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

ARNOLD & PORTER KAYE SCHOLER LLP'S RESPONSE TO PLAINTIFF STATE OF NEW YORK'S MOTION BY ORDER TO SHOW CAUSE FOR DEFAULT JUDGMENT AND OTHER RELIEF

I. INTRODUCTION

The State's motion seeks sanctions of default and/or preclusion against Endo,[1] and seeks monetary and other sanctions against Endo and Arnold & Porter Kaye Scholer LLP ("A&P"). Endo's response sets out in detail why default and preclusion sanctions are wholly inappropriate under the facts and circumstances here. A&P agrees. There was no willful or contumacious behavior by Endo or its counsel in connection with the production of pre-2008 call notes in this action.

The State's motion focuses on examples from the recent productions of additional call note data that summarize visits by Endo representatives to health care providers in New York in which Endo's opioid products were mentioned. Early on in this action, Endo, through A&P, produced thousands of call notes relating to the time period from 2008 forward. As A&P's

[1] "Endo" refers, collectively, to Defendants Endo Pharmaceuticals Inc., and Endo Health Solutions Inc.

declarants attest, A&P honestly and reasonably believed that there were no available records of Endo's pre-2008 call notes. It was not until late-May and early-June 2021 that A&P and Endo realized that *some* of the pre-2008 call notes produced a decade earlier by Endo in response to a federal government investigation relating to Lidoderm, a non-opioid pain patch, might also include incidental references to Endo's opioid products. Upon making that connection, A&P promptly investigated whether it could locate a copy of the prior production to the federal government of Lidoderm call notes; discovered that it had those materials in off-site storage; retrieved the disks containing the production; and caused the disks to be made available for further review and production in opioid cases as appropriate.

Sanctions are reserved for conduct that is willful, contumacious, or frivolous. A&P's conduct here is none of these, and neither is Endo's. A&P recognizes that production of these materials regrettably occurred at a late stage in these proceedings and that it would be better if the production had occurred earlier. A&P regrets that this has occurred. The State tries to take advantage of sanctions proceedings in the *Staubus* case in Tennessee, arguing that Endo and A&P should be punished here in part because of what happened there. There is no basis for that conclusion. The issues in *Staubus* were far different and both Endo and A&P have taken extensive steps to resolve those issues and address the concerns reflected in the orders there. The late-produced call notes at issue here were not an issue in the *Staubus* sanctions proceedings and the short cut approach that the State suggests here would be inappropriate and should not be pursued: the inadvertent late production here, the impact of it on these proceedings, and the proper remedy should and must be assessed on their own merits.

Endo's response suggests a number of remedies that will protect Plaintiffs from any arguable prejudice. Endo also proposes that, other than interim relief to eliminate any prejudice

in Plaintiffs' presentation of evidence, this matter be referred to a discovery master. A&P agrees with this approach. But in the absence of willfulness or bad faith, the extreme sanctions sought by Plaintiffs, including default and preclusion, are disproportionate, punitive, and wholly inappropriate.

II. BACKGROUND

The State alleges in its moving papers that A&P engaged in sanctionable conduct in connection with the production of call note documents that had been produced to the federal government a decade earlier in connection with an investigation relating to the non-opioid product Lidoderm. Accordingly, consideration of the State's motion requires an understanding of the production of call notes in the Lidoderm investigation and the production of call notes in this action.

A. The Lidoderm Investigation and Document Production

In January 2007, the United States Department of Health and Human Services Office of Inspector General issued a Subpoena Duces Tecum ("Subpoena") to Endo seeking documents relating to Endo's promotion and marketing of Lidoderm (the "Lidoderm Litigation."). Lidoderm is a non-opioid medication indicated for the relief of pain associated with post-herpetic neuralgia. The government's investigation (and related civil *qui tam* actions filed by private individuals) was focused on whether Endo had promoted Lidoderm for unapproved uses, sometimes called "off-label" promotion. All of the requests in the Subpoena related to Lidoderm (referred to in the requests as "the Covered Drug"). A&P represented Endo in responding to the Subpoena. Affidavit of Jonathan L. Stern ("Stern Aff.") at ¶¶ 6-10.

From 2007 through about 2012, Endo produced voluminous documents responsive to the government's Subpoena. Those efforts involved the collection and review of millions of

documents. Among the materials produced were documents responsive to a request for production seeking "[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 . . . ." The documents responsive to this request for "call notes" "about Lidoderm" were produced to the government in three separate productions consisting of one CD and two DVDs, made respectively on September 19, 2008, October 15, 2008, and January 23, 2009 (the "2008/2009 Lidoderm Call Note Production"). The 2008/2009 Lidoderm Call Note Production was filtered to exclude any call notes that did not reference Lidoderm. *Id.* at ¶¶ 11-13.

