SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

IN RE OPIOID LITIGATION	Index No.: 400000/2017 Hon. Jerry Garguilo

THIS DOCUMENT RELATES TO:

County of Suffolk v. Purdue Pharma L.P., et al., Index No. 400001/2017;
County of Nassau v. Purdue Pharma L.P., et al., Index No. 400008/2017; and
The State of New York v. Purdue Pharma L.P., et al., Index No. 400016/2018

OPPOSITION OF ENDO PHARMACEUTICALS INC., ENDO HEALTH SOLUTIONS INC., PAR PHARMACEUTICAL, INC., AND PAR PHARMACEUTICAL COMPANIES, INC. TO PLAINTIFF STATE OF NEW YORK'S MOTION BY ORDER TO SHOW CAUSE FOR DEFAULT JUDGMENT AND OTHER RELIEF

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

Defendants Endo Pharmaceuticals Inc. and Endo Health Solutions Inc. ("Endo") take their obligations to this Court seriously.[1] As this Court knows, Endo is subject to concurrent, voluminous discovery obligations in a multi-district litigation and numerous state court actions across the country. By their nature, these cases present significant challenges in terms of the speed and complexity of discovery from multiple data sources covering a time period of nearly two decades. While Endo's discovery efforts in all of these matters, including this one, have been undertaken in good faith, Endo recognizes that those efforts have at times fallen short. Critically, neither Endo nor their counsel Arnold & Porter Kaye Scholer ("APKS") have ever intended or attempted to frustrate or obfuscate discovery in this or any other proceeding. Understanding the State's[2] concerns, Endo wants to meaningfully address the issues raised and cure any prejudice caused by its late productions.

Endo strongly disagrees with the State's assertions and believes that a full examination of the facts will confirm that Endo and its counsel did not act contumaciously, and the State's case has not been irreparably or significantly impaired by the late productions. For these reasons, the Court should deny the State's request to enter a default judgment that would prevent Endo from defending itself on the merits.

That said, Endo recognizes that a jury trial is underway and it should not be derailed by the collateral inquiries presented by the Order to Show Cause. Under the circumstances, and given the grave nature of the accusations and the case-altering sanctions sought by the State in the middle

[1] While this brief is filed on behalf of four Defendants, the ensuing discussion is limited to the Endo Pharmaceuticals Inc. and Endo Health Solutions Inc. because those companies are the focus of the State's motion.

[2] For simplicity, Endo's references to the "State" include the Counties that have joined the State's motion.

of trial, Endo and APKS believe that the Court should adopt, with slight modification, the proposed relief as reflected in paragraph 6 of the August 2, 2021 Order: a Special Discovery Referee should be appointed to hear arguments and take evidence on the issues presented and to make a Report and Recommendation to the Court on a parallel track with the ongoing jury trial. Combined with the interim relief already afforded by the Court's August 2, 2021 Order, the jury trial can (and should) proceed apace and without interruption.[3]

A parallel proceeding with a discovery referee offers several important benefits: (1) the referee can examine in detail the distinctions between the *Staubus* proceedings in Tennessee and the current proceedings[4]; (2) the referee can take testimony, including *in camera* and *ex parte* proceedings to address privilege concerns, with respect to the late-produced documents; (3) the referee can hear and consider legal arguments from the parties; and (4) the referee can produce a Report and Recommendation to the Court with respect to the potential additional relief while the Court continues to oversee the jury trial. Additionally, Endo is continuing to look for additional materials and, as a result, new responsive materials may come to light. If they do, Endo will alert the parties and the discovery referee to permit the referee to address the situation as appropriate.

In the meantime, while Endo recognizes that it only recently produced some responsive data and documents in a timely manner, default is not justified on the facts of this case. Plaintiffs'

[3] In compliance with the Interim Relief Paragraph (c) of the August 2 Order, Endo is serving Plaintiffs today with a latter and attachments that address the information required by the Order, some of which was previously provided to Plaintiffs with earlier productions. Endo's letter cross-references the prior productions, provides bates-numbered lists of documents, and explains the productions. Endo also offered to meet and confer with Plaintiffs any time to address questions or concerns Plaintiffs may have, as well as any future production notices.

[4] This case is very different from *Staubus*. *Staubus* concerned whether Endo conducted a sufficient search for Tennessee-specific material; this matter concerns whether Endo sufficiently investigated years-old discovery related to non-opioid litigation. The Tennessee court did not hold an evidentiary hearing regarding Endo's compliance with its discovery obligations. And the parties settled that case before Endo's appeal of the default sanction was resolved.

central complaint revolves around the recent production of pre-2008 "call data" that stemmed from the regrettable reality that no one realized until recently that the prior production in the other matter might include information about opioids that otherwise was not available. When Endo's counsel realized that the data was responsive, Endo quickly produced the documents to minimize any prejudice. No one acted in bad faith. No one intentionally concealed documents in an attempt to influence this litigation. The State's rhetoric aside, the facts do not show any knowing or intentional conduct.

