SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

IN RE OPIOID LITIGATION

Index No.: 400000/2017
Part 48

Hon. Jerry Garguilo

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF STATE OF NEW YORK'S MOTION BY ORDER TO SHOW CAUSE FOR DEFAULT JUDGMENT AND OTHER RELIEF PURSUANT TO CPLR §§ 3126, 3215, AND 4401; 22 NYCRR 130-1.1; AND THE COURT'S INHERENT AUTHORITY

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PRELIMINARY STATEMENT

Five days ago, the State caught Defendants Endo Pharmaceutical, Inc. and Endo Health Solutions, Inc. ("Endo") and its longtime attorneys Arnold & Porter Kaye Scholer LLP ("APKS")—red-handed—as they clumsily tried to maintain the gigantic fraud they have been perpetrating on the Court from their initial appearance to the present day. As the State has now discovered, Endo and APKS have—for nearly a decade—been concealing vast troves of smoking-gun evidence proving Endo's grave misconduct in New York, including at least tens of thousands of individual records, each revealing another shocking detail of Endo's inappropriate, behind-closed-doors communications and transactions pushing the company's dangerous and addictive opioid drugs on New York prescribers. And incredibly, Endo and APKS persisted in this scheme even though they had been caught and sanctioned—and Endo defaulted on liability—for lying to another tribunal in service of a virtually identical scheme just two months before jury selection in this Court, and despite knowing, by that time, that its inculpatory documents would have to be produced to Plaintiffs here, in the midst of a jury trial.

The Court has no choice but to impose terminal consequences here, given that the Plaintiffs' right to a fair trial has been irreparably compromised by this misconduct. It is impossible for the Court to craft curative measures short of a default judgment that can make up for evidence—that Plaintiffs have been deprived throughout this entire proceeding—proving, for example, that when an Endo sales representative saw a "*lot of drug abusers and crack-heads*" during their first visit soliciting opioid prescriptions at a New York doctor's office—a "*scary place*"—Endo did not report the incident to the State as required, and instead sent its employee back *five more times in eight months*, including a visit explicitly intended to push Endo's Percocet opioid drug *"as [a] Gateway" to higher-strength opioids*.

But obviously, given the persistence of Endo and APKS after being sanctioned and defaulted in Tennessee, more is needed here. And so the State respectfully requests that the Court employ the full suite of additional, appropriate measures at its disposal to cure as much of the staggering prejudice to Plaintiffs as possible. These include: deeming the relevant issues resolved in Plaintiffs' favor, and precluding Endo from contesting them, in any future proceedings in this Court; expedited discovery into the underlying repositories of documents Endo and APKS have been hiding, their actions and omissions in the course of that concealment, and the involvement of their foreign parent company in either; and financial sanctions against both Endo and AKPS on account of their brazenly frivolous and unlawful conduct. Finally, the State seeks interim trial orders to at least limit the prejudice to Plaintiffs in the continuation of their cases-in-chief. The State respectfully submits that the Court should grant the State's motion for this relief in its entirety, because Endo and AKPS have **still, *still*** not learned their lesson.

BACKGROUND AND FACTS

The basic facts of Endo's discovery abuses are simple. Endo and its counsel APKS have known since the State's investigation of Opana ER in 2013—in which APKS represented Endo—that the call notes and any other data capturing its sales representatives' communications with healthcare providers were highly relevant to the State's case and a source of inculpatory materials regarding the misrepresentations those sales representatives made about the safety of Endo's dangerous, addictive opioid drugs. (Affirmation of John Oleske in Support of Motion by Order to Show Cause for Default and Other Relief, dated August 1, 2021 ("Oleske Aff."), at ¶¶ 4–9.)

And Endo's counsel, APKS, who represented the company in prior investigations of Lidoderm—a non-opioid pain product that Endo sales representatives detailed concurrently with Percocet and then with Opana ER—knew precisely how and where Endo kept that information, as

that prior investigation involved productions of calls and detailing visits made by Endo representatives. (*See* Oleski Aff., Ex. M.) But instead of mining the sources from the Lidoderm investigation or conducting a proper search of any of the company's other customer relationship management systems during the State's investigation, Endo obfuscated and hid these materials in a "commercial data warehouse" in 2014 ***without disclosing that to the State*** during its then on-going investigation. (*Id.* ¶ 68, Ex. I.)

Fast-forward to the State's March 2019 filing of its complaint against Endo and other manufacturers for their misleading statements and misrepresentations about opioids. (*Id.* ¶ 10.) Central to the State's complaint was that Endo deceptively promoted opioids and conducted hundreds of thousands of sales visits to New York providers. (*Id*. ¶¶ 11–14.) And Endo and APKS had to know immediately that the detailed records it possessed, which disclose the content of its employees' private conversations with prescribers in New York in explicit detail, were going to be among the most important evidence Endo was going to need to produce in discovery—the State even cited similar notes produced by other manufacturers in the Complaint itself. (*Id*. ¶ 15.) From that point forward in this litigation, and repeatedly during the ongoing jury trial, the subject and content (or lack thereof) of sales employees' call notes reflecting solicitations of prescribers has been at the center of attention. (*Id*. ¶¶ 62–63.)

