COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	
COLORADO COURT OF APPEALS Case No. 12CA1251	
DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Case No. 2011 CV 2218 Hon. Ann B. Frick	▲ COURT USE ONLY ▲
Plaintiffs/Respondents: WILLIAM G. STRUDLEY and BETH E. STRUDLEY, Individually, and as the Parents and Natural Guardians of WILLIAM STRUDLEY, a minor, and CHARLES STRUDLEY, a minor, v. **Defendants/Petitioners:** ANTERO RESOURCES CORPORATION, ANTERO RESOURCES PICEANCE CORPORATION, CALFRAC WELL SERVICES CORP, AND FRONTIER DRILLING LLC	Case No. 2013SC576
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BRIEF OF AMICUS CURIAE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 32, and 53. Specifically, I certify that this Amicus Brief in Support of Petition for Writ of Certiorari (including headings and footnotes but excluding the caption, table of contents, table of authorities, signature blocks and certificate of service) contains 3,788 words.

s/ Jared R. Butcher
Jared R. Butcher

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INTEREST OF THE AMICUS CURIAE

Amicus curiae American Petroleum Institute ("API") submits this brief in support of the Defendants' Petition for Writ of Certiorari. This Court should grant review of the court of appeals' published opinion to clarify that so-called "*Lone Pine* orders" are available to Colorado trial courts as a general case-management tool in appropriate matters.

API is a national trade association representing more than 500 companies in the oil and natural gas industry, including companies operating and doing business in Colorado. Its members range from the largest major integrated oil companies to the smallest of independents, and include some of the largest producers of oil and natural gas in Colorado, as well as other producers, refiners, suppliers, pipeline operators, marine transporters, and service and supply companies that support all segments of the industry. The industry comprises 8% of the U.S. economy, supports 9.8 million domestic jobs, and delivers to the U.S. government more than $86 million per day in revenue. Since 2000, the industry has invested over $2 trillion in U.S. capital projects to advance all forms of energy, including alternative energy. API's members have invested a substantial amount of capital into Colorado in order to develop this state's natural resources. Together with its member companies, API is committed to ensuring a strong, viable U.S. oil and

natural gas industry capable of meeting the energy needs of our nation in an efficient and environmentally responsible manner.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should review the court of appeals' categorical rejection of *Lone Pine*-type case-management orders as a tool for district courts to use in appropriate cases. Whether the Court grants review because this is an issue of first impression, *cf.* C.A.R. 49(a)(1), or because the court of appeals' decision is inconsistent with this Court's recent decisions recognizing the trial courts' authority to control their dockets and manage cases, C.A.R. 49(a)(2), or because this Court should exercise its powers of supervision over the trial courts' operations, C.A.R. 49(a)(4), the Court should take in this case what will likely be its only opportunity to ensure that district courts have the tools they need to effectively manage complicated cases for the benefit of both the parties and the judicial system.

I. The Ability of a Trial Court to Manage Complicated Cases in Stages Is Critical to Ensuring Effective and Efficient Resolution of Cases.

A trial court's ability to use a variety of tools to manage its docket within the broad outlines dictated by the Colorado Rules of Civil Procedure is essential to allowing cases to be appropriately decided on their merits while simultaneously reducing unnecessary burdens on the parties and the courts. The key dispositive rules—Rule 12(b)(6) motions to dismiss and Rule 56 motions for summary

judgment—have well-defined, one-size-fits-all standards for every case, from the straightforward to the complicated. But courts have recognized the need for additional tools that enable them to manage different cases differently, while still preserving the rights of the parties. A complicated case must often be broken down into smaller portions to be manageable.

Courts from every jurisdiction have recognized the need and the ability of trial courts to efficiently manage, evaluate, and test cases, reducing unnecessary expenditures of time, effort, and money. As this Court recently emphasized in *DCP Midstream, LP v. Anadarko Petroleum Corp.*, Colorado law reflects "an evolving effort to require active judicial management of pretrial matters to curb discovery abuses, reduce delay, and decrease litigation costs." 303 P.3d 1187, 1190, ¶ 4 (Colo. 2013). Citing the consequences of delay for parties and judicial resources, the Court recognized that "[a]ctive judicial management is necessary to address these problems, and our rules have evolved to stress this principle." *Id.* at 1194, ¶ 27. It is critical to tailor the rules to each case, the Court stressed, because "each case is unique and deserves unique treatment," and "the reasonable needs of the case will necessarily vary, depending on the subject matter and complexity of the case, the nature of the parties' claims or defenses, and the discovery necessary to resolve the dispute." *Id.* at 1191, ¶ 8.