Nor did the belated productions harm the State's case. The State has pulled sound bites from the belated production, but most of that information was cumulative of other discovery already produced, and the State already had chosen not to make that information a focus of its case. For example, the State already was in possession of voluminous call data, but it decided to pursue a different legal strategy, opting to not even share the call data in its possession with its experts. It therefore is very unlikely that the State would have presented its case differently if Endo had provided the new call data earlier.

Endo respects this Court, and it takes this lawsuit seriously. It apologies for the impact that discovery issues are having on the Court's schedule amidst the daunting challenge of the jury trial. But the most drastic sanction sought – a default judgment – is far too harsh a penalty here.

BACKGROUND

A. The 2007 Lidoderm Litigation Subpoena and Productions

The document production at issue involves documents originally requested in different litigation about an entirely different Endo product more than a decade ago.

In January 2007, the U.S. Department of Health and Human Services Office of the Inspector General issued a subpoena to Endo seeking documents relating to Endo's promotion and

marketing of Lidoderm. Lidoderm is a non-opioid medication indicated for the relief of pain associated with post-herpetic neuralgia. *See* Aff. of J. Stern ¶ 6.

The government's investigation (and related civil *qui tam* suits and other matters) focused on whether Endo had promoted Lidoderm for unapproved uses, sometimes called "off-label" promotion. *Id*. ¶ 7. Accordingly, HHS's subpoena sought production of documents related to possible off-label promotion of Lidoderm. All of the requests in the subpoena expressly referred to Lidoderm; none referred to any opioid product. *Id*., Ex. 1 (subpoena).

Among the documents produced were those responsive to a request for "[a]ll documents that identify, refer to or relate to sales calls, visits by sales representatives . . . about [Lidoderm] including specifically contact call reports, notes or comments regarding calls." *Id*., Ex. 1 Request 6. The documents responsive to this request for "call notes" "about Lidoderm" were produced to the government in three separate productions (one CD and two DVDs) in September and October 2008 and January 2009. *Id*. ¶ 12.

In 2014, the vast majority of the Lidoderm litigation was resolved. *Id*. ¶ 14. Arnold & Porter sent copies of discovery materials from that litigation—including file copies of the 2008/2009 "call notes" productions—to off-site storage. *Id*. ¶ 15.

B. Discovery in the Nationwide Opioid Litigation

In December 2017, the federal opioid-related cases were coordinated in MDL 2804 before the Northern District of Ohio. That MDL now includes nearly 3,000 cases against Endo. Separately, in July 2017, the Litigation Coordinating Panel transferred all opioid-related cases filed in New York state courts for coordination in these consolidated cases ("the New York actions"). See Order, County of Suffolk v. Purdue Pharma L.P., No. 613760/2016 (N.Y. Sup. Ct. Coord. Panel July 19, 2017). Suffolk and Nassau Counties' actions became part of the New York actions in 2017. The State first filed its opioid-related action in 2018 (after the coordination order), and it

added Endo as a Defendant in 2019. *See* State's First Am. Compl., (Mar. 28, 2019).[5] The State's lawsuit also became part of the New York actions.

Discovery for the thousands of cases in MDL 2804 and hundreds of other cases in state courts around the country, including this one, has been a major undertaking. Davis Aff., ¶ 13. The opioid litigation is one of the largest, most complex mass litigations in history, and the discovery has been commensurate with the litigation's size and scope. *Id*. In MDL 2804, Endo alone has produced over 5.4 million documents covering a wide variety of topics. *Id*. ¶ 14. Endo has made those productions on a rolling basis. *Id.* Plaintiffs likewise have produced materials on a rolling basis. *Id*.

C. Discovery in the New York Actions

In this case, as in most complex cases, the parties negotiated the scope of document discovery, including the parameters of what would be searched and produced. For example, with respect to electronic files of particular individuals, the parties had extensive discussions about whose files would be searched and which search terms would be used. Plaintiffs and Defendants went back and forth through several rounds of negotiations, eventually agreeing on custodians and search terms. *Id*.

As part of a coordinated effort by various parties and federal and state courts involved in opioid litigation nationwide to promote efficiency and avoid duplicative discovery efforts, Plaintiffs in the New York actions have received all of the discovery produced in MDL 2804. As this Court noted in Case Management Order 2: The parties "agree[d] to treat document productions made in In re: National Prescription Opiate Litigation, MDL No. 2804 as if produced in this coordinated litigation." CMO 2 ¶¶ 7, 15 (Sept. 5, 2018), Doc. 541. Although Case

[5] As the Court is aware, the State previously had conducted an opioid-related investigation of Endo, which was resolved in 2016 through an Assurance of Discontinuance.

