E-FILE

SURPEME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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Index No. 400000/2017

IN RE OPIOID LITIGATION

Hon. Jerry Garguilo

REPORT OF
REFEREE
JOSEPH J. MALTESE

----------X

This Report applies only to the following underlying actions of this coordinated litigation against the Defendants Endo Pharmaceuticals, Inc. and Endo Health Solutions, Inc. and Par Pharmaceuticals, Inc. and Par Pharmaceuticals Companies, Inc. brought by the Plaintiffs:
County of Suffolk under Index No. 400001/2017
County of Nassau under Index No. 400008/2017
State ofNew York under Index No.400016/2018

Joseph J. Maltese, an attorney at law in good standing, licensed to practice before the courts of the State of New York, affirms the following under the penalties of perjury pursuant to CPLR § 2106(a):

1. That I am a former Associate Justice of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.
2. That on July 17, 2017, the Litigation Coordinating Panel of the State of New York, commonly known as the Mass Torts Panel, pursuant to 22 NYCRR 202.69 issued an Order Granting the Defendants' Application to Coordinate nine (9) Supreme Court actions then pending in nine (9) different counties of the State of New York in Suffolk County with the consent of the then nine county plaintiffs to be thereafter known as the above captioned coordination *In re Opioid Litigation.* (NYSCEF No. 1). Since that time the State of New York and several other counties and municipal entities have been joined in this coordination as plaintiffs, well as other defendants.
3. That on August 24, 2021 I was advised by Justice Jerry Garguilo of the Supreme Court of the State of New York, County of Suffolk, who is presiding over the above captioned matters that I was being appointed to serve as a Referee to hear and report. The order of appointment as a Referee was signed by Justice Garguilo on August 31, 2012 to review and report my findings, conclusions and recommendations to the court based upon the submissions by the parties and any other admissions, documents and

statements made in connection with the subject matter of the motions filed by Orders to Show Cause by John Oleske, Esq. as the Senior Enforcement Counsel of the New York State Office of the Attorney General (OAG) on behalf of the State of New York by the plaintiff, State of New York, on August 1, 2021 and signed by Justice Garguiloon August 2, 2021 as well as a second motion on August 11, 2021 for contempt, and other relief against the defendants, Endo Pharmaceuticals, Inc. and Endo Health Solutions, Inc. (together "Endo") and Par Pharmaceuticals, Inc. and Par Pharmaceuticals Companies, Inc. (together "Par") (collectively "Endo/Par") and against the attorneys for Endo/Par Arnold & Porter Kaye Scholer LLP ("APKS") and Redgrave LLP ("Redgrave").

4. That the plaintiffs, the County of Suffolk represented by Jane Conroy of Simmons Hanly Conroy and the County of Nassau represented by Hunter Shkolnik of Napoli Shkolnik have joined in these motions.
5. That the initial Order to Show Cause dated August 2, 2021, filed by the State of New York, sought an order, pursuant to CPLR 3126, 3215 and 4401; 22 NYCRR 130-1.1 and the Court's inherent authority:
   a) Striking Endo's answers and entering a default judgment of liability against each of the Endo Entities on each of plaintiffs' causes of action for public nuisance;
   b) Deeming all issues relating to any withheld and/or spoliated documents, testimony, or other information as being resolved in plaintiffs' favor for all purposes in any proceedings under the coordinated index number;
   c) Precluding Endo from opposing any claims, interposing any defenses, and proffering or objecting to any evidence relating to any such issues in any proceedings under the coordinated index number;
   d) Authorizing plaintiffs to obtain expedited discovery from Endo and APKS as to their noncompliance with discovery in this proceeding, and/or any of Endo's operational conduct relating to the discovery at issue;
   e) Authorizing plaintiffs to obtain expedited jurisdictional discovery from Endo and APKS as to the knowledge and/or involvement of Endo International PLC in connection with such discovery noncompliance and/or any of Endo's operational conduct relating to the discovery at issue;

f) Appointing a referee to serve as a discovery monitor for the purpose of facilitating such expedited discovery;

g) Awarding plaintiffs their costs in the form of expenses and reasonable attorneys' fees in prosecuting this action against Endo, dating from Endo's initial responsive filing on November 10, 2017, to the present, to be recoverable jointly and severally from Endo and APKS;

h) Awarding plaintiffs all other appropriate financial sanctions against Endo and APKS on a joint and several basis; and

i) Granting such other and further relief as the Court may deems just and proper.