Trial courts have a variety of tools to encourage the early evaluation, streamlining, and screening of cases before the completion or even beginning of discovery. The most obvious tool is the case-management order under Colorado Rule of Civil Procedure 16(a). As discussed below, the type of case-management order that has become known as a *Lone Pine* order is merely a modified form of order that has been developed to address particular characteristics of certain kinds of cases. Other tools for early judicial intervention and management include Rule 11 sanctions, motions to dismiss under Rule 12(b)(6), and disclosure obligations under Rule 26(a)(1). For example, Colorado Rule of Civil Procedure 11 requires that, "before a pleading is filed, there must be a reasonable inquiry into the facts and the law," and, "based on this investigation, the signer must reasonably believe that the pleading is well grounded in fact." *Stearns Mgmt. Co. v. Mo. River Servs., Inc.*, 70 P.3d 629, 632 (Colo. Ct. App. 2003).

In addition, Rule 12(b) has increasingly been used to test vague allegations at the threshold stage of the pleadings. The pending petition for certiorari in *Medical Lien Management, Inc. v. Allstate Insurance Co.*, 2013 WL 2450632 (Colo. App. June 6, 2013), asks this Court to determine whether, under Rule 12(b), Colorado will follow the more-exacting pleading standard adopted by the U.S. Supreme Court, which imposes a duty on the trial court to inquire not only into

whether a claim is possible, but also into whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1249 (2009) (quotation omitted).

And even if a claim survives a motion to dismiss, disclosure obligations under Rule 26(a)(1) are a critical means of testing whether there is indeed a factual basis for the claims. Disclosure obligations do not turn on the completion or commencement of discovery, and a party "is not excused from making such disclosures because the party has not completed investigation of the case." Colo. R. Civ. P. 26(a)(1)(D). As shown below, case-management orders have been developed by courts as a logical outgrowth or combination of these other procedures.

II. Courts Across the Nation Have Utilized *Lone Pine* Case-Management Orders as a Tool in Toxic- and Mass-Tort Cases.

As one solution to the growing time and expense devoted to cases involving multiple and complicated questions, many of which can be decided on a single issue or narrow range of issues, many jurisdictions have employed case-management orders often termed "*Lone Pine*" orders. The use of such orders is a reaction to the particular concerns presented by toxic- and mass-tort cases. They have steadily been adopted throughout the country, including under the Federal

Rules of Civil Procedure, and authority for their use has been grounded in a variety of rules of procedure, common-law doctrines, and statutes.

A. Toxic- and mass-tort cases, by their nature, present particular case-management concerns.

Toxic- and mass-tort cases present unique case-management concerns. First, they increasingly present complicated issues, thus generating greater expense and docket-management concerns. The cases sometimes, but not always or necessarily, involve many parties on the plaintiffs' or defendants' side.[1] Such cases often feature broad allegations of liability that are conclusory and lacking in detail, or are based on the parties' beliefs or dramatic human situations rather than competent evidence. Allegations of injuries may include every conceivable injury without regard to exposure or actual liability, and without specific information relating to each plaintiff.

Parties and the courts are often are required to spend enormous amounts of money, time, and energy litigating these claims with respect to every element and defense, even though one issue is often dispositive.[2] For example, a toxic-tort case

[1] *E.g.*, *Pinares v. United Techs. Corp.*, 2011 WL 240512, at *1-2 (S.D. Fla. Jan. 19, 2011) (issuing *Lone Pine* order despite only two plaintiffs because case "will require as much effort as its companion" class action).

[2] *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 151 (2d Cir. 1987) (continued litigation would cost millions); *Renaud v. Martin Marietta Corp.*,

alleging that exposure to a given chemical that allegedly contaminated a plaintiff's property caused the plaintiff to contract cancer might be decided on the issue that the chemical is not a carcinogen, or that the plaintiff cannot provide any evidence of contamination on his or her particular parcel of land. While the case may be capable of resolution on this issue, such a case will not be filtered out at the motion-to-dismiss stage so long as the complaint contains adequate allegations. If such a case contains multiple plaintiffs and defendants, or asserts exposure to many chemicals, or involves multiple technical, medical, and scientific issues, or requires multiple experts, expensive, time-consuming, and complex discovery of all of the parties would be required before this issue could reach summary judgment. As the New Jersey court noted in *Lone Pine*, many defendants understandably will settle such claims, even if meritless, rather than spend the hundreds of thousands of dollars necessary for discovery.[3]

B. *Lone Pine* orders have been developed in response to concerns about mass- and toxic-tort cases.

Lone Pine orders take their name from the New Jersey case of *Lore v. Lone Pine Corp.*, which involved claims by plaintiffs alleging that landfill-polluted

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749 F. Supp. 1545, 1547 (D. Colo. 1990) (trial would take six to nine months to complete).