Nevertheless, throughout pre-trial discovery in this litigation, Endo and APKS have constantly lied, both overtly and by omission, about its knowing and ongoing concealment of this damning evidence. From the beginning, in response to the State's specific request for these and other Endo documents relating to marketing and detailing, APKS falsely represented, on Endo's behalf, that any call notes or other responsive documents had already been produced in the MDL proceeding. (Oleski Aff., Ex. B(i) at 25.) APKS and Endo also falsely represented that to the

extent the call notes had not been produced in the MDL (they knew they had not), they would conduct a reasonable search to find and produce them. (*Id.*, Ex. C at 2.) Subsequently, in response to the State's inquiries about Endo's diligence in locating non-custodial repositories of such documents, APKS and Endo falsely asserted that Endo would conduct a reasonable search of CRM systems[1] and produce responsive documents in discovery. (*Id.* ¶¶ 19–26.)

In reality, neither APKS nor Endo disclosed at any time, whether in its discovery responses, through the years of discovery disputes that followed, or during this jury trial, that Endo owns and operates a commercial data warehouse containing the records of Endo employees' communications and activities with New York prescribers generated by at least four different Endo CRM systems, or give the State any reason to believe that the searches APKS and Endo were promising would omit well-known repositories containing inculpatory documents that APKS and Endo had been concealing from the State for years. (*Id.*, Exs. B, C.) Indeed, Endo's "discovery counsel" Redgrave LLP recently confirmed that the CRM has been at all times accessible to the company's Commercial IT department and contains data retained "indefinitely." (*Id.* ¶¶67–68.)[2]

After being held in contempt and sanctioned for withholding discovery in Tennessee, and facing a default liability judgment in that jurisdiction, Endo retained Redgrave in May 2020. (*Id.* ¶¶ 33–40.) Sometime in mid-May 2021, Endo told certain plaintiffs in the other jurisdictions that

[1] "CRM" stands for "customer resource management" and is frequently used to refer to software that allows large companies to monitor interactions with its customers, like the pharmaceutical sales representative interactions with physicians at issue in this case.

[2] Even if the commercial data warehouse had been inaccessible at the time of discovery in the New York litigation, Endo was obligated at the time "to identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing." *See, e.g.*, Fed. R. Civ. P. 26, advisory committee's note (2006). The identification should have provided "enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources." *Id.*; *see also* Commercial Division Rule 8(b) (requiring parties to meet and confer before preliminary conference about "potentially relevant sources of [electronically stored information (ESI)] and whether the ESI is reasonably accessible"). But again any arguments with respect to the purported inaccessibility of the commercial data warehouse does ***not*** explain why the CRM systems were not searched in connection with the State's investigation ***in 2013***, which occurred before the commercial data warehouse was even in existence.

it had identified additional responsive documents in the commercial data warehouse and from the Lidoderm investigation. (Oleski Aff. ¶¶ 41–48.) APKS claims in recent letters sent to those plaintiffs that it only "ascertained recently that the Lidoderm call notes . . . also mentioned opioid products." (*Id.*, Ex. M at 1.) But that is patently false as APKS—Endo's counsel charged with carefully reviewing documents and making productions to regulators during the Lidoderm investigation—would have had to know that the call notes also would mention opioids.

Endo's revelations were memorialized in various status reports filed by the parties in *City of Chicago v. Purdue Pharma*, No. 14-cv-04361 (N.D. Ill.) in June 2021—while jury selection was ongoing in the New York trial—but APKS did not communicate any of this information with the State at the time. (*Id.* ¶¶ 42–49.) Indeed, during the actual trial, Endo did not disclose to the State or the Court that it had made these purported "discoveries," that productions in other jurisdictions contained highly relevant documents responsive to the State's longstanding document requests, or that APKS had withdrawn as counsel of record to Endo in the Tennessee proceeding. (*Id*. ¶¶ 40, 51.)

Although the State has only just begun to analyze the forbidding volume of materials Endo has produced since the default in Tennessee, each individual scratch in the surface of these productions has revealed nothing less than the evidentiary equivalent of a smoking gun. For example, the complete version of P-11287—the belatedly produced ENDO-OPIOID_MDL-07391949 containing narratives from Endo's sales calls—tells the story of one sales representative who observed a "*lot of drug abusers and crack-heads*" during their first visit to a prescriber's office, which the representative explicitly called a "*scary place*." (*See also id.*, Ex. K (Tr. 276).) Those records show that Endo did not respond to its employees' report of this situation by contacting the New York Bureau of Narcotics Enforcement and passing the employee's report on

to that agency. Those records also show that Endo did not even stop soliciting this prescriber—rather, they reveal that Endo had its employee return to push its products—including its branded Percocet opioid drug—on that prescriber *five more times in just the next eight months*. And after at least one of those visits, Endo's employee appears to report that he pushed that doctor to prescribe Endo's Percocet to his patients "as [a] Gateway" to higher-potency opioid drug formulations. (P-11287.)