The Court further

ORDERED, that pending the hearing of this motion and/or further order of the Court:

a) All documents produced by Endo subsequent to the close of discovery in this action are deemed authentic and admissible to the extent any plaintiff seeks to introduce them in the ongoing trial;

b) Any plaintiff may read any portions of any such documents, and explain such documents' source, nature, and connection to other evidence, directly to the jury in the ongoing trial, subject to further order;

c) Endo and all other parties in this action represented by APKS shall deliver to plaintiffs a list identifying the bates number and the dates, persons, entities, and repositories establishing the chain of custody of each responsive document produced by Endo or any such other party after the close of discovery in this action no later than 5:00 p.m. on Tuesday, August 3, 2021, (amended to Wednesday August 4, 2021) and as relates to any supplement or overlay produced since the close of discovery, Endo or any such other party shall identify each and every document or data entry and field added or supplemented. Endo and APKS shall provide plaintiffs with all of the above information with respect to any additional productions of responsive documents in writing at the time those productions are made."

> The Court also ORDERED that Endo shall produce for testimony at the hearing on this motion: (i) Endo's senior-most legal officer with personal knowledge of the matters at issue; (ii) Endo's senior-most operational officer with personal knowledge of the matters at issue; and (iii) Brandon Leatha of Leatha Consulting LLC. In addition, no later than 5:00 p.m. on Tuesday, August 3, 2021, Endo shall also produce to plaintiffs all documents Endo and/or APKS previously provided to Mr. Leatha in connection with the matters at issue; and it is further ORDERED, that APKS shall produce at a date and time to be designated its Partner Joshua M. Davis and Melissa Weberman, its Lead Attorney and Managing Director of APKS's eDiscovery + Data Analytics ("eData") Group, for testimony at the hearing on this motion."

The Court originally reserved the hearing on the motion until August 6, 2021 but has adjourned these matters for further consideration to be conducted at the conclusion of the ongoing trial.

6. In addition to the production of the Endo sales representative's call notes well after the commencement of the trial, the Plaintiffs claim that they are aggrieved by the recently disclosed email written by Linda Kitlinski, a former Endo employee to her husband outlining some alleged improprieties at Endo. Since Ms. Kitlinski is no longer is employed by Endo and resides in Pennsylvania, she apparently is beyond the jurisdiction of this Court. The Plaintiffs' counsel assert that this email, which purports to have some damaging comments about the marketing sales practices of Endo and educational programs for physicians sponsored by Endo would have been of great assistance for plaintiffs' counsel in preparing their cross examination of Endo witnesses who have already testified at the trial. Linda Kitlinski's e-mail is attached as Appendix B.
7. After the Court issued the Order to Show Cause on August 2, 2021, Henninger S. Bullock, Esq. of the law firm of Mayer Brown, appeared to represent the Endo/Par defendants and requested that since he was just entering the litigation that he be given until August 4, 2021, to respond to the Order to Show Cause (NYSCEF Doc. No. 8248).

8. That on August 4, 2021, Jonathan L Stern, Esq., a partner in the firm of APKS filed an affidavit (NYSCEF No 8297) stating in part, that he was the relationship partner for APKS with Endo since 2004 and that since that time... "I provided strategic advice to Endo across the entire litigation, in which Endo is currently a party in over 3,000 cases. I work with other members of the larger APKS team and have operational responsibility for those cases and I from time to time appear in specific cases on behalf of Endo." Mr. Stern states in essence, that the recently uncovered "call notes" from the Endo sales representatives were originally part of another proceeding concerning an investigation concerning a non-opiate drug called Lidoderm. That after that matter was resolved, those "call notes" were stored in an off-site storage facility. That when requests were made for discovery of call notes concerning the sales promotion of opioids in other litigations in federal and state courts similar to the one here New York, " I did not make the connection between the Lidoderm investigation and the instant matter, and it did not register with me that the firm's long-closed files would be a potential source of discoverable materials completely unrelated to opioid litigation." He concludes that at the end of May 2021 he became aware that the "Lidoderm-filtered call notes" previously produced in the government investigation may also contain call notes that were opioid-related. "That was the first time the potential connection entered my mind." He then directed that those call notes be located and on June 7, 2021, three disks were uncovered, reviewed, and found that "some of the 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." Once that data was uncovered, he claims he directed those copies of the data be turned over to Redgrave LLP, Endo's discovery counsel.