Management Order 2 was entered before the State sued Endo, the State provided notice in May 2019 that it would use the Order to obtain access to "all Defendants' MDL discovery productions," including Endo's. Davis Aff., Ex. 3. All Endo discovery produced in the MDL is thus "deemed" served on Plaintiffs in the New York actions.

In both the MDL and New York actions, Plaintiffs requested documents about "detail calls" or visits made by Endo sales representatives to healthcare providers in connection with the promotion of Endo's opioid medications.

Endo produced two data files, ENDO-NY-00000001 and ENDO-NYAG-DATA-00000004, consisting of call data for 2008 through 2016 reflecting detailing visits to New York healthcare providers concerning Opana ER and Opana IR. Davis Aff. ¶ 17. The source of that data was Endo's customer relationship management (CRM) systems and included information about the healthcare providers detailed by Endo sales representatives, the call date(s), the product detailed, and the detail priority of that product, as logged by the sales representatives. *Id.* This data also includes the healthcare provider's address and specialty. *Id.* Endo noted that the responses did not include materials from MDL 2804 "produced to Plaintiff already pursuant to CMO No. 2." Davis Aff., Ex. 5, First RFPd; see Davis Aff. ¶ 17.

D. Endo's Search for Earlier Call Data

In October 2017, Carol Purcell, Senior eDiscovery and Records Management Attorney at Endo, investigated whether pre-2008 call data existed. Purcell Aff. ¶ 7. Based on information she obtained from Endo's Information Technology team, Purcell concluded that Endo did not maintain sales representative call history prior to 2008. *Id.* Purcell was also informed that call data for the period January 2008 to 2016 was located in a data storage warehouse, and call data productions made in 2018 and 2020 was collected from that warehouse. *Id.* ¶ 8.

Endo had a data store – a Network Access Storage ("NAS") server containing multiple hard drives – related to the Lidoderm document review database and productions that Celerity, the e-discovery vendor that assisted Endo with the Lidoderm investigation, provided to Endo in December, 2017. *Id.* ¶ 9. Endo had received that NAS server in response to a request Purcell made in 2016 to Celerity. *Id.* ¶¶ 9-10. Before June 2021, Purcell was not aware that the NAS server contained opioid information because she understood that the Lidoderm investigation concerned Lidoderm, a non-opioid medication, and that the data on those drives was produced in response to a subpoena issued over seven years before Purcell started with Endo. *Id.* ¶¶ 12-13. It is not Purcell's standard practice to search data stores or vendor database archives related to completely unrelated products. *Id.* ¶ 13. In May 2021, and in response to requests from APKS, Purcell investigated the hard drives but did not locate any file types of a size that would likely be a database of pre-2008 data. *Id.* ¶ 14.

E. The Discovery that the 2008/2009 Lidoderm Call Data May Contain Opioid-Related Call Data Pre-Dating 2008

The 2008/2009 Lidoderm call data and other pre-2008 call data were not produced in the initial discovery responses in the MDL or in jurisdictions (like New York) deemed to receive all discovery in the MDL.

The accompanying affidavits explain the background about this information was not originally produced. Jonathan L. Stern, Arnold & Porter's lead partner for Endo matters since 2004, explains that it did not initially occur to him to investigate the availability of the Lidoderm call data productions from late 2008 and early 2009 with respect to the opioid litigation for several reasons, including that "the investigation and litigation associated with those productions was focused entirely on a product (Lidoderm) and an issue (off-label promotion) that were completely unrelated to the allegations about opioid medications here." Stern Aff. ¶ 17.

Mr. Stern further explained that "the information environment involved in this litigation is tremendously complex, involving thousands of cases, millions of documents, many hundreds of witnesses, and a vast array of legal and factual issues," and "it did not register with [him] that the firm's long-closed files would be a potential source of discoverable material in the completely unrelated opioid litigation." *Id.* ¶ 19.

Another Arnold & Porter partner who worked on the Lidoderm litigation and worked on opioid litigation, Joshua Davis, explained that he did not think to review the Lidoderm call note productions from 2008 and 2009 because that production "was made over a decade ago"; he "was not aware that the Lidoderm Call Note Production had been retained"; he "was not involved in the collection or production of the Lidoderm Call Note Production"; and he "had no reason to believe that" the Lidoderm call note production "would incidentally include information responsive to opioid-related discovery requests that was not already included in Endo's extensive opioid productions." Davis Aff. ¶ 19.