Another one of the entries revealed in the State's initial, cursory review of that one document shows that Endo made detailing visits to Dr. Russell Portenoy (who has already been a subject of extensive testimony in the ongoing trial), and specifically, that these employees referred to Dr. Portenoy as the "king of pain management" at the same time they were soliciting him to write prescriptions for Endo's Percocet opioid drug. (*See* Oleski Aff., Ex. K (Tr. 276).)

The State, which is in the midst of presenting its case-in-chief to the jury, does not have the resources or capacity to continuously monitor and mine Endo's voluminous belated productions. (*Id.* ¶ 71.) Indeed, since April 2021 when Endo received a default liability judgment in Tennessee, Endo has made over 100 productions in the multi-district litigation, spanning more than 272,000 documents from 322 different custodians. (*Id*. ¶ 61.) The more recent productions made since jury selection began are also voluminous and include:

- Over 30,000 Excel spreadsheets, 23 Access files,[3] and nearly 170,000 emails with attachments.
- At least three productions containing over 10,000 documents, and one containing over 90,000 documents.
- 280 documents that are single-page slip-sheets that report a "technical issue," and the native file has not been produced.
- 75 native files, containing hundreds of thousands of rows of data.

[3] Microsoft Access is a database software program.

- More than 14,000 documents involving key witnesses in the New York trial: Kitlinski (5,855 documents), Walker (5,022 documents), Hernandez (3,454 documents), and Barto (878 documents).

- More than 46,000 documents are from the custodial files of J.P. Brassil, the Eastern Regional Business Director for Endo Pharmaceuticals from 2001 to 2010, whose region included New York and Endo's marketing of Percocet. Documents from the custodial files of Endo's Regional Business Directors ("RBD") are highly relevant because—in addition to the Global Exclusion List maintained by Endo's Compliance Department—the Regional Business Directors also could exclude prescribers from detailing by placing them on an RBD exclusion list.[4]

(*Id*. ¶¶ 62–63.)

To be clear, Endo did not produce these documents to the State. In order for the State to access these productions—which again are not addressed to the State or explicitly identified as responsive to the State's requests—the State must contact the e-discovery platform in the MDL, called RICOH, to request that the productions be made available for download. Often RICOH does not respond quickly enough, such that the production credentials expire and then OAG must ask APKS for access to the files through their FTP site. Only once the Endo Defendants' counsel does so, can personnel from the OAG begin to download the production and process it for upload to our e-discovery platform, without any assurance that what counsel has made available is identical to the MDL production in the first place. (*Id*. ¶ 64.)

When the State apprised the Court of newly-produced documents containing highly relevant statements, counsel for Endo was not able to explain why it had failed to conduct a reasonable search previously or lied to the State during discovery, averring only that the documents

[4] In their interrogatory responses (signed by APKS lawyer Joshua Davis), Endo did not identify J.P. Brassil as a person with knowledge concerning issues raised in Plaintiff's First Amended Complaint (*see* Oleski Aff., Ex. B(ii) at 16–17). Endo's recent productions confirm that Endo falsely omitted Mr. Brassil's name. Endo did list Mr. Brassil as a district manager or regional director who supervised the promotion of Opana ER in New York at various times. (*Id*. at 42). But only now, more than two years later, has Endo finally produced his custodial file.

previously produced in discovery had come from the "only call note database that was operational within the company." (*Id*. ¶¶ 66–68.)

But the commercial data warehouse where these call notes are ostensibly from, however, has been in existence since 2014 and contains several CRM sources (TReX (StayinFront), Veeva, Engage and Navigator), containing data from as early as 2008. (Oleski Aff., Ex. I at 5.) The warehouse has been maintained by the Endo Defendants' Commercial IT group since its existence (*id*. at 4), and therefore has been readily available to the Endo Defendants during the long course of discovery in this litigation, as the information in the warehouse is retained "indefinitely" (*id*. at 7). Finally, and perhaps most importantly, the State had asked for this very information ***in 2013***, long before any of these documents were hidden in the commercial data warehouse during the State's then-ongoing investigation.

On July 29, 2021, during a break in the trial, counsel for the State asked APKS partner Andrew Solow, among other things, whether (i) Endo would identify the bates numbers of documents responsive to the State's document requests that had been produced, without any notice to the State, within the dozens of document productions Endo has made since the commencement of this trial; and (ii) whether APKS would be seeking permission to withdraw as Endo's counsel in this litigation, as it had in Tennessee. (Oleske Aff. ¶ 69.) Mr. Solow responded in the negative to both inquiries, although he indicated that Endo's separate "discovery counsel" would contact the State to discuss its inquiries. (*Id*.)