However, he did not direct that those documents, which were in response to prior discovery demands be turned over directly to this Court or the Plaintiffs herein, who were preparing their cases for trial.

9. On August 4, 2021, Joshua Davis, another partner of APKS also submitted an affidavit (NYSCEF No 8300) that in substance was essentially the same as the affidavit of his partner, Jonathan Stern in relation to the Lidoderm litigation and states that he was unaware of whether APKS retained copies of the productions made in that

litigation. He further states that he was working as an associate at APKS in 2017 when both the instant coordination commenced in July 2017 and the federal Multidistrict Litigation (MDL 2804) in the U.S. District Court for the Northern District of Ohio. At that time, he was assigned "to lead the team working on discovery across all federal and state cases, to prepare company and expert witnesses for depositions, to take depositions of plaintiffs fact and expert witnesses and to interact with plaintiffs' counsel with respect to discovery." After outlining his understanding in accordance with the New York Case Management Order No. 2 that all discovery deposited into the federal MDL 2804 was "deemed" produced to the plaintiffs in this New York coordination of cases. He closes by stating that "it did not occur to me that that (the Lidoderm call notes) would incidentally include information responsive to opioid-related discovery requests that was not already included in Endo's extensive opioid productions."

10. On August 4, 2021, since part of the relief sought by the plaintiffs in the Order to Show Cause was that APKS, as attorneys for Endo/Par, be discharged by the Court and be sanctioned, Charles Michael, Esq. from the law firm of Steptoe & Johnson, LLP, submitted a response to the plaintiff's State of New York's Order to Show Cause and Other Relief (NYSCEF Doc. No. 8295). Charles Michael, Esq as counsel for APKS, referred to simply as A&P in this response, states that

> "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 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 contained the

production; and caused the disks to be made available for further review and production in opioid cases as appropriate".

In regard to the plaintiffs' demand for sanctions, Mr. Michael further asserted that: "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 ad 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."

11. That on August 10, 2021, the plaintiff, State of New York, filed an additional motion by Order to Show Cause for civil contempt against the defendants Endo/Par and APKS and Redgrave, that was signed by the Court on August 11, 2021 to:
    a) Adjudge defendants Endo Pharmaceuticals, Inc., and Endo Health Solutions Inc. (together "Endo") and defendants Par Pharmaceutical Inc. and Par Pharmaceutical Companies, Inc. (together "Par") (collectively "Endo/Par"), and their counsel Arnold & Porter Kaye Scholer LLP ("APKS") and Redgrave LLP ("Redgrave") in civil contempt of Part C of the Court's interim Trial Order entered August 2, 2021 (NYSCEF No. 8247) (the "Interim Discovery Order");
    b) Punish them until they cease their continuing, serial violations of the Court's directives and fully purge themselves of their contempt;

c) Sanction Endo/Par and their counsel, APKS and Redgrave for their multiple acts of frivolous and abusive misconduct subsequent to the State's original Rule 130 motion on August 1, 2021 (NYSCEF No. 8239);

d) Disgorge all fees paid by Endo/Par to APKS and Redgrave in connection with this litigation into an escrow account subject to the Court's supervision pending further proceedings;

e) Disqualify APKS and Redgrave from any further participation as counsel to Endo/Par in any proceedings under the coordinated index number;

f) Revoke *pro hac vice* admissions the Court previously granted to APKS partner Pamela Yates and Redgrave partner Jonathan Redgrave; and requiring them to notify their home jurisdictions and any other jurisdiction in which they are currently admitted *pro hac vice* of the circumstances of the Court's revocation of their admission here, in a form to be approved by the Court; and

g) Conform the State's August 1, 2021motion, the Court's August 2, 2021 Order to Show Cause, to conform and replace all references to "Endo" with "Endo/Par" and to replace all references to "APKS" with "APLS" and "Redgrave" and as to the relief specifically naming "Redgrave" same is reserved to argument and hearing.