Jobina Jones-McDonnell, the Vice President and Assistant General Counsel for Litigation and Risk at Endo Pharmaceuticals, one of the attorneys responsible for managing Endo's outside counsel on the opioid litigation and related government investigations, was similarly unaware that the Lidoderm collection or production could include documents relevant in this litigation. She testified that "[t]o the best of my knowledge, the Lidoderm government investigation focused solely on Lidoderm. I was not aware that the Lidoderm collection for that investigation had captured incidentally opioid call data or documents." J. Jones Decl. ¶ 4.

At the end of May 2021, as Arnold & Porter and Endo were attempting to determine the availability of alternative sources of opioid-related call data, members of the Arnold & Porter team considered the possibility that the 2008/2009 Lidoderm call data may also incidentally contain

opioid-related call data. The firm alerted the client, see J. Jones Aff. ¶ 3, and pulled its files from off-site storage the first week of June. Stern Aff. ¶ 16. Arnold & Porter attorneys then reviewed a sample of those files and determined that the Lidoderm call note data production included some instances where a sales representative "detailed" both Lidoderm and an opioid-related product. *Id.*

After Arnold & Porter determined that the copies of the disks that it had in storage were indeed a potential source of discoverable material in this case, Arnold & Porter provided the materials to Endo's discovery counsel for further review and production.

F. Endo Separately Discovers that a Former eDiscovery Vendor Hired in 2007 to Assist Endo and the Firm in the Lidoderm Litigation Retained a Backup Copy of Endo Call Data from 2007

On June 11, 2021, Endo contacted Celerity, the online vendor Endo used for the Lidoderm Litigation, to ask whether Celerity had retained a copy of the call note data as originally provided by Endo to Celerity in connection with the Lidoderm investigation. J. Jones Aff.

On June 17, 2021, Celerity advised that, after searching boxes in an inventory vault, it had located the media that Endo had sent to Celerity starting in 2007. Endo took immediate steps to retrieve the data and transport it to Endo's eDiscovery vendor.

Endo's discovery counsel determined that the Celerity files contained additional call-note related files. Jones Aff. Endo took immediate steps to retrieve the data and transport it to Endo's current eDiscovery vendor and process and prepare any opioid-related call data for production. *Id.*

ARGUMENT

I. The Court Should Not Enter A Default Judgment Against Endo

A. Default is a proper sanction only in the most egregious cases

This Court may impose penalties for the willful failure to disclose information in discovery. NY CPLR § 3126. The Court's authority is "broad," *Arpino v. F.J.F. & Sons Elec. Co.*, 102 A.D.3d 201, 209 (2d Dep't 2012), but not limitless. A discovery sanction "should be as narrowly

tailored as possible to the circumstances of the individual case," "to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof during the pending civil action." *Matusewicz v. Jo Jo's Auto Parts, Inc.*, 18 A.D.3d 828, 829-30 (2d Dep't 2005) (internal quotation marks omitted).

An order striking a party's pleading and entering a default judgment is a blunt instrument appropriate only for the most egregious cases. "[P]ublic policy strongly favors the resolution of actions on the merits wherever possible." *PAL Envtl. Servs., Inc. v. LJC Dismantling Corp.*, 157 A.D.3d 808, 809 (2d Dep't 2018); *see Krause v. Lobacz*, 131 A.D.3d 1128, 1129 (2d Dep't 2015). The State has recognized this; it argued that its own failure to produce documents in response to this Court's orders did not warrant any sanction because "strong public policy strongly favors the resolution of cases on their merits." State's Mem in Opp. to Mot to Dismiss or to Renew Mot. in Lim. and Preclude Evid. or for Adverse Infer. 3 (June 21, 2021) (State Mem.), NYSCEF Doc. No. 8054.

"[T]he drastic sanction of striking a pleading should not be invoked unless the resisting party's default is shown to be deliberate and contumacious." *Mayers v. Consol. Charcoal Co.*, 154 A.D.2d 577, 578 (2d Dep't 1989). Willful and contumacious conduct means the most serious and intentional misconduct. Examples are "failures to comply with several court orders," *Harris v. City of New York*, 117 A.D.3d 790, 791 (2d Dep't 2014), or "intentionally false and misleading" conduct, *Arpino*, 102 A.D.3d at 208. Negligence (even gross negligence) is not enough. Rather, there must be a "*pattern* of *willful* failure to respond to discovery demands or comply with disclosure orders." *Crystal Clear Dev., LLC v. Devon Architects of N.Y., P.C.*, 127 A.D.3d 911, 914 (2d Dep't 2015) (emphasis added).

