of the two elements required by Section 3292." *Id.* at 1273. There is no further inquiry into possible subjective motives involved in seeking the order; once the elements are satisfied, the tolling order is proper. *Id.* ("If both of those considerations are met, the statute of limitations 'shall' be suspended."); *see also United States v. Benscher*, No. 6:15-cr-221-ORL-37DAB, 2016 U.S. Dist. LEXIS 7688 *14-15 (M.D. Fla. 2016) (*citing Broughton* in finding that a "§ 3292 decision depends on only two inquiries: (1) whether an official request was made; and (2) whether that official request was made for evidence that reasonably appears to be in the country to which the request was made. . . . Upon satisfaction of these two requirements, the statute of limitations 'shall be suspended' and there are no 'necessary evidence' or 'good faith' requirements for a § 3292 request.").

Here, Teva has not even suggested a reason to question whether the United States failed to satisfy the two statutory elements or whether the court failed to conduct the requisite inquiry in reviewing the application and entering the § 3292 order based on the Israel MLA request. To the contrary, the four corners of the 2018 tolling request make apparent that the elements of § 3292 were satisfied (*see* Exhibit A to Teva's Response). The Court should reject Teva's improper request to inquire into the United States' motivations for making the request.[11]

[11] Glenmark also questions "whether the requests were a pretextual effort to toll the statute of limitations" but indicates it will brief that issue at a later time. Motion at 3 n.2. When it does, its claim will be meritless for the same reasons.

CONCLUSION

For the foregoing reasons, the United States of America respectfully requests that this Court deny Glenmark Pharmaceuticals Inc., USA's Emergency Motion for Relief from Compulsory Interviews and Related Misconduct by the Antitrust Division (Dkt. 117) and Teva's request for relief in its Response thereto (Dkt. 126).

Dated: August 16, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this pleading was electronically filed, and was thus served on this the 16th day of August, 2021 on defense counsel:

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