Charles Martin, Esq., representing APKS in his response to New York State's August 19, 2021, Supplemental Affirmation (NYSCEF no. 8574) claims that the State's affirmation is "notably short on legal authority for the extreme and prejudicial relief it seeks. APKS is hard-pressed to see how disqualifying Endo's counsel in the middle of trial, functionally doing the same by prohibiting counsel from being paid, could result in anything other than a mistrial.

Endo has well explained how the Court can take measures to allow this trial to proceed without meaningful prejudice to plaintiffs from Endo's recent productions of documents in this and other opioid cases. The Court should adopt those measures as it sees fit and proceed with this case on the merits".

The State's motions of August 2 and August11, 2021 as well as the plaintiff's supplemental affirmation of August 19, 2021 raise general issues that it contends should result in, among other things, Endo being defaulted and APKS being disqualified, disgorging its fees, and having Ms. Yates's *pro hac vice* admissions revoked with a concomitant bar referral.

Pre-2008 Call Notes

As APKS explained in detail in its response to the State's August 2, 2021 motion, the issue regarding call notes arises out of Endo's production of call note data providing information from sales calls by Endo representatives to health care providers.

The relevant APKS partners, who admittedly supervised the discovery of the various opioid litigations have stated under oath that they did not realize prior to May 2021 that the call notes from the Lidoderm document production from more than a decade earlier might also contain references to opioids. As previously noted above, the documents were produced into the federal MDL after the trial was well underway for 2 months without any notice to the plaintiff, State of New York, or the other plaintiffs.

Kitlinski Email

In August 2021, Endo produced in a similar case pending in the federal court in San Francisco, in the federal MDL in Ohio, a 2009 email that former Endo employee Linda Kitlinski, purportedly sent to her husband. The facts regarding this document are in Appendix Band are as follows:

- The Kitlinski Email was reviewed in September 2014 by a contract attorney from a litigation document vendor retained to assist in the massive review of Endo documents required by opioid investigations and lawsuits. These included a subpoena from the New York Attorney General and a lawsuit filed by the City of Chicago.
- The contract attorney from the retained litigation document vendor, *erroneously* in APKS's view, marked the Kitlinski Email as non-responsive to the New York Attorney General's pending subpoena and not relevant to the pending City of Chicago lawsuit. As a result, the document was not produced in 2014 and not reviewed by APKS.
- Ms. Feniger was the first potentially hostile witness whom the plaintiffs called here live in the case at bar. A few days prior to her taking the stand, Ms. Yates of APKS met with Mr. Badala to discuss the issue. Ms. Yates's understanding of that agreement (which she stands by today) is that ***neither side*** had to disclose

documents in advance of an examination of a hostile witness. Ms. Yates agreed that Mr. Badala's examination of a Park company witness would not be atypical direct examination and the advance exchange of exhibits would not apply.

- Ms. Yates and Mr. Badala also discussed advance notification of the documents to be used in Ms. Yates's examination of Ms. Feniger after Mr. Badala's examination. Ms. Yates advised that she thought a similar agreement of no exchange was appropriate, primarily because it would also not be a typical direct examination. Mr. Yates believes she specifically said that her "direct" would be dependent on his cross-examination, and since she did not know the scope of Mr. Badala's "cross," it was difficult for her to know what document she would use in her examination.
- Ms. Yates contends that as a result of that agreement, the parties had no obligation to exchange exhibits for their examination of Ms. Feniger. Ms. Yates did not confirm her agreement with Mr. Badala with the State's counsel because Mr. Badala was calling the witness.
- Consistent with the parties' agreement, Mr. Badala did not disclose in advance the documents he used in his examination of Ms. Feniger, and Endo made no objection to those exhibits on the basis that they had not been disclosed the night before.
- When Ms. Yates initially moved to admit P-02855, the first exhibit she used with Ms. Feniger, neither the State nor the Counties objected at all, and certainly not on the ground that Ms. Yates had not disclosed the exhibit the evening before. August 9, 2021 (Tr. At 16-17).
- When the State finally objected to that first exhibit after a number of questions, it was not on the basis that defendants were required to disclose exhibits used on their direct examinations of adverse witnesses. Instead, the State objected on the ground that it was "not produced to the State." *Id.* at 21:20-29:13.
- When Ms. Yates moved to admit P-02860, the second document she used with Ms. Feniger, the State objected on several grounds: that the document had not been timely produced, that the witness had not written the letter so lacked foundation, and that the document included a list of enclosures and Ms. Yates was

only seeking to admit the cover letter. *Id.* at 38:5-20. It was not under the Court heard further argument that the State raised the objection of failure to exchange the night before. *Id.* at 40-44.