"When the moving party is still able to establish or defend a case, a less severe sanction than striking a pleading is appropriate." *Cioffi v. S.M. Foods, Inc.*, 142 A.D.3d 520, 525 (2d Dep't 2016). The State recognized this; it argued that "[b]efore a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious." State Mem. 3.

The party seeking sanctions has the burden to "mak[e] a 'clear showing'" that the alleged violations were willful and contumacious, and that it has been "substantially prejudiced" by those violations. *Singer v. Riskin*, 137 A.D.3d 999, 1001 (2d Dep't 2016); *Mordekai v. City of New York*, 168 A.D.3d 926, 928 (2d Dep't 2019) (citing *Iscowitz v. Cty. Of Suffolk*, 54 A.D.3d 725 (2d Dep't 2008)). When the non-moving party has substantially complied with discovery requests and orders, in good faith, its conduct is not willful and contumacious. *See, e.g., N.Y. Timber, LLC v. Seneca Cos.*, 133 A.D.3d 576, 577-78 (2d Dep't 2015); *Palmieri v. Piano Exchange, Inc.*, 124 A.D.3d 611, 612 (2d Dep't 2015).

B. The State has not proven a pattern of willful discovery violations

In this case, there is no bad faith and no pattern of willful violations. Endo acted in good faith to comply with all requirements of the discovery process in this coordinated proceeding. It made a mistake in failing to connect the dots and recognize that files relating to an unrelated, closed matter about a different, non-opioid prescription medication might also include information about opioids. When Endo's counsel recognized those files contained information responsive to requests in the opioid litigation, it immediately corrected the error. That mistake does not establish a pattern of willfully failing to comply with discovery obligations; Endo and its counsel acted promptly to rectify the mistake. The State therefore cannot show a "clear," "willful and contumacious pattern of noncompliance." *Rodriguez v. Big Ben Assocs. I*, 95 A.D.3d 1098, 1099-1100 (2d Dep't 2012).

The State asserts that, in 2013 and 2014, when it was investigating Lidoderm, it asked Endo for call data relevant to that drug. As the State acknowledges, it only requested materials "spann[ing] from January 1, 2009, to the subpoena date." State Aff. ¶ 5. The materials at issue predate that time period, so there is no basis for the State's claim that Endo "obfuscated" and "hid" that information. Br. 3, 8. The pre-2009 materials were not responsive to the State's subpoena.

The State's account of what happened in this case does not fairly represent the facts. The State claims that Endo had a "scheme" that began falling apart only when it and its outside counsel were "caught lying to another court just two months before the trial date here." Br. 10. That account has no factual basis and defies common sense. The Tennessee court had ordered the production of certain discovery in May 2020; that order was focused primarily on Tennessee-specific materials; the parties reached agreement on the methodology that would be used to respond to the Tennessee court's order; and, as plaintiffs there agreed, "Endo completed its supplemental productions on June 30, 2020." Status Rep., *Staubus* at 1 (July 14, 2020). The Tennessee court's concern was with whether Endo had sufficiently searched for and produced Tennessee-specific material. This is a different case with a different record and a different concern.

The State argues that Endo committed a "fraud" by purposefully withholding relevant discovery production even as Endo produced it in other opioid-related litigation across the country. But Plaintiffs have had access to all discovery from the MDL since the earliest days of this case, under Case Management Order 2. *See* CMO 2, ¶ 15. As this Court itself said, "on day one when I did the case management order four years ago, four plus years ago, everything in the MDL was imported here, exported there, imported here." Trial Trans. 280. Plaintiffs' exhibit list underscores the point; it lists over 25 documents produced into the MDL *after* the earlier discovery cutoff in

this case. Because of that coordination, Plaintiffs always have had access to all of the discovery produced in MDL 2804.

C. The State has not established that the delayed discovery had a material effect on its case

The State has failed to show that the delayed discovery productions are material to its case. CPLR 3126 sanctions should be narrowly tailored to reflect the party's culpability and the prejudice resulting to the moving party. *See McDonnell v. Sandaro Realty, Inc.*, 165 A.D.3d 1090, 1095-96 (2d Dep't 2018); *Peters v. Hernandez*, 142 A.D.3d 980, 980-81 (2d Dep't 2016): *Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 58 A.D. 3d 717, 718-19 (2d Dep't 2009).

Although the State claims great harm to its case, the facts do not bear that out. The State knew what information it would be getting in the delayed production, and the State already had data similar to the additional data produced and had deliberately chosen not to use it. The State thus has not been prejudiced in its ability to present its case as it chooses. A default judgment would be far too severe a sanction for the delayed productions.

1. The State already had similar call data in its possession, and its experts did not rely on it

The State claims that if it had had the additional call data during fact discovery, its experts would have used it. That is implausible, because the State already had considerable volumes of the same type of data and chose not chose have their experts use it.