[3] *Lore v. Lone Pine Corp.*, 1986 WL 637507, at *4 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

waters caused personal injury and property damage.[4] The court's case-management order required plaintiffs to document certain "basic facts" regarding their claims, including each plaintiff's individual exposure and reports from treating physicians or other experts.[5] Many of the facts were within the particular control of the plaintiffs, or could be obtained by them without discovery.[6] When plaintiffs failed to comply, the court dismissed the case.

Since then, other federal and state courts around the country have used variations of the *Lone Pine* management order as tools for cases posing multiple factual questions, or recognized the ability of the trial court to do so.[7] While some

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[4] *Id.* at *1.

[5] *Id.* at *1-2.

[6] *Id.* (facts included personal exposure, injury, and causation, and property's location, diminished value, and causation).

[7] *See, e.g.*, *In re Asbestos Prods. Liab. Litig. (No. VI)*, 718 F.3d 236, 240-41 & n.2 (3d Cir. 2013); *Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011); *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000); *In re Fosamax Prods. Liab. Litig.*, 2012 WL 5877418, at *2 (S.D.N.Y. Nov. 20, 2012); *Burns v. Universal Crop Protection Alliance*, 2007 WL 2811533, at *3 (E.D. Ark. Sept. 25, 2007); *Baker v. Chevron USA, Inc.*, 2007 WL 315346, at *1 (S.D. Ohio Jan. 30, 2007); *Cottle v. Superior Court*, 5 Cal. Rptr. 2d 882, 886-87 (Ct. App. 1992) (recognizing authority to enter order); *Atwood v. Warner Elec. Brake & Clutch Co.*, 605 N.E.2d 1032, 1036 (Ill. App. Ct. 1992); *In re Love Canal Actions*, 547 N.Y.S.2d 174, 179 (Sup. Ct. 1989); *Penix v. Avon Laundry & Dry Cleaners*, 2009 WL 792348, at *5 (Ohio Ct. App. Mar. 26, 2009); *Martinez v. City of San Antonio*, 40 S.W.3d 587, 591 (Tex. App. 2001); *Kinnick v. Schierl, Inc.*, 541 N.W.2d 803, 806 (Wis. Ct. App. 1995); *see also* M. Bernadette Welch, Annotation, *Propriety and Application of Lone Pine Orders Used to Expedite Claims and*

courts have declined to issue *Lone Pine* orders under the facts of the case, they have done so in the exercise of discretion and applying the doctrine, not because of a perceived lack of authority.[8] A general form of such orders could require documentation by a set date of (1) the identity of each substance to which the plaintiff was exposed, (2) the precise condition from which the plaintiff allegedly suffers, and (3) some modicum of scientific evidence supporting causation.[9] The latter may include physician, scientist, or other expert affidavits as to exposure and causation, or documentary or expert proof that the individual defendant made or sold the allegedly injurious product.[10] Submission of some minimal level of proof that there has been some exposure to a substance that is capable of causing the disease or injury that the plaintiff has required by the court allows case to proceed

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Increase Judicial Efficiency in Mass Tort Litigation, 57 A.L.R.6th 383 (2010) (collecting cases).

[8] *See, e.g.*, *Abrams v. Ciba Specialty Chems. Corp.*, 2008 WL 4710724, at *5 (S.D. Ala. Oct. 23, 2008) (order unnecessary "since this case is going to proceed with a test group"); *Ramos v. Playtex Prods., Inc.*, 2008 WL 4066250, at *7 (N.D. Ill. Aug. 27, 2008) (declining to enter because the plaintiffs' claims were based on risk of exposure rather than actual exposure); *Kinnick*, 541 N.W.2d at 806-07 (trial court acted within discretion by denying order although it had authority to enter one).

[9] *E.g.*, *Avila*, 633 F.3d at 833; *McManaway v. KBR, Inc.*, 265 F.R.D. 384, 385 (S.D. Ind. 2009).