- There were no further objections to any exhibits Ms. Yates used with Ms. Feniger by the State or Counties claiming failure to exchange the night before. See id. at 58:8-12; 62:12-16; 69:4-7; 71:25-73:10; 73:22-25; 77:25-78:4; 79:11-14; 83:22-25. Yates Aff. ,, 5-13. Thus, Ms. Yates operated on the good-faith, and accurate, understanding that she and the plaintiffs' counsel examining Ms. Feniger had agreed that there would not be an advance exchange of exhibits they intended to use in their examinations of Ms. Feniger. Any contention to the contrary is disputed and incorrect.

Documents Used by Ms. Yates in Her Examination of Ms. Feniger

The State also asserts that Ms. Yates improperly prepared Ms. Feniger and/or used documents in her examination of Ms. Feniger that had been produced during trial. As Ms. Yates has stated under oath, however, she did not intend to use any documents that were produced during trial in her examination of Ms. Feniger. Indeed, prior to her examination of Ms. Feniger, Ms. Yates had a list of production dates for each document she considered using to ensure that she did not use documents there were produced during trial. Most of the documents on her list had been produced in 2018. The most recently produced was from April 1, 2021, months before trial. All of these documents were also on Par' s exhibit list prior to Ms. Yates's examination of Ms. Feniger.

2009 Letter to DEA

Ms. Yates was informed that a two-page letter to the DEA (END-NY-02860) had been produced on October 25, 2018. Although END-NY-02860 references attachments, the attachments were not part of the version produced in 2018. However, the identical letter is contained in PAR_GAAG-00105712, which was produced on August 1, 2021. The August 2021 production (PAR_GAAG-00105712 through PAR_GAAG-00105972) also included attachments to that letter.

Ms., Yates did not show PAR_GAAG-000105712 through PAR_GAAG-00105972 (the document produced during trial) to Ms. Feniger during her preparation of the witness. Rather, Ms. Yates showed Ms. Feniger END-NY-02860, and subsequently sought to admit the document

at trial, because it had been produced years prior to trial. Plaintiffs objected and the Court sustained the objection.

In court on August 10, 2021, Ms. Yates misspoke and represented that the document PAR_GAAG-00105712 was produced on April 1, 2021, instead of August 1, 2021. In any event, the letter (without attachments), that Ms. Yates sought to introduce into evidence had been produced nearly three years before trial.

Ms. Yates's two responses to the Court on August 9 and August 10 were consistent. On August 9, she felt bound to protect Par's attorney-client privileged communications regarding a subsequent search for the document in question that contained the attachments. As *permitted* by Mr. Redgrave, her later response on August 10 disclosed that Par had, in fact, authorized and conducted a subsequent search that resulted in the location of a version of the document that included the attachments that were not in Ms. Feniger's custodial file.

Endo's response of August 18, 2021 explains why it believes that a finding of civil contempt is entirely unwarranted against Endo or APKS, and APKS joins in those factual recitations. In addition, APKS asserts that in its response to the August 11, 2021, Order to Show Cause, Paragraph (c) did not order APKS to do anything with respect to document productions occurring prior to that date. APKS contends that the Court's directive with respect to prior document productions is aimed solely to the parties, and not to APKS itself.

However, APKS was representing Endo and had access to those documents from prior litigation in other courts and was responsible for producing those documents in compliance with the continuing discovery obligations and the Court's directives.

Recently Produced Documents Appended to the State's Latest Submission

APKS further asserts that" the State attached to its August 19, 2021, supplemental submission a number of documents recently produced by Endo in this and other cases around the country, which the State disingenuously characterizes those documents as "case-changing" for the merits of this case. With respect to the relief sought by the State against APKS, it suffices to point out that the factual record does not provide any basis for assigning blame to APKS, or to anyone else for that matter, for the timing of the production of these documents".