The State met and conferred with Endo's "discovery counsel" Redgrave on July 30, 2021. Although Redgrave committed to identifying the late productions that may contain materials responsive to the State's Requests for Production, the State has received no such information at the time of this writing. (*Id.* ¶ 70.)

LEGAL STANDARD

Whether pursuant to CPLR §§ 3126, 3215 or its own inherent authority, the Court may impose all appropriate relief "to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice." *CDR Créances S.A.S. v. Cohen*, 23 N.Y.3d 307, 318 (2014) (addressing CPLR § 3126 and inherent authority of court); *see also Baez v, Wurm*, 240 A.D.2d 526 (2d Dep't 1997), *app. dismissed,* 91 N.Y. 956 (1998) (addressing CPLR § 3215 default for discovery violations).

"A trial court has discretion to strike pleadings" of a party that fails in discovery to make "a timely response and one that evinces a good-faith effort to address the requests meaningfully," and where that failure "is dilatory, evasive, obstructive, and ultimately contumacious." *CDR*, 23 N.Y.3d at 318 (citations omitted).

"The nature and degree of the sanction to be imposed…is within the broad discretion of the motion court." *Schiano v. Mijul, Inc.*, 131 A.D.3d 1157, 1157 (2d Dep't 2015); *see also McNelis v. Thomas,* 171 A.D. 3d 1038, 1039 (2d Dep't 2019).

Apart from default, preclusion orders are appropriate where the nonmoving party "willfully fails to disclose information which the court finds ought to have been disclosed." *Maliah-Dupass v. Dupass*, 166 A.D.3d 873, 875 (2d Dep't 2018) (quoting CPLR § 3126(2)). *See also Turiano v. Schwaber*, 180 A.D.3d 950 (2d Dep't 2020) (same); *Patino v. Carlyle Three, LLC*, 148 A.D.3d 1175, 1176-77 (2d Dep't 2019) (same).

Among the Court's powers, statutory and inherent, are the power to deem admitted those matters relating to discovery violations, and in light of such admissions, the Court separately has power to enter judgments as a matter of law during trial pursuant to CPLR § 4401. *See* CPLR

§ 3126; *Miller v. Bah,* 74 A.D.3d 761 (2d Dep't 2010) (granting judgment as a matter of law given conclusive nature of admissions deemed made by defendant).

Finally, parties and their attorneys may be sanctioned, and the moving parties awarded their expenses, attorneys' fees, and other appropriate financial penalties, for conduct that is "frivolous" where:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

22 NYCRR § 130-1.1(c)(1)-(3) ("Rule 130"); *see also U.S. Bank N.A. v. Sirota,* 189 A.D.3d 927, 929 (2d Dep't 2020) (reversing and remanding for imposition of financial sanctions against party that frivolously undermined pre-trial discovery).

ARGUMENT

Endo and APKS willfully concealed vast repositories of directly inculpatory evidence throughout the entire course of this litigation, and their plan would likely have fully succeeded had they not both been caught lying to another court just two months before the trial date here. But after they were both sanctioned for discovery violations—and Endo was defaulted on liability—in that other major opioid litigation in Tennessee, they both knew that the damning proof they had hidden from the State for years would be pried loose. And they knew it would have to be produced to the State *during* the projected timeframe of the trial. This left Endo and APKS with only one lawful option as the Court and more than a dozen other parties stood at the threshold of jury selection.

But neither "spoke truth" as they were obliged to do before the Court exercised its awesome power of *voir dire* over hundreds of Suffolk County residents. Instead, Endo and APKS consciously chose to silently cross what must be preserved as a *per* se terminal line in our system of justice—knowingly and incurably corrupting this jury trial. The only appropriate consequence for crossing that terminal line is the imposition of terminal remedies: striking Endo's answers and entering default judgments holding them liable for public nuisance.

That Endo must be defaulted on liability is not a close case under the controlling and dispositive authorities. The central relevance of the just-disclosed call notes and other promotional records—which describe Endo's unlawful communications and transactions with prescribers in shocking detail, and shatter the defenses it has previewed for the jury—is indisputable. That Endo's misconduct was a willful and contumacious scheme to defraud the Court is clearly and convincingly established by the duration and persistence of its efforts to hide the equivalent of a warehouse containing thousands of unmistakably smoking guns. And due to the enormous scale and still-incomplete nature of the untimely flood of vital evidence Endo has casually loosed in the middle of the State's case-in-chief, there is simply no alternative remedy capable of curing the prejudice that Endo has now thoroughly embedded in this phase of the trial.

Indeed, Endo and APKS have now proven, through their deliberate actions and omissions, that not only are default judgments required here, *they are insufficient.* By the time they chose to proceed with jury selection here, both Endo and APKS had been progressively sanctioned by the Tennessee court for the same kind of discovery misconduct in explicit and specific terms, including a finding that "Endo and its attorneys have **still** not learned their lesson." (Oleske Aff., Ex. G at 25 (emphasis in original).) That they chose to continue their scheme while those words should have still been ringing in their ears means that the Court must go even further here, by deeming all

issues relating to the withheld evidence as decided in Plaintiffs' favor, and precluding Endo from arguing or proffering evidence to the contrary, in all future proceedings conducted under the statewide consolidated index number for opioid litigation being supervised by the Court.

