IN THE CIRCUIT COURT FOR SULLIVAN COUNTY
AT KINGSPORT, TENNESSEE

BARRY STAUBUS, et al.,	
Plaintiffs,	JURY DEMAND
	Case No. C-41916
v.	Division C
PURDUE PHARMA, L.P., et al.,	
Defendants.	

ORDER GRANTING DEFAULT JUDGMENT AGAINST ENDO DEFENDANTS IN FAVOR OF PLAINTIFFS

On April 9, 2020, Plaintiffs Filed a Motion for Sanctions against the Endo Defendants. On May 4, 2020, this Court issued an Order on that Motion, holding Endo and its counsel in contempt of Court, directing Endo to produce certain records, and reserving judgment on other sanctions, including but not limited to punishment and remedies for contempt. After Endo completed those productions, the parties submitted supplemental reports and briefing regarding the issue of further sanctions against it and its counsel. For the reasons stated herein, the Court hereby grants a **DEFAULT JUDGMENT** in Plaintiffs' favor on liability, in addition to other sanctions, and reserves issuing a final judgment pending a damages trial.

BACKGROUND

The relevant procedural history of this case is extensive. The Court finds that Plaintiffs' recitation of the procedural history and relevant correspondence to be both comprehensive and accurate. The Court therefore incorporates those submissions by reference.[1] The original

[1] *See* Plaintiffs' 4/9/20 Motion for Sanctions Against Endo and/or Order to Show Cause ("Pltfs. 4/9/20 Motion for Sanctions"); Plaintiffs' 4/23/20 Reply on Motion for Sanctions; Plaintiffs'

Defendants were Purdue Pharma L. P., Purdue Pharma, Inc., The Purdue Frederick Company: Mallinckrodt PLC, Endo Health Solutions, Inc., Endo Pharmaceuticals, Inc., and Abdelrahman Hassabu Mohamed. Purdue Pharma and Mallincrodt have filed bankruptcy and the Plaintiffs have settled with Dr. Mohammed. The only Defendants left are the Endo Defendants. This is a very large and very complex case. The Plaintiffs have sued for $2,400,000,000 and have expert testimony which supports that amount. Because millions of documents have been produced by the parties, it is impossible to describe the complexity and the magnitude of the case. A photo of the multitude of bench books submitted by the parties on the many issues that have already been heard is helpful. See Exhibit A.

I. Plaintiffs' Claims

Plaintiffs in this case are Baby Doe (a baby born drug dependent) (hereinafter, "Baby Doe") and the District Attorneys General for the First, Second, and Third Judicial Districts (the "District Attorneys") (collectively, "Plaintiffs"). Plaintiffs filed this action in June 2017, alleging claims under Tennessee's Drug Dealer Liability, T.C.A. § 29-38-101 *et seq.* ("DDLA"). Plaintiffs asserted DDLA claims against three groups of major pharmaceutical manufacturer Defendants (the "Manufacturer Defendants"), a former Morristown prescriber who later lost his license and was sentenced to prison, and certain street-level dealers. The pharmaceutical company defendants included two related companies, Endo Health Solutions, Inc. and Endo Pharmaceuticals, Inc. (collectively, "Endo").

Under the DDLA, a person who illegally distributes drugs or knowingly facilitates the illegal distribution of a drug in Tennessee can be held liable to an appropriate plaintiff.[2] The

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7/14/20 Report to the Court Concerning Endo Compliance; and Plaintiffs' 11/4/20 Reply Concerning the Issue of Sanctions Against Endo.

[2] T.C.A. § 29-38-104(1), 104(9), and 105(a).

DDLA authorizes two forms of liability: one based on direct liability, the other based on illegal market facilitation.[3] The statute allows a baby exposed to drugs *in utero* to recover damages, and allows governmental entities to recover damages caused by an individual's use of an illegal drug.[4] Per § 116(a), the District Attorneys here represent local governments within their judicial districts.[5]

The stakes in this litigation are exceptionally high. Plaintiffs have alleged that Baby Doe may suffer from long-term (perhaps lifetime) impairments as a result of exposure to drugs *in utero*. As for the District Attorneys, they have filed expert reports that, collectively, estimate the local governments' prospective damages at $2.4 billion.[6] More generally, the opioid epidemic has had a serious impact in Tennessee and, in particular, the geographic areas at issue in this lawsuit.

II. Endo Operations in Tennessee

To place matters into context, some background concerning Endo's operations in Tennessee – and Plaintiffs' theories of liability concerning those operations – are warranted. At all relevant times, Endo manufactured, sold, and distributed prescription pharmaceuticals nationwide, including Tennessee. This included a branded opioid product called Opana ER. Endo made and sold Opana ER in an original formula through approximately 2012, when it began making and selling a reformulated version of the product. After Endo introduced the reformulated version of Opana ER into the Tennessee market, abuse of the product in Tennessee increased substantially. The record contains evidence that, according to Endo's own records,

[3] T.C.A. § 29-38-106(b)(1)-(2).
[4] T.C.A. § 29-38-106(c).
[5] *See* T.C.A. § 29-38-116(a).
[6] *See* Plaintiffs' 9/26/20 Notice of Filing Expert Reports Under Seal, Exhibit E thereto, Expert Report of Scott Hemphill, at p. 3 ¶ 9.

approximately 75% of nationwide abuse of Opana ER between 2013 and 2016 occurred in Tennessee.[7]

Through 2016, Endo utilized a sales force to market its branded opioids to prescribers in Tennessee, including promotion of Opana ER. That sales force included sales representatives in Tennessee (or responsible for geographic areas that included Tennessee), District Sales Managers who had responsibility for Opana ER in Tennessee, and Regional Business Directors who had responsibility for Opana ER in Tennessee.[8] It appears that, during the relevant time frame, Endo employed at least 86 Tennessee sales representatives, 18 District Sales Managers, and 7 Regional Business Directors.[9]

The sales representatives interacted with Tennessee prescribers to promote Endo's branded opioids (particularly Opana ER). These visits were frequent: between 2008 and 2016, Endo made nearly 110,000 detailing visits to Tennessee prescribers – an average of 264 visits per week during that time frame.[10] Sales representatives, district managers, and regional managers communicated over email about Tennessee prescribers.