While the tardy production of those documents may or may not have been "case changing" APKS asserts, it is up to the plaintiff not the defendant to select their theories and

evidentiary proofs to substantiate their theory of the case they choose to present. The tardily disclosed "call notes" one of which indicating that a sales representative observed in a physician's waiting room" A lot of drug abusers here and crackheads. Scary place" (8/22/03). That "call note" may have been utilized to demonstrate that notwithstanding those observations that the sales representative continued to promote additional sales in a place he may have believed was a "pill mill".

Counsel for APKS further argues that there is no legal or factual basis for disgorgement of APKS's fees or an order directing APKS to pay its fees into the Court. "The State's papers are notably silent on the legal authority for this requested relief. This is no surprise, as there is no basis in law or in fact for the relief requested".

It is pointed out that the Second Department has made it clear, that a litigant lacks standing to seek the disgorgement of the fees paid to its adversary's counsel:

> ***As to the return of legal fees, a party who is neither a present nor a former client or an attorney has no standing to complain about the attorney's representation*** Here, [the lawyers] were retained to represent [the defendants] only, and the plaintiff was, at all times relevant herein, represented by other counsel. [The lawyers] never affirmatively assumed any duty to represent the plaintiff. Thus, the plaintiff has no standing to complaint of [the lawyers'] simultaneous representation of [defendants.]

Kalish v. Lindsay, 47 A.D.3d 889, 891-92, 850 N.Y.S.2d 599, 602-03 (2d Dept 2008) (emphasis added) (citations omitted).

Counsel for APKS further argues that there is no factual or legal basis for disqualifying APKS, revoking Ms. Yates's *pro hac vice* admission, or making a bar referral.

> "Although the disqualification of an attorney is a matter which rests within the sound discretion of the trial count, a party' s entitlement to be represented in ongoing litigation by counsel of its choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted." *Zutter,* 15 A.D.3d at 397, 790 N.Y.S.2d at 486 (citations omitted).

Counsel for APKS concludes that "against this backdrop, disqualification of APKS or any of its lawyers in the middle of this trial is completely unwarranted". The defendant's assert

that: "[T]he record on the Court's Orders to Show Cause is replete with evidence that Endo and APKS have acted with good faith and honesty in the litigation of this case. The State's most recent filing essentially asks the Court to disregard affidavits submitted by a number of counsel and to instead assume, without supporting facts, that these officers of the court are lying. The State' s most recent filing has taken the rhetoric in this case to a new level. The State' s completely unfounded accusations against other officers of the court demonstrates the need for the Court to tamp down the rhetoric in this case, and to resolve the pending Orders to Show Cause based on evidence and not unfounded accusations and invective."

New York Law Concerning Disclosure of Discovery

New York State evidentiary and discovery rules are contained in statutes, court rules and case law. The New York Civil Practice Law and Rules (CPLR) is the primary sources of such rules on discovery, which may be modified by Court Rules. The CPLR states, in part:

CPLR 3126. Penalties for refusal to comply with order to disclose provides:

> If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
>
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
>
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the

> action or any part thereof, or rendering a judgment by default against the disobedient party.

CPLR 3102(h) Amendment or supplementation of responses, notes in relevant part:

> (h) Amendment or supplementation of responses. A party shall amend or supplement a response previously given to a request for disclosure promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading.

CPLR 3l0l(h) McKinney's Supplement notes the section only applies to a "party."

> Subdivision (h) requires the amendment or supplementation to be made "promptly" upon the party's obtaining the new information. It should make no difference when the party obtains the information. The amendment or supplementation should certainly be made sufficiently in advance of trial so the party entitled to it can adequately prepare but acting "promptly" is the key. Lawyers should review their prior responses to disclosure with their clients at certain intervals during the litigation to ensure that they are correct. If a prior response was incomplete or incorrect, or circumstances have changed relevant to a prior correct response, it is the client who most often possesses this knowledge. A regular review of disclosure responses with the client will help to avoid trouble at trial, including possible preclusion...
>
> CPLR 3101(h) does not provide a specific remedy for an outright failure to amend or supplement responses. A party can move to compel another to amend or supplement under CPLR 3124, but that should be a rare event. The first sentence of CPLR 3101(h) places the burden of amending or supplementing a prior response squarely on the party who has served the response.