Moreover, due to the pervasive and ongoing prejudice caused to the State by the continued concealment of any relevant information as a result of this scheme, along with the likelihood of revealing additional actionable misconduct by Endo and APKS, the Court should permit Plaintiffs to obtain expedited discovery from Endo and APKS as to both their noncompliance and Endo's underlying sales and marketing operations. Given recently-discovered evidence of the potential knowledge and control of Endo's parent company with respect to these matters, the Court should also allow expedited jurisdictional discovery from both Endo and APKS as to that entity, Endo International plc. And because Endo and APKS have proven that they simply cannot be trusted to meet their obligations unsupervised, the Court should appoint a discovery monitor to ensure the prompt and comprehensive disclosure of this evidence, which is already years overdue.

In addition to the substantive remedies set out above that the State seeks on the hearing of this motion, the State also respectfully submits that the conduct of Endo and APKS throughout this litigation has now been revealed as frivolous within the meaning of 22 NYCRR § 130-1.1. As a result, the State seeks the full spectrum of financial penalties available under that rule, including all of its expenses and attorneys' fees in prosecuting its action against Endo from the time of its inception. Because Endo and APKS are both distinctly culpable for this misconduct, the State asks that the total judgment on any such award be entered against them both, jointly and severally.

In the meantime, due to the prejudice inherent in the State's being required to continue the presentation of its case-in-chief before its motion can be heard, the Court should grant appropriate interim relief. Specifically, the Court should adopt the same evidentiary remedies utilized for

curative purposes by the Tennessee court, by deeming any of Endo's untimely-produced documents proffered by Plaintiffs in the ongoing trial to be authentic and admissible, and allowing Plaintiffs to read and explain those documents directly to the jury. The Court should also enter an interim order directing Endo and APKS to at least begin the well-established process of curing their ongoing discovery violations in this action by providing Plaintiffs with a list of Bates numbers and corresponding custodial information accounting for all of the responsive documents they have produced after the close of discovery, and directing them to provide transparent and thorough descriptions in future document production cover letters as to the specific content and responsiveness of the materials being produced. Finally, so as to ensure the efficiency, effectiveness, and potential finality of this motion sequence, the Court should enter an interim order requiring Endo and APKS to produce the witnesses identified by the State for testimony at the hearing on this motion.

I. The Court Should Strike Endo's Answers and Enter Default Judgments Against Endo as to Liability on Plaintiffs' Public Nuisance Claims.

While the remedies of striking pleadings and granting default judgments are often described as "extraordinary" or "severe," in light of the misconduct on display in this case, they are shown to be both the Court's only meaningful option, and even more justified by the holdings in the controlling authorities than those decisions were on their own facts.

Indeed, the three prerequisites for the award of these remedies are satisfied here to an alarming degree of certainty: (i) *the relevance* of Endo's improperly withheld troves of communications and transactions with prescribers in the ongoing trial is virtually impossible to overstate; (ii) *the willfulness* of Endo and its attorneys is uniquely demonstrated by their choice to proceed to trial with their scheme still ongoing here, despite having just been caught, exposed, and defaulted for that same scheme in another jurisdiction; and (iii) *there are no other meaningful*

alternative remedies, given the staggering volume of critical, direct evidence of Endo's liability that is just now beginning to be made available, on a decidedly incomplete and non-transparent basis, as Plaintiffs' case-in-chief was supposed to be drawing to a close. *See CDR*, 23 N.Y.3d 307, 320-323 (explaining three required considerations of relevance, willfulness, and alternatives).

A. The Evidence Withheld by Endo is Indisputably and Centrally Relevant to the State's Action for Public Nuisance.

As the Court and jury are now well aware, a key overlapping pillar in each of the remaining Manufacturer Defendants' apparent defenses is the idea that, notwithstanding the evidence of their corporate employees saying and doing inappropriate things about promoting opioids to prescribers *among themselves*, there is no proof that any of the companies' salespeople actually said or did anything inappropriate *to or with any prescribers in New York*. *See, e.g.,* July 13, 2021 Trial Tr. at 258. In Endo's case, this prospective defense has always been implicitly bolstered by the fact that the documents it produced to Plaintiffs in this action concerning its sales calls to prescribers do not include any records of anything anyone involved actually said or did. *See e.g.* July 12, 2021 Trial Tr. at 197-201 (Endo counsel cross-examining Dr. Lembke about specific statements communicated to HCPs in the relevant jurisdictions); *see also* P-11287 (Endo's originally-produced call notes with no data for the "Comments," "Duration," and "Messages" columns).