[10] *E.g.*, *Cottle*, 5 Cal. Rptr. 2d at 897.

to next stage of discovery,[11] while failure to make the required showing may preclude evidence on the pertinent issue at trial or lead to dismissal of the claims through a variety of procedural mechanisms, whether before any discovery or after limited, targeted discovery.[12]

Courts use *Lone Pine* orders because they conserve judicial resources and protect the interests of all litigants through effective case management, including such techniques as phased, targeted discovery on critical elements of claims.[13] The orders do not prejudice plaintiffs, as they require evidence that the plaintiffs should and have had before suing, and would not need discovery to obtain—including evidence about their own conditions and property that they may uniquely control. As one court explained, "Plaintiffs do not need discovery to be able to state

[11] *E.g.*, *Baker v. Anschutz Exploration Corp.*, 2013 WL 3282880, at *5 (W.D.N.Y. June 27, 2013) (expert reports that "are far from models of clarity" met *Lone Pine* order's "essential requirements," and deferring issue of admissibility).

[12] *E.g.*, *Acuna*, 200 F.3d at 338 (recommending dismissal); *Martinez*, 40 S.W.3d 587 (affirming striking of causation experts and entry of summary judgment because of absence of evidence).

[13] *E.g.*, *Acuna*, 200 F.3d at 340 ("*Lone Pine* orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation.").

whether their own properties are contaminated. Plaintiffs do not need discovery to state the factual basis on which they filed this action."[14]

Such orders may also advance case assessment by focusing the parties and the court on key scientific and technical issues, and this may facilitate the resolution of the case without the need for a long trial, whether by motion, voluntary dismissal, settlement, or another mechanism.[15] *Lone Pine* orders can streamline the remaining litigation by screening out individual plaintiffs or defendants, or establishing the pertinent nexus between particular plaintiffs and particular defendants.[16] And by sequencing discovery, the court may avoid unnecessary discovery and motion practice on issues that, because of the lack of sufficient evidence on key matters as causation, will never have to be decided.

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[14] *Adinolfe v. United Techs. Corp.*, 2011 WL 240504, at *1 (S.D. Fla. Jan. 18, 2011); *see also Acuna*, 200 F.3d at 340 (order required information that the plaintiffs should have had before filling their claim).

[15] *See McMunn v. Babcock & Wilcox Power Generation Grp., Inc.*, 896 F. Supp. 2d 347, 351 (W.D. Pa. 2012) (prohibiting the plaintiffs "from asserting any theory of exposure, dose or causation that was not specifically stated in their response to the [*Lone Pine* order] and supported by admissible evidence").

[16] *See Asbestos Prods.*, 718 F.3d at 240-41 (3d Cir.) (*Lone Pine* order streamlined litigation and allowed meritorious claims to advance while weeding out unsupported claims); *Burns*, 2007 WL 2811533, at *3 (because case involved several defendants, and because a plaintiff must introduce sufficient evidence to show that a particular defendant's product was a substantial factor in causing the injury, a preliminary showing on causation was necessary for efficient case management).

Neither plaintiffs nor defendants benefit from going through lengthy and gratuitous litigation procedures.

C. Courts have found authority for issuing *Lone Pine* orders in a variety of rules and principles.

The courts have grounded these case orders in a variety of rules, including the Federal Rules of Civil Procedure and other state rules that, like Colorado's, generally track the federal rules. For example, some courts have looked to pre-filing Rule 11 obligations, as *Lone Pine* orders "essentially require[] that information which plaintiffs should have … before filing their claims pursuant to [Rule] 11(b)(3)."[17]

Another basis for *Lone Pine* orders in federal courts has been Rule 16, which grants trial court judges wide discretion in managing discovery.[18] State courts have

[17] *Acuna*, 200 F.3d at 340.

[18] *See Acuna*, 200 F.3d at 340 ("In the federal courts, [*Lone Pine*] orders are issued under the wide discretion afforded district judges over the management of discovery under Fed. R. Civ. P. 16."); *Avila*, 633 F.3d at 833-34 ("No basis appears for us to cordon off one type of order—a prima facie order on exposure and causation in toxic tort litigation—from the universe of case management orders that a district court has discretion to impose.").

also grounded their authority to issue such orders under their cognate provisions to Rule 16 of the Federal Rules.[19]

Alternatively, some courts order production of expert reports under Rule 26(a)(2)'s expert-disclosure requirement.[20] Courts have reasoned that a *Lone Pine* order is "a minimal showing consistent with Rule 26 that there is some kind of scientific basis" supporting the claims at issue.[21] Courts have also grounded their ability to require a preliminary showing of some key elements of the plaintiffs' case in the trial court's duty under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), to determine whether an expert's testimony is valid and reliable. The Ninth Circuit, for example, has reasoned that "a case management order that focuses on key issues for expert opinion is in aid of the *Daubert* responsibilities the district judge must discharge."[22]

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[19] *See, e.g.*, *Schelske v. Creative Nail Design, Inc.*, 933 P.2d 799, 801, 802 (Mont. 1997) (holding that "[t]he District Court's issuance of the [*Lone Pine* order] was wholly within its discretion as a management tool contemplated by Rule 16").