The State had considerable call data in its possession when the expert reports were served. That included: (1) call logs produced by Endo showing all detailing visits to doctors from 2008 to 2015, *see* END-NY-00000001; (2) Janssen call data that included a field in which sales representatives wrote free-form comments about their detailing visits for Duragesic, *see, e.g.*, JAN-NY-00173009-JAN-NY-00173013; (3) Cephalon's call data in which sales representatives wrote free-form comments about their detailing visits for Actiq, *see* TEVA_MDL_A_02416207; and (4)

Allergan's call logs of detailing visits to doctors for Kadian, *see* AL-NY-00155. Yet Plaintiffs did not provide any of these detailing logs or call data to Dr. Lembke, their expert. Dr. Lembke instead relied on only a small number of marketing materials from each manufacturer Defendant. *See* Lembke Report, Exhibit B (Dec. 19, 2019). She stated that she "didn't think it was necessary" to review additional documents for her opinions because she "lived through this promotional campaign," Lembke Dep. 288:21-289:6; "was the recipient of those marketing efforts," *id.* at 275:19-276:1; and was only including "representative samples," *id.* at 277:19-278:2.

The State's claim that Dr. Lembke would have relied on the additional call data is inconsistent with Dr. Lembke's own testimony. Dr. Lembke did not rely on call data for Cephalon, Janssen, or Allergan, or the call data that had already been produced by Endo. She was not provided with the call logs that Endo had produced as she was preparing her report. The State cannot credibly claim that *additional* Endo call logs would have made any significant difference to Dr. Lembke. She said the call data was not important to her analysis.

The State provided Dr. Kessler with call data of Janssen, Cephalon, Allergan, and Endo, but he did not make significant use of it. The call data provided included Cephalon's free-form call data that are similar in format to Endo's pre-2008 data that was recently produced, yet Dr. Kessler did not provide any testimony regarding that Cephalon call data during his trial preservation deposition, or any opinions as to Janssen in his trial preservation deposition. TEVA_MDL_A_02416207. The State says its experts would have relied on call data referring to "drug abusers and crack-heads" in a doctor's office and the continued calls on that doctor. The State did not raise the Cephalon call data in the testimony of either Dr. Lembke or Dr. Kessler. So there is no reason to believe it would have done so for Endo's call data.

While the overwhelming focus of Plaintiffs' motion relates to pre-2008 call notes, Plaintiffs reference other call data as well. But that data is different from the pre-2008 call notes and its production does not prejudice them in this action. On July 16, 2021, Endo produced a data set known as "CDW_ADS Calls with Messages" that includes "message description" and "message name" fields not located in previous call data collections from CDW that were recently located by Redgrave working with Endo IT and consultant teams in response to specific requests in other cases. The additional fields included in this production were not free-form entries, but rather "drop down"-type selections from which a sales representative could choose a particular selection (such as "DDI: No CYP450 PK Drug-Drug Interactions at Clinically Relevant Doses"). Those particular selections corresponded with approved messages such as those summarized in the Digital Master Visual Aid, which has long been in Plaintiffs' possession. *See, e.g.*, END00059865 at -891.

2. The delayed discovery would not affect the State's presentation of its case

The State complains that the recently produced call data are the "equivalent of a smoking gun," and that having them earlier would have changed the "strategic and tactical alternatives the Plaintiffs would have possessed from the outset." Br. 5, 17. That claim is belied by the evidence the State already had and the choices the State made about how to use the evidence.

For instance, the State had the testimony of Warren McReddie, a New York Endo sales representative for Opana ER, who testified that "people that were seeking out types of prescriptions, addicts . . . They looked like drug addicts to me. . . . There were some offices I'd go into and then see that there were people just lined up to get in there, waiting for their meds." McReddie Investigatory Subpoena 98:24-99:18 (Aug. 20, 2014). On July 22, 2021, Plaintiffs informed Endo that they would *not* call Mr. McReddie to testify. *See* Email from John Oleske to James Herschlein (July 22, 2021). Although Mr. McReddie's testimony was not identical to the

wording used in the call data cited by the State, it is substantially similar and conveys the same message (that Endo's sales representatives encountered offices with addicts). The only conclusion to be drawn is that Plaintiffs did not consider this type of evidence to be a "smoking gun."