B. The Opioid Litigation

In December 2017 the federal opioid-related cases were coordinated in a Multidistrict Litigation before the Northern District of Ohio ("MDL 2804"). MDL 2804 now has nearly 3,000 cases. Separately, in July 2017, the Litigation Coordinating Panel transferred all opioid-related cases filed in New York state courts for coordination in the above-captioned consolidated matter (the "New York Actions"). Affidavit of Joshua Davis ("Davis Aff.") at ¶ 11 .

With thousands of actions in MDL 2804 and hundreds of cases in the New York Actions and in state courts across the country, discovery has been a major undertaking. In MDL 2804, to date Endo alone has produced 5.4 million documents covering countless topics on a rolling basis. Plaintiffs likewise have produced materials on a rolling basis. As part of a coordinated effort of the state and federal lawsuits, Plaintiffs in the New York Actions have received all of the discovery produced in MDL 2804.[2] All Endo discovery produced in the MDL is thus "deemed" served on Plaintiffs in these New York Actions. *Id.* at ¶¶ 13-15.

[2] In particular, under Case Management Order 2, the Court held that "it is the intent and objective of this Court to allow discovery to proceed in these coordinated proceedings in

Of particular relevance here, in the MDL and New York Actions, Plaintiffs requested documents relating to "detail calls" or visits made by Endo sales representatives to healthcare providers in connection with the promotion of Endo's opioid medications. In MDL 2804, for instance, Plaintiffs sought "[a]ll Documents, data, notes, memorandums, or database entries from 1999 to present memorializing calls or visits made by sales representatives to prescribing physicians, hospitals, pain clinics, rehabilitation facilities, and pharmacies, in connection with the Marketing, sales or distribution of your Opioid Products." Endo searched for, collected, and provided to A&P the responsive call notes it was able to locate. *Id.* at ¶ 16.

In the New York Actions Plaintiffs sought, among other requests, "[a]ll Documents and communications concerning your marketing and detailing to New York customers." Two data files, ENDO-NY-00000001 and ENDO-NYAG-DATA-00000004, were made available that included call note data for the time period of 2008 through 2016 reflecting detailing visits to New York healthcare providers concerning Opana ER and Opana IR. This data includes information about the healthcare providers detailed by Endo sales representatives, including the call date, the product detailed, and the detail priority of that product, as logged by the sales representatives. This data also includes the healthcare provider's address and specialty. These productions included New York-related call notes that Endo had collected and provided to A&P. *Id.* at ¶ 17.

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coordination with opioid-related cases pending in state and federal courts throughout the nation, including *In re: National Prescription Opiate Litigation*, MDL 2804 . . . ." CMO 2 at ¶ 7 (Sept. 5, 2018) (Doc. 5806). As such, "[t]he parties agree to treat document productions made in *In re: National Prescription Opiate Litigation*, MDL 2804 as if produced in this coordinated litigation." *Id.* ¶ 15. Though CMO 2 was executed before the State sued Endo, the State on May 2, 2019 provided notice that it was adhering to CMO 2 and obtaining access to "all Defendants' MDL discovery productions." Davis Aff. at ¶ 15.

C. The Discovery that the 2008/2009 Lidoderm Call Notes May Contain Material Responsive to Discovery in the Opioid Litigation

As of May 2021, A&P believed that all available call notes referencing opioid products had been produced in discovery. Near the end of May 2021, however, as A&P and Endo were attempting to determine the availability of alternative sources of opioid-related call notes, a member of the A&P team raised the possibility that the Lidoderm-filtered call notes produced to the government in 2008 and 2009 might also contain call notes that were opioid-related. To assess that possibility, A&P ordered the relevant files from storage on Thursday, June 3, 2021. A&P learned on Monday, June 7, 2021, that those files contained three disks, a CD and two DVDs. Stern Aff. at ¶¶ 20-21.

A&P then reviewed the CD, which comprised a sample of the production on the two DVDs, and ascertained: (1) that the disk in fact contained Lidoderm call note data; and (2) that some of that data appeared incidentally also to include call note data from sales calls on which the sales representative "detailed" both Lidoderm and an opioid-related product. A&P then promptly provided the disks with the Lidoderm production to Redgrave LLP, another firm that represented Endo in connection with discovery issues since April 2020, for further evaluation and production. *Id.* at ¶¶ 21-22. Documents from the 2008/2009 Lidoderm Call Note Production were produced in the opioid MDL on June 21, 2021, and by virtue of CMO 2 those documents were also deemed produced in this case. A cover letter accompanying this production from Redgrave LLP was emailed to the plaintiffs' counsel across the opioid cases, including Plaintiffs' counsel, on June 21, 2021, and that cover letter explains the source of these documents. Ex. A (Letter from Christopher Q. King of June 21, 2021).