In light of these inescapable realities of the ongoing trial, there can be no question that the internal Endo documents now being revealed for the first time—containing hundreds of thousands, if not millions, of records of the blatantly compromising details of those conversations and transactions that Endo and APKS deliberately scrubbed out of its pretrial discovery production—relate to "a material issue in this case" and that "by failing to disclose [that evidence] until [after] the eve of trial, the [Plaintiffs] were severely prejudiced in preparing" their cases-in-chief. *Blake v. Chawla*, 299 A.D.2d 437, 441 (2d Dep't 2002) (granting terminal sanctions pursuant to CPLR

§ 3126); *see also CDR*, 23 N.Y. 3d 307, 321 (explaining that defaulting a party for its concealment of responsive discovery requires that the evidence in question be "central to the substantive issues in the case")

B. Endo's Misconduct was Willful and Contumacious, and the Circumstances Present Clear and Convincing Evidence that it Constituted a Fraud on the Court.

Even if Endo and APKS had fully disclosed their concealed caches of documents reflecting communications and transactions with prescribers at some point prior to jury selection, the Court could still now find that their prior misconduct was sufficiently willful and contumacious, given the inferences properly drawn from Endo's and APKS's "repeated failure to comply with court-ordered discovery…inadequate explanations for the failures, [and their] failure to comply…over an extended period of time." *Bouri v. Jackson*, 177 A.D.3d 947, 949 (2d Dep't 2019).

But of course, neither Endo nor APKS said a word, despite the sanctions and default that had already been imposed in the Tennessee proceeding, and with the full knowledge that their continued silence would unavoidably ensnare the Court, the other parties, the venire, and the jurors in an inherently-compromised trial process that could explode with disastrous consequences at any moment—as indeed it has here. The Court of Appeals has explained that under such circumstances, where:

> a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by…unfairly hampering the presentation of the opposing party's claim…[and] when a party lies to the court and its adversary intentionally, repeatedly, and about issues central to the truth-finding process, *it can fairly be said that the party has forfeited the right to have the claim decided on the merits*.

CDR, 23 N.Y.3d 307, 321 (emphasis added); *see also Lucas v. Stam*, 147 A.D.3d 921, 924 (2d Dep't 2017) (reversing trial court's denial of motion to strike answer where defendant's

"inexcusable," "piecemeal manner" of disclosures of employee operational records "could have only been designed to conceal evidence"); *Herman v. Herman*, 134 A.D.3d 442 (1st Dep't 2015) (affirming trial court's entry of default judgment against defendant whose "dilatory, evasive [and] obstructive" discovery violations "prejudiced plaintiffs by impeding their ability to obtain true discovery and by forcing them to spend enormous amounts of money and time to prove their case," and imposed "an unnecessary drain on limited court resources" and where defendant's "misconduct was not isolated, and [it] made little or no good faith attempt to correct it.")

C. The Prejudice to the State Caused by Endo's Misconduct is Incurable by Any Alternative Remedies to Default Judgment.

While the Court is required to explain "why lesser sanctions would not suffice to correct the offending behavior" before entering a default judgment, *CDR*, 23 N.Y.3d 307 at 322, *citing Dodson v. Runyon*, 86 F.3d 37, 39 (2d Cir. 1996) (court should consider "suitability of lesser sanctions"), that analysis here only more fully exposes the pervasive extent and intractable nature of the particular prejudice Endo and APKS willfully injected into this jury trial at its inception. Indeed, it spotlights their distinct position—alone among the trial's otherwise unwitting participants—of having total foreseeability of the very complications that have by now rendered the prejudice to Plaintiffs incurable by other means.

For example, while the State has asked the Court for interim relief allowing Plaintiffs to admit and explain directly to the jury whatever improperly-withheld documents they can manage to analyze "on the run" as they race to complete their cases-in-chief, this is decidedly an exercise in triage. There are simply no orders the Court could fashion governing a continued liability trial against Endo before this jury that could ever come close to repairing the damage Endo and APKS have deliberately inflicted on the process for fairly adjudicating Plaintiffs' claims for public nuisance.

For example, however wide the latitude granted by the Court in admitting evidence, questioning witnesses, or making arguments to the jury, it will never replace the strategic and tactical alternatives the Plaintiffs would have possessed from the outset of the litigation but for the concealment of the evidence in question. Likewise, even extreme remedies like permitting Plaintiffs to proffer snap opinions from new experts would still be obviously insufficient to make up for the now-irreparable loss to the jury of considered analyses and opinions of its key experts, Drs. Kessler and Lembke, concerning the withheld evidence of Endo's extensive and grossly improper relationships with prescribers.[5] And of course there is now no practical way, even with the most extensive "sidecar" discovery orders, to provide Plaintiffs with the pre-trial examination testimony they were entitled to take from the numerous additional Endo employees now being revealed as directly knowledgeable of those specific and explicitly inculpatory communications and transactions with prescribers.