The State also contends that call data about visits to Dr. Russell Portenoy would have been key to its case. The State cites call notes referring to Dr. Portenoy the "King of Pain" and refers to a payment made to the hospital where he worked. Br. 6; Trial Tr. 14:2-12 (Aug. 2, 2021). But the State already had extensive information about the historical interactions between Endo and Dr. Portenoy. That was shown by the questioning of Dr. Lembke by Mr. Shkolnik. Trial Tr. 126:7-129:24 (July 12, 2021). Dr. Lembke discussed Dr. Portenoy's role in disseminating allegedly misleading messages and the significance of payments made to opinion leaders in the field. *See, e.g.*, *id*. at 129-137; 153:15-156:18. Plaintiffs did not provide documents about those payments to Dr. Lembke before her serving her report—despite the fact that the documents were in Plaintiffs' possession at that time. Plaintiffs plainly did not consider the documents important to Dr. Lembke's opinions.

Further, the call data add nothing to the opinions already in the trial record. Dr. Lembke testified that Dr. Portenoy "was a prominent person in his field or a recognized physician in the treatment of cancer pain and non-cancer pain very much here in the State of New York." Trial Tr. 125:19-21 (July 12, 2021). Thus, it is not surprising that a sales representative in the field of pain medicines thought of Portenoy as the "king of pain management" or that Dr. Portenoy was on a list of doctors for Endo's sales representatives to visit.

The State notes that several witnesses were asked about their lack of knowledge regarding Endo's (and other Defendants') detailing of physicians. But the belatedly produced call data would not have changed any of that testimony. First, as discussed above, when Plaintiffs had the

opportunity to provide Defendants' call data to Dr. Lembke, they did not do it – so Dr. Lembke's opinions would not have changed if the State had this additional subset of Endo's call data sooner.

Second, the data would not have changed the testimony of Chief Ferro, an Assistant Police Chief and fact witness, because the call data had nothing to do with Chief Ferro's investigations. *See* Trial Tr. 213:25-214:7 (July 27, 2021). Chief Ferro testified that he does not review call data of manufacturers as part of his regular duties, and he confirmed that he has no personal knowledge of any specifics related to detailing. *Id*. at 216:14-22; 225:24-226:5.

Third, the only other witness asked about detailing of doctors was Dr. Manseau, another fact witness. He testified that, in his work, he did not "research the effects of the impact of detailing or meetings with sales representatives," and he had one experience in which a sales representative for Abilify—a non-opioid product—called on him. *Id.* at 197:23-199:3. As a fact witness, he had no personal knowledge of Endo's detailing and it would have been inappropriate to provide him with Defendants' internal documents to prepare him for his testimony.

Plaintiffs claim that new information about Endo reimbursing doctors for meals was new and important to its case. At an August 2, 2021 hearing, counsel for the Counties referred to a "meal get-together with doctors in New York, $1,825 for lunch at Ruth's Chris . . . ." Tr. 13:20-24. This kind of information is not new to Plaintiffs. On May 27, 2020, during the fact discovery period, Endo produced to Plaintiffs a database of payments reflecting meals for doctors and their staff, which included more than 60,000 rows of data reflecting in- and out-of-office meals, ranging from a few dollars to a $1,200 dinner. *See* ENDO-NYAG-DATA-00000005. Plaintiffs apparently did not consider this data important to their case, as they did not include it on their exhibit list.

3. The State certified its readiness for trial even though it knew discovery was ongoing

Finally, in November 2019, Plaintiffs certified to the Court that they were ready to go forward with their case on the basis of existing discovery, by filing a note of issue and a certificate of readiness in order to set this case for trial as fast as possible. *See* 22 NYCRR § 202.21(a). "The filing of a note of issue or a demand for such filing is tantamount to asserting that all pretrial proceedings have been completed and that the case is in a trial posture." *Siragusa v. Teal's Exp., Inc*., 96 A.D.2d 749, 750 (4th Dep't 1983). By filing the note of issue and certificate of readiness, a party waives it right to further discovery. *J.H. v. City of New York*, 170 A.D.3d 816, 818 (2d Dep't 2019) (by filing note of issue and certificate of readiness, "plaintiffs waived any objection to the City defendants' failure to meet their disclosure obligations"); *accord K-F/X Rentals & Equip., LLC v. FC Yonkers Assocs.*, 131 A.D.3d 945, 946 (2d Dep't 2015) *Iscowitz*, 54 A.D.3d at 725; *Gray v. Crouse-Irving Mem'l Hosp., Inc.*, 107 A.D.2d 1038, 1039 (4th Dep't 1985). That is the case even where discovery is ongoing at the time. *See Iscowitz*, 54 A.D.3d at 725.