To be clear, A&P did not intentionally withhold or delay production of the Lidoderm call notes. The A&P attorneys collecting and producing documents in the opioid cases did not

understand, prior to late-May 2021, that the decade-old production in the Lidoderm Litigation was a likely source of call notes relevant to the opioid litigation in this and other courts. This belief by A&P attorneys was reasonable given that document production in the Lidoderm Litigation had occurred a decade earlier and had nothing to do with opioids. Davis Aff. at ¶ 19; Stern Aff. at ¶¶ 17-19, 23 However, once A&P concluded that the 2008/09 Lidoderm Call Note Production might include some opioid-related call notes, A&P promptly ascertained whether it had a copy of the production, promptly retrieved the production disks, and promptly provided a copy of the disks to Redgrave LLP for evaluation and production. Stern Aff. at ¶¶ 20-22.

III. ANALYSIS

A. A&P's Conduct Does Not Merit Sanctions for Endo or A&P

The imposition of discovery sanctions is reserved for willful, contumacious, or frivolous conduct. Endo's opposition explains why default and preclusion sanctions are inappropriate. Similarly, A&P has engaged in no conduct in this action that would give rise to such sanctions against Endo. To the contrary, A&P attorneys went above and beyond in finding a creative way to access pre-2008 call notes that, to A&P's understanding, were no longer accessible from Endo's own active databases.

While the nature and degree of sanctions is a matter committed to the discretion of the court, "[a]ctions should be resolved on the merits whenever possible." *1523 Real Estate, Inc. v. E. Atl. Props., LLC,* 41 A.D.3d 567, 568, 839 N.Y.S.2d 111, 112 (2d Dep't 2007); *see also Zouev v. City of New York*, 32 A.D.3d 850, 851, 821 N.Y.S.2d 620, 622 (2d Dep't 2006). Indeed, "the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful and contumacious." *1523 Real Estate*, 41 A.D.3d at 568, 839 N.Y.S.2d at 112; *see also Javeed v. 3619 Realty Corp.*, 129 A.D.3d 1029, 1033, 12

N.Y.S.3d 219, 223 (2d Dep't 2015). Similarly, the sanction of preclusion is appropriate only where "the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious." *Assael v. Metro. Transit Auth.*, 4 A.D.3d 443, 443, 772 N.Y.S.2d 364, 365 (2d Dep't 2004); *Zakhidov v. Boulevard Tenants Corp.*, 96 A.D.3d 737, 739, 945 N.Y.S.2d 756, 757-58 (2d Dep't 2012).

Here, no conduct by Endo or A&P can justify issuance of default or preclusion sanctions against Endo. There was no willful violation of discovery obligations or court orders by Endo or A&P lawyers. That is established by the affidavits of the A&P lawyers themselves.[3] A&P partner Joshua Davis's affidavit makes clear that he had no idea that the 2008/2009 Lidoderm Call Note Production contained call notes referencing opioid products. Davis Aff. at ¶ 19. He also was not involved in the retrieval, review, or production of those call notes in this case. *Id.* at ¶ 18. A&P partner Jonathan Stern similarly has represented that the first time A&P lawyers realized that the 2008/2009 Lidoderm Call Note Production potentially could be mined for opioid-related call notes was in late May 2021, and that A&P acted promptly upon that realization. Stern Aff. at ¶¶ 20-23. This evidence is unrebutted and irrefutable.

The facts relating to call note production support the A&P affiants' representations that A&P was not trying to withhold call notes from the State. A&P and Endo long ago produced eight years' worth of opioid-related call notes from Endo's systems. Davis Aff. at ¶ 18. If A&P and Endo were trying to conceal call notes from opioid plaintiffs, why would they willingly produce call notes from 2008 to 2016, and why would they have produced additional call note data as it was identified in recent months? Thus, A&P made no attempt to withhold call notes,

[3] Affidavits filed by Endo personnel similarly show an absence of willful or contumacious conduct on Endo's part.

and Endo made the 2008-2009 Lidoderm Call Note Production available to Redgrave LLP promptly upon learning that it was a potential source of opioid-related call notes.