[20] *E.g.*, *Fosamax*, 2012 WL 5877418, at *4 (noting that order was issued pursuant to Rule 16 and Rule 26).

[21] *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E.D. La. 2008),

[22] *E.g.*, *Avila*, 633 F.3d at 834 (9th Cir. 2011). While Colorado's test for the admissibility of scientific evidence is "reliability and relevance," and is therefore broader than the federal rule, factors similar to those addressed in a *Daubert* analysis may be considered in determining admissibility, and thus would be additional authority for issuing a case-management order. *See People v. Schreck*, 22 P.3d 68, 78 (Colo. 2001).

Other courts—and particularly state courts—have cited the inherent ability of trial courts to develop innovative and effective ways of managing litigation and controlling their dockets.[23] As one New York court has reasoned, "the Judiciary Law encourages judicial resourcefulness in crafting appropriate remedies in the absence of express authority."[24] All of these grounds for *Lone Pine* orders are rooted in the principle, recognized by this Court in *DCP Midstream*, that there should be "an evolving effort to require active judicial management of pretrial matters to curb discovery abuses, reduce delay, and decrease litigation costs."[25] The grounds are also consistent with this Court's consistent recognition of the inherent authority of the trial court to "enable a court to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective." *Pena v. District Court*, 681 P.2d 953, 956 (Colo. 1984) (quotation omitted).

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[23] *E.g.*, *Cottle*, 5 Cal. Rptr. at 886-87 ("California courts have broad and inherent power to control matters before them…. Furthermore, courts have inherent equity, supervisory and administrative powers, as well as inherent powers to control litigation before them."); *Love Canal*, 547 N.Y.S.2d at 177 ("[A] court may invoke its inherent authority to deal with cases before it (as here) in any appropriate manner, even in the absence of any direct grant of legislative or administrative power." (quotation omitted)).

[24] *Love Canal*, 547 N.Y.S.2d at 177.

[25] 303 P.3d at 1190, ¶ 4.

III. The Court of Appeals' Decision Effectively Makes *Lone Pine* Orders Unavailable in Colorado.

The availability of *Lone Pine* orders is an issue of first impression under Colorado law that deserves this Court's consideration. The court of appeals' opinion, however, will likely frustrate any ability of parties to bring the issue to this Court in future cases. There are likely to be a variety of mass-tort, toxic-tort, or other types of cases in Colorado in which litigants would otherwise seek, and the trial courts would otherwise enter, *Lone Pine* orders.

Although the court of appeals is a "divisional" court, *see* C.R.S. § 13-4-106, and the decision below will not bind other panels of that court, it is unlikely, as a practical matter, that there will be further opportunities for this Court or the court of appeals to revisit the propriety of *Lone Pine* orders. The court of appeals flatly precluded *Lone Pine* orders and provided no guidance for trial courts or parties in identifying where they might be permissible. *See, e.g.*, Op. at 22, ¶ 32 ("[W]e conclude that that discretion is not so broad as to allow courts to issue *Lone Pine* orders."); *id.* at 26, ¶ 39 (*Lone Pine* orders are "not otherwise provided for under Colorado law"). The court of appeals' categorical rejection of such orders makes Colorado an outlier, if not unique.

As a result, it is very unlikely that trial courts will enter such orders even in cases ideally suited to them. This chilling effect on the trial courts in issuing *Lone*

Pine orders, and the absence of any vehicle for immediately appealing as of right the denial of a *Lone Pine* order, may make the issue effectively unreviewable in subsequent cases.

This Court alone can provide clear guidance regarding the flexibility trial courts may have in managing cases, and the circumstances in which *Lone Pine* orders may, or may not, be appropriate. The Court can fashion standards and guidelines that offer trial courts valuable tools for controlling dockets, while ensuring that all parties have a fair chance to litigate their disputes on the merits, without undue delay or expense. The Court should take this opportunity to provide that guidance.

CONCLUSION

This Court should grant a writ of certiorari.

Respectfully submitted this 30th day of August, 2013.

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