Here, in November 2019, the State filed its note of issue and certificate of readiness, certifying it was ready for trial. *See* Note of Issue with Certificate of Readiness for Trial (Nov. 1, 2019), NYSCEF Doc. No. 1798. It then filed a second note of issue in June 2020. Note of Issue with Certificate of Readiness for Trial (June 16, 2020), NYSCEF Doc. No. 6674. At that point, the State had substantial information about call notes and detailing, including information similar to that recently produced, and it certified that it did not want or need further discovery. Defendants moved to vacate the notes of issue on the ground that discovery was continuing, *see* Affirm. of Nathaniel Asher at 2-3 (Nov. 20, 2019), NYSCEF Doc. No. 1966; *see also* Defs' Mem. of Law in Support of Motion to Vacate Note of Issue and Certificate of Readiness at 1-3 (July 15, 2020), NYSCEF Doc. No. 7267, and the State knew that Defendants were continuing to produce

discovery in conjunction with the MDL (and other state court litigations outside New York). Yet the State wanted to press forward. That underscores that the State believed it had what it needed for trial, and that the recently produced data would not have had any material effect on its strategy.

II. Plaintiffs' Proposed Sanctions Are Disproportionate To The Conduct Alleged

A sanction under CPLR 3126 "should be 'commensurate with the particular disobedience it is designed to punish, and go no further than that.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Glob. Strat Inc.*, 22 N.Y.3d 877, 880 (2013) (citation omitted).

A. The Court Should Not Strike Endo's Answer And Impose A Default Judgment

The State seeks an order striking Endo's answer and granting the State a default judgment. But the Second Department has repeatedly reversed orders striking pleadings for even serious discovery violations. *See, e.g.*, *Nunez v. Laidlaw*, 150 A.D.3d 1124, 1126 (2d Dep't 2017); *John Hancock Life Ins. Co. of N.Y. v. Triangulo Real Estate Corp.*, 102 A.D.3d 656, 657 (2d Dep't 2013); *Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condo*., 51 A.D.3d 784, 785 (2d Dep't 2008); *Myung Sum Suh v. Jung Ja Kim*, 51 A.D.3d 883, 883 (2d Dep't 2008). As the State itself has recognized, the "law only allows dismissals when parties have actually violated Court orders," and the State has identified no orders Endo violated here. State Br. 6, NYSCEF Doc. No. 8054. Striking Endo's answer on this record—where Endo produced the discovery on its own initiative, without being ordered to do so by the Court—would be even less appropriate. *See Ural v. Encompass Insurance Co. of America*, 158 A.D.3d 845, 846-48 (2d Dep't 2018).

B. The Court Should Not Preclude Endo From Putting On A Defense

The State alternatively seeks an order precluding Endo from opposing any claims, interposing any defenses, and proffering or objecting to any evidence relating to issues relating to any withheld documents. But as the State has recognized in addressing its own failures to timely produce documents, "[p]reclusion orders are appropriate where the nonmoving party refuses to

obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed. It is a drastic remedy that requires a clear showing that the failure to comply with court-ordered discovery was willful and contumacious." State Br. 12-13, NYSCEF Doc. No. 8054. The State has not come close to meeting that burden. *See Dimoulas v. Roca*, 120 A.D.3d 1293, 1294-96 (2d Dep't 2014) (reversing trial court's preclusion of evidence based on discovery refusals).

The trial court should give a party a fair opportunity to remedy any violations before imposing penalties, and the penalty imposed should match the terms of any conditional order the court enters. *Felice v. Metropolitan Diagnostic Imaging Group, LLC*, 170 A.D.3d 960, 961-63 (2d Dep't 2019). Here, Endo has already quickly remedied the mistake once it was discovered, supplementing its production even before Plaintiffs' motion was filed. Precluding Endo from putting on a defense would be wholly disproportionate in the circumstances.

C. Plaintiffs' Proposed Sanctions Would Violate Due Process

Preventing Endo from defending the claims against it would be so severe a sanction that it would violate due process. The Due Process Clause "imposes substantive limits 'beyond which penalties may not go,'" *TXO Prod. Corp. v. Allied Res. Corp.*, 509 U.S. 443, 453-54 (1993) (quoting *Seabord Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907)), and it accordingly "prohibits a State from imposing a 'grossly excessive' punishment" on a wrongdoer in a civil action, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (quoting *TXO*, 509 U.S. at 454). "A default judgment granting relief against a defendant for failure to cooperate in pretrial discovery is a harsh sanction, which must be cautiously used, lest the resulting grant of relief amount to a deprivation of property without due process." *SEC v. Research Automation Corp.*, 521 F.2d 585, 588 (2d Cir. 1975) (citations omitted). Imposition of a default sanction in this case would violate due process

because Endo has not acted in bad faith, lesser sanctions would provide an effective remedy, and the State has not been prevented from putting on its case.

CONCLUSION

For these reasons, Endo respectfully requests that this Court deny the State's request for a default judgment and submit that appointment of a discovery referee and the entry of the interim sanctions is appropriate to remedy the delayed production here.

Dated: August 4, 2021

New York, New York

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