In any event, Endo should not be heard to complain that the Court is not trying hard enough to relieve it from the consequences it knowingly invited as a result of the still-unacknowledged misconduct it has perpetrated through its attorneys. Having made an intractable mess of this jury trial, Endo and APKS have only themselves to blame for the fact that the Court has no alternative to wiping the slate clean of Endo's pleadings, and as much as possible, of the prejudice left behind, by granting the State's motion for a default judgment on liability. *See Matrix Polymers v. A-E Packaging, Inc.*, 2017 U.S. Dist. LEXIS 2358, *29-30 (E.D.N.Y. Jan. 5, 2017) (refusing to vacate default judgment resulting from discovery violations, and holding that "present regret neither abrogates…willfulness nor converts feigned indignation into a meritorious defense.")

[5] The absence of testimony from Plaintiffs' experts about these internal Endo promotional records is now a glaring lost opportunity in light of both experts' *Frye* and trial examinations. (*See* Oleske Aff. at ¶¶ 54-55.)

II. Endo's Recidivism after its Recent Default for Related Discovery Misconduct in Tennessee Mandates Penalties Beyond Default Judgment.

Unsurprisingly, the State has been unable to find a reported New York case addressing a situation remotely comparable to the one here, where a party that has been defaulted for lying to one court then openly demonstrates the insufficiency of default judgments as a deterrent by immediately perpetrating even more calculated and egregious fraud on a different tribunal in a separate proceeding. And while the Court has the power to enter default judgments on both liability *and* damages as a consequence for such misconduct under the right circumstances, *see CDR*, 23 N.Y.3d 307, 324-325 (granting default judgment on liability and damages where latter could be determined from documents in the record), the State concedes that quantification of the abatement remedies at issue in the next phase of its trial against Endo will unavoidably require additional proceedings.

Nevertheless, New York law still provides clear guidance, such as that set out in CPLR § 3126, for the Court to rely on in providing additional curative remedies here. Specifically, the State respectfully submits that given the prejudice that will remain embedded in any promptly-concluded abatement trial, and in any subsequent trials of the State's other, presently-deferred claims, and given the unapologetic recidivism of Endo and APKS, the Court should award the additional relief set out in CPLR § 3126 of deeming all issues relating to the evidence withheld by Endo as being resolved in Plaintiffs' favor, and precluding Endo from offering any evidence or argument contesting those issues, in any and all further proceedings under the coordinated opioid litigation index number supervised by this Court. *See Wing Kwong Ho. v. Target Constr. of N.Y., Corp.*, 2010 U.S. Dist. LEXIS 54176 (E.D.N.Y. June 3, 2010) (precluding defendant undeterred by prior default judgment from offering evidence in its defense in subsequent proceeding).

III. Expedited Discovery under the Supervision of a Discovery Monitor is Required to Cure and Prevent Prejudice to the State.

Just as Endo and APKS had only one lawful option at the outset of this trial, and did not choose it, they have only one appropriate set of responses available to them now in identifying and remediating the harms of their discovery misconduct, and yet they have failed to even acknowledge their obligation to take any of even the most rudimentary steps required under the circumstances. *See Brummer v. Wey*, 2021 N.Y. Misc. LEXIS 2632 (Sup. Ct. N.Y. County May 18, 2021) (sanctioning defendants with financial penalties under Rule 130 and precluding them from offering evidence in their defense for failure to proffer electronic repositories for forensic examination or otherwise "provide meaningful supplemental responses") (*citing Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543 (2015); *Zubulake v. UBS Warburg LLC*, 220 FRD 212 (S.D.N.Y. 2003)).

Because neither Endo nor APKS can be trusted to promptly, transparently, and comprehensively disclose either the full suite of responsive documents they have concealed up to this point, or the factual circumstances surrounding their years-long pattern of discovery misconduct, the State respectfully requests that the Court allow Plaintiffs to obtain expedited discovery from both Endo and APKS concerning those matters under the supervision of a special referee chosen by the Court to serve as a discovery monitor for these purposes. *See Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc.3d 1019(A) (Sup. Ct. Nassau County 2004) (appointing special referee to expedite and monitor discovery).

Finally, in light of recently-discovered evidence suggesting knowledge, operational involvement, and/or effective control of Endo International plc with respect to the Customer Relationship Management repositories at issue, the State also asks that it be permitted to obtain expedited jurisdictional discovery from both Endo and APKS focusing on those specific

connections. *See Leili v. Romanello*, 173 A.D.3d 463 (1st Dep't 2019) (affirming trial court's order allowing jurisdictional discovery where movant demonstrated articulable "sufficient start" in establishing connection to forum).

IV. Endo and APKS Should be Sanctioned for their Frivolous Conduct in this Proceeding, and Held Jointly and Severally Liable for Plaintiffs' Expenses and Attorneys' Fees in Prosecuting this Action, as well as all Appropriate Additional Financial Sanctions.