> If the information comes in on the eve of trial, "the court may make whatever order may be just" upon the motion of a party or on its own motion.

It must be noted that despite Defense Counsel's argument that the certificate of readiness rule bars Plaintiffs claims, the same is not so. A certificate of readiness is no barrier to an amendment or supplementation required by CPLR 3101(h).

CPLR 3126 and 310l(h) are to be read together. CPLR 3126 does apply to a failure to supplement under CPLR 3lOl(h). (See McKinney Commentary C3126:6).

In addition, the parties were all subject to the rules of the New York State Court Electronic Filing (NYSCEF) system as required by this Court's Case Management Order No. 2 dated September 5, 2018, and the Rules of the Commercial Division of the Supreme Court ofNew York in 22 NYCRR sect. 202.70 *et seq.*

Discussion

The New York Court of Appeals in *Merrill Lynch* v. *Global Strat, et. al.*, 22 NY 3d 877 held that while the trial courts have discretion in issuing sanctions pursuant to CPLR 3126 for non-compliance with discovery orders, those sanctions should be commensurate with the party's conduct in non-compliance.

The New York Supreme Court Appellate Division, Second Department in 2017 affirmed the trial court's striking of the defendant's answer, where the defendants failed to timely comply with discovery orders, *Shavonn Lucas* v. *Lawrence Stam, et* al., 147 A.D.3d 921. In *Lucas,* the plaintiff moved pursuant to CPLR 3126 to strike the separate answers of the defendants for failure to comply with court ordered discovery and pursuant to 22 NYCRR 130-1.1 to impose monetary sanctions. The trial court noted "the piecemeal manner in which defendants provided [discovery] was inexcusable and could only have been designed to conceal evidence and delay these proceedings." The Appellate Division agreed with the trial court holding:

> The Supreme Court properly inferred the willful and contumacious character of the defendants' conduct from their repeated failures over an extended period of time, without an adequate excuse, to comply with the plaintiffs' discovery demands and the court's discovery orders.

> The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court *(Lazar, Sanders, Thaler & Assoc., LLP v Lazar,* 131 AD3d at 1133; see Wolf v Flowers, 122 AD3d 728, 728 [2014]; *Arpino v F.JF. & Sons Elec. Co., Inc.,* 102 AD3d at 209)... In determining the appropriate sanction to impose, we are guided by CPLR 3126, which permits courts to, among other things, "order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order" (CPLR 3126 [1]), issue a preclusion order (see CPLR 3126 [2]), or strike a pleading (see CPLR 3126 [3]). The striking of a pleading is a drastic remedy that may only be warranted upon a clear showing that the failure to comply with discovery demands or court-ordered discovery was willful and contumacious *(see Lazar, Sanders, Thaler & Assoc., LLP v Lazar,* 131 AD3d at 1133.
>
> The First Department in *Arts4All, LTD v. Hancock,* 54 AD3d 286 (2008), aff. 11 NY3d 908 (2009) sustained the trial court' s dismissal of the counterclaims for failure to comply with discovery orders.

New York Courts have noted that in order to demonstrate fraud on the court, which may warrant a sanction, the non-offending party must establish by clear and convincing evidence that the offending party has acted knowingly in an attempt to hinder factfinder's fair adjudication of the case and his adversary's prosecution of the case. *Lucas v Lawrence Stam, et al.*, 147 A.D.3d 921.

It should also be noted that the penalties for refusal to comply with an order or to disclose pursuant to CPLR 3126 apply to the *parties* and not to their counsel.

However, the Court of Appeals in *Gibbs v. St. Barnabas Hospital,* 16 NY3d 74, 81 found it necessary to state "As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice (citations omitted). The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar... "

Findings

After reading and considering the documents submitted by the parties contained in Appendices A and A-2 and the relevant transcripts of the trial, I make the following findings:

1. That since the defendants Endo/Par have settled the causes of action against them pursuant to a Final Consent Order and Judgment dated September 10, 2021 duly filed and granted (NYSCEF Doc 8644) no findings are made as to their conduct in connection with this motion.
2. However, while APKS as counsel for Endo/Par have submitted through their counsel explanations for the delays in submitting the ordered discovery in a timely manner due to misfiling in the various data retrieval systems employed by them directly or through a contractor such explanations are insufficient and inconsistent with the facts concerning the timing and substance of those disclosures.
3. APKS is the same law firm that has represented Endo/Par in similar cases in other jurisdiction where the plaintiffs have sought the same type of discovery.
4. APKS has produced the same type of court ordered discovery, albeit late in other jurisdictions *before* a trial or depositions.
5. In particular, on April 9, 2020, Chancellor Moody of the Circuit Court for Sullivan County at Kingsport, Tennessee found that "Endo's responses concerning the same type of document discovery to be "evasive and incomplete."
6. Notwithstanding the production of the same call notes disclosed in the Tennessee case, in 2020, those same documents were not timely produced in this litigation until after the commencement of the trial before this Court.
7. The discovery produced after witnesses have testified at the trial has prejudiced the plaintiffs' presentation of their cases in an orderly and timely manner.

Conclusions

Both Joshua Davis and Jonathan Stem, partners at APKS have acknowledged that errors or mistakes were made in not timely disclosing the call note documents sought by the plaintiffs' counsel. Plaintiffs' counsels have all stated that this delay of disclosure has altered their ability to present their cases to the jury. This delay has

caused much additional legal work, time, and effort for the plaintiffs' counsel, which are in the middle of trial presentation and for this Court, which is presiding over this trial. It appears that counsel for APKS knew, or should have known, of the existence of the "call notes" requested and of their most relevant content concerning the marketing of opioids, which was also the subject matter of the cases in Tennessee and in San Francisco as well as this Court. To claim that they did not contemplate that opioid marketing was also the subject matter of those same call notes, which became apparent in 2020 in the Tennessee court should have alerted them to their relevance here in the New York state cases.

Nonetheless, APKS, as counsel for the same defendant Endo/Par in Tennessee, as they are in this Court, they should have known the full extent of the contents of those documents for which they were criticized and sanctioned in Tennessee over a year ago. Moreover, APKS thereafter disclosed those same documents to the federal court in San Francisco, and slipped those voluminous documents into the MDL, while failing to give this Court notice of their existence, perhaps in the hope that the plaintiffs counsel was preoccupied with the ongoing trial to notice them. Placing those documents in the federal MDL document database, while accessible to the plaintiffs' counsel, did not give them or the Court timely notice of their existence for possible use in this trial. Therefore, APKS was deficient in not timely disclosing those documents. Consequently, all of the plaintiffs were prejudiced by this delay and accordingly, the Court should fashion an equitable remedy for this failure to timely disclose those documents.

While counsel for APKS and Redgrave have denied any "willful and contumacious conduct" in connection with these discovery violations, assessing the level and extent of that conduct is to be determined by the Court in its discretion based upon the facts elicited herein.

Recommendations

In my assigned role I was to review the documents submitted by counsel on the Orders to Show Cause dated August 2, 2021. and August 11, 2021 and all the

thousands of pages in the responsive papers and exhibits to make recommendations to the Court in deciding the pending motions before it and not to infringe on the Courts role in deciding these matters. Based upon my review of the documents presented by counsel for the plaintiffs and for the defendant Endo/Par and their attorneys APKS and Redgrave, I make the following recommendations.

1. Due to the delay in disclosing relevant evidence before and during this trial that the plaintiffs claim was necessary in the prosecution of their case, it is recommended that the Court should award costs to include reasonable attorney fees to the plaintiffs for the prosecution of these motions and in the Court's discretion to award monetary sanctions against APKS.

2. It is not warranted nor recommended that the Court discharge APKS from representing Endo/Par.

3. It is not recommended that the Court discharge Redgrave from representing Endo/Par nor shall any costs, attorney fees and sanctions be imposed against Redgrave as they entered this litigation after the initial discovery violations.

4. It is not warranted nor recommended that the Court discharge Pamela Yates, a partner in APKS, who it admitted *pro hoc vice* from representing Endo/Par at this trial.

5. It is not warranted nor recommended that this Court refer Pamela Yates, a partner in APKS for discipline to the bar of the State of California and any other court where she is admitted to practice law.

September 20, 2021

Respectfully submitted.

Joseph J. Maltese
Referee