The State's motion also seeks monetary sanctions against Endo and A&P pursuant to 22 NYCCR 130-1.1. Under NYCCR 130-1.1, "[c]onduct during a litigation . . . is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another, or it asserts material factual statements that are false." *Wecker v. D'Ambrosio*, 6 A.D.3d 452, 453 (2d Dep't 2004). A "good faith basis" for a litigant's conduct is sufficient to preclude an award of monetary sanctions. *Dank v. Sears Holding Mgmt. Co.*, 69 A.D.3d 557, 558 (2d Dep't 2010).

The conduct at issue here was not frivolous. A&P did not take a position that pre-2008 call notes were not discoverable; its attorneys simply did not have actual awareness that call notes produced a decade earlier in a matter relating to a completely different, non-opioid product, existed and were a potential source of opioid-related call notes. "[F]rivolous . . . means that the [behavior or] legal claim can be supported by no colorable argument, is unsupported by precedent, logic, or other rational argument, and lacks any significant support in the legal community." *Principe v. Assay Partners*, 154 Misc.2d 702, 709, 586 N.Y.S.2d 182, 187 (N.Y. Sup. Ct., New York Country 1992).

Nevertheless, A&P regrets that the pre-2008 call notes were not produced until June and July 2021. Endo's response proposes remedies to eliminate any possible prejudice to Plaintiffs in their trial presentation. This includes allowing Plaintiffs to admit the late-produced documents without a sponsor and allowing Plaintiffs' experts to update their opinions to address these

documents. Endo also proposed referring the remainder to a discovery master for consideration in a way that will not divert the Court's resources from the ongoing trial. A&P has no objection to the relief proposed by Endo, or to the involvement of a discovery master. Any sanction beyond what Endo has proposed would be punitive and disproportionate, and contrary to the strong public policy of resolving cases on their merits.

B. The Discovery Issues in Tennessee Are Completely Unrelated to the Pre-2008 Call Note Production

The State's motion tries to connect the call notes issues in this case to the imposition of sanctions against Endo and A&P in the *Staubus* opioid case.[4] That connection is completely unwarranted.

The issues in the *Staubus* case principally involved a representation that Endo had produced the responsive Tennessee-specific documents that it could locate upon a reasonable search when there had been no search of certain Tennessee-based sales representatives and their supervisors. The discovery at issue in Tennessee is not at issue here. Moreover, as soon as A&P realized that some opioid-related call notes could be mined from the 2008-2009 Lidoderm Call Note Production, A&P retrieved those documents and turned them over to Redgrave LLP for review and production.

The State's attempt to manufacture a non-existent link between the Tennessee sanctions and the discovery issue in this case is clear from the State's focus on A&P partner Joshua Davis, who was named in the Tennessee sanctions orders.[5] Mr. Davis had no role whatsoever in

[4] In the *Staubus* case in Tennessee, the court imposed sanctions against Endo and A&P, including an entry of default on liability against Endo. The Tennessee court's default judgment order is attached as Exhibit G to the Oleske Affirmation.

[5] The State's proposed Order to Show Cause, which this Court entered with some modifications, specifies that Mr. Davis should appear to testify on the State's motion. He is the

document collection or production in the Lidoderm investigation. Davis Aff. at ¶¶ 5, 7. He also did not understand that some of the call notes in the 2008/2009 Lidoderm Call Note Production included references to opioid products. *Id.* at ¶ 19. Mr. Davis also had no role in collecting or producing documents from the 2008/2009 Lidoderm Call Note Production once others at A&P realized that some subset of those call notes might reference opioid products. *Id.* at ¶18. Thus, the State's motion is trying to use Mr. Davis as a bogeyman despite his irrefutable lack of knowledge that the Lidoderm production included references to opioid products and his lack of involvement in retrieving and producing documents from that production in this case.

IV. CONCLUSION

In a perfect world, the pre-2008 call notes would have been discovered earlier and produced earlier. But there was no willful or contumacious misconduct that would support a default or preclusion order. There also was no frivolous conduct. To the extent the Court finds it appropriate to order the remedies proposed by Endo in its response, and to refer the remainder of the State's motion to a discovery master, A&P has no objection.

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only A&P partner so listed. The Order to Show Cause also indicates that A&P attorney Melissa Weberman should appear to provide testimony at a date and time to be set by the Court, presumably because she holds the title of Managing Director of A&P's eData Group. But as Ms. Weberman's affirmation shows, she has had no involvement at all in the issues identified in the State's motion. Affirmation of Melissa Weberman at ¶¶ 4-8.

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Respectfully submitted,

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