Pursuant to Rule 130, this Court has ample grounds to exercise its discretion and award Plaintiffs' costs and reasonable attorney's fees, as well as other "financial sanctions," resulting from Endo's and APKS's decision to frivolously double down on inexcusable discovery misconduct. *See supra* at 10 (quoting 22 NYCRR § 130-1.1(c)); *see also, e.g.*, *Shields v. Carbone*, 99 A.D.3d 1100, 1103 (3d Dep't 2012) (upholding trial court's use of discretion in awarding sanctions, based in part on "behavior in prior cases" because the trial court properly considered "whether [sanctionable] behavior here was aberrant or part of a pervasive pattern"); *Marrero v. New York City Transit Auth.*, 150 A.D.3d 1097, 1098 (2d Dep't 2017).

In determining whether Endo and APKS's conduct was frivolous, this Court must "consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party." 22 NYCRR § 130-1.1(c); *accord Marrero*, 150 A.D.3d at 1098. When considered in context, we now know that Endo and APKS have done much that is deemed frivolous under each alternative prong of Rule 130—all of which indisputably came to their attention when they were severely sanctioned in Tennessee at the latest:

(i) Endo and APKS have acted in a manner "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," by: (a) failing to reasonably identify repositories containing potentially relevant materials for years; (b) remaining silent when they

collected and produced to other parties information central to the public nuisance claims at issue in this trial; and (c) failing to amend their pleadings or discovery responses to reflect the clear admissions of underlying misconduct now evident in their untimely document productions, among other conduct, *see* 22 NYCRR § 130-1.1(c)(1); (*see also, e.g.*, Oleske Aff. at ¶¶ 18-26, 41-47, 55, Exs. A, B, C, H, I, J;)

(ii) Endo and APKS have delayed, concealed, and misrepresented responsive discovery, that is both significant in substantive material and quantitative measure, "primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure" Plaintiffs, *see* 22 NYCRR § 130-1.1(c)(2); (*see also* Oleske Aff. at ¶¶ 48-52, 57-60;) and

(iii) Endo and APKS have repeatedly and continually "assert[ed] material factual statements that are false," including in Endo's discovery responses, APKS's subsequent communications with the State and the Court through pre-trial proceedings, and in APKS's July 28, 2021 false statement on the record in open court averring among other things that, at the time of discovery, documents were downloaded from Endo's "only call note database that was operational within the company," (*see, e.g.*, Oleske Aff. at ¶ 67, Ex. L.)

In light of the multiple ways in which Endo's and APKS's conduct has been patently frivolous, this Court may properly impose the available financial sanctions against "either an attorney or a party to the litigation or against both." 22 NYCRR § 130-1.1(b). Given the circumstances here, and consistent with the Tennessee court's finding that "Endo and its attorneys have **still** not learned their lesson," (Oleske Aff., Ex. G at 25 (emphasis in original),) both Endo and its counsel should be held accountable in service of the purpose and intent of Rule 130, which is to "limit frivolous and harassing behavior." *Marrero*, 150 A.D.3d at 1098.

Accordingly, together with the other relief established herein, Plaintiffs should be awarded their costs and reasonable attorney's fees since the commencement of this action, as well as other "financial sanctions," as commensurate with Endo and APKS's years-long and egregious frivolous conduct, pursuant to Rule 130.

V. The Court Should Award the Proposed Interim Relief pursuant to its Inherent Authority and in the Interests of Justice.

No matter how promptly the Court may wish it could hear this motion and resolve the thicket of unwelcome issues it addresses, it is unavoidable that in the meantime, the State will continue to be prejudiced by having to proceed with its case-in-chief while it is just beginning to understand the substantive impact of the materials Endo and APKS are revealing for the first time. And while nothing can cure that prejudice in the short term, the Court can and should at least make interim orders providing some minimal level of protection to Plaintiffs. Specifically, the State respectfully asks the Court to follow the model provided by the Tennessee court in its order defaulting Endo, by deeming any of Endo's previously-withheld documents both authentic and admissible when proffered by any Plaintiff, and allowing Plaintiffs to read and explain those documents directly to the jury. (*See* Oleske Aff., Ex. G at 27;) *accord*, *Linde v. Arab Bank, PLC*, 706 F.3d 92, 102, n.31 (2d Cir. 2013) (affirming trial court's order deeming financial records that defendant failed to disclose automatically authentic and admissible at trial).

Finally, as noted above, while both Endo and APKS should know better, they have refused to even begin a meaningful remedial effort in connection with their contemptuous misconduct here. The State therefore respectfully asks the Court to order Endo and APKS to: (i) provide Plaintiffs a list identifying the subject matter, bates number, and corresponding custodial history of each responsive document they have produced after the close of discovery in this proceeding; and (ii) prominently provide the same information as it relates to each future production. *See, e.g., Niagara Mohawk Power Corp. v. City of Saratoga Springs Assessor*, 2 A.D. 3d 953, 954 (3d Dep't 2003) (affirming trial court's direction of additional mid-trial disclosures, recognizing that "trial courts have broad discretion in directing the disclosure of material and necessary information.")

CONCLUSION

For the reasons set forth above, Plaintiff State of New York respectfully requests that the Court grant its motion.

Dated: August 1, 2021

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