In addition to promoting Endo's prescription opioids, Endo's sales force also was tasked (at least ostensibly) with identifying and internally reporting prescribers for engaging in potential diversion of prescription opioids.[11] As Plaintiffs explained at one of the hearings (and Endo did not dispute), the sales force was supposed to keep its "eyes open" with regard to potential

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[7] *See* 4/16/20 Declaration of Tricia Herzfeld in Support of Plaintiffs' Response to Manufacturer Defendants' Statement of Facts Filed in Support of Their Motion for Summary Judgment Against Governmental Plaintiffs, Exhibits 6 (Endo Resp. to RFA No. 73) and 35 (Tennessee Effect) thereto.

[8] Endo 5/13/20 Defendants' Emergency Motion to Extend, at p. 6.

[9] *See* Endo's 5/13/20 Emergency Motion to Extend, at pp. 6-7; Endo Defendants' 5/19/20 Status Report Concerning Production of Documents Discussed at the May 15, 2020 Conference, at p. 4.

[10] *See* Plaintiffs' 4/13/20 Response in Opp. to Motion to Stay, Exhibit 8 thereto, Endo Resp. to RFA No. 43.

[11] This issue was discussed at the April 24, 2020 hearing.

diversion by individual prescribers and their associated clinics.[12] Leaving aside whether this system created inherent conflicts of interest, it appears that Endo's Tennessee sales representatives or district managers at times reported prescribers for engaging in suspicious activity in either of two ways. First, a Tennessee sales representative could fill out a form entitled "Report of Suspected Diversion" and provide information that the sales representative believed was potentially problematic. The record contains some examples.[13] Second, a Tennessee sales representative or district managers could informally email another company official with that representative's observations.[14] Although it is not clear to the Court how formalized this process was, those reports sometimes were made to or forwarded to Endo's Compliance Department.[15]

It appears that, following a report of diversion (formal or informal), Endo officials could take certain steps. Upon receiving a report from a sales representative, a District Manager could decline to take any action at all (and thereby allow detailing to continue), forward the report to the Compliance Department, or (at least in limited instances) place the prescriber on some type of informal sales exclusion list. As for the Compliance Department, it could either decline to take any action (allowing detailing to continue) or place the prescriber on a "Global Exclusion List" (barring sales representative from detailing that prescriber). These exclusion lists were fluid, with some prescribers being taken off the lists (allowing detailing to resume) at various points in time. Furthermore, it appears that, at times, Endo might exclude certain prescribers from a particular clinic while continuing to detail others or, where Endo had previously excluded

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[12] April 24, 2020 Hearing.
[13] *See, e.g.*, Pltfs. 7/14/20 Report Concerning Endo Compliance, Ex. 1 thereto (Report of Suspected Diversion as to James Pogue).
[14] *See, e.g.*, 4/13/20 Declaration of Tricia Herzfeld in Support of Plaintiffs' Opposition to Motion for Stay, Ex. 10 thereto (November 2007 Email String concerning Frank McNiel).
[15] *See id.*

multiple prescribers from a particular practice, allowing detailing to resume as to some of those prescribers.

For purposes of liability, Endo's knowledge concerning suspect practices by Tennessee prescribers – including knowledge of potential diversion – are obviously critical to this case. This would include email correspondence concerning Tennessee prescribers, formal Reports of Suspected Diversion, informal Reports of Diversion to district managers or compliance officials, and the responses by district managers or compliance officials to those reports – such as whether they allowed detailing to continue or not. It would also include which prescribers Endo placed on its "global exclusion list" or district manager exclusion list, whether Endo excluded subsets of prescribers at a particular clinic, and whether (and why) Endo resumed detailing prescribers previously flagged for suspicious behavior.

III. Other Types of Relevant Endo Records

Endo maintained records reflecting prescriptions of Opana ER or shipments of those products. Among other things, Plaintiffs have asserted that Endo knew that the volume of opioids being prescribed in East Tennessee was too high and was causing increased rates of addiction and opioid overdose deaths – particularly as to abuse of Opana ER. Accordingly, information reflecting Endo's knowledge of the distribution volumes and prescription rates for prescription opioids – including Opana ER – is important evidence.

Also, at all relevant times, Endo was required to maintain a valid registration with the State of Tennessee to manufacture and distribute prescription drugs in Tennessee.[16] The parties have vigorously disputed what obligations Tennessee imposed on Endo through the registration process, and what representations Endo made to the State of Tennessee about whether it was a

[16] *See* T.C.A. § 53-11-301 *et seq.*

"manufacturer," a "distributor," or a "wholesaler" of opioids. Accordingly, records reflecting whether and when Endo entities held registration certificates, Endo's communications (both internally and externally) regarding its registration status, and communications concerning Endo's compliance with its registration obligations are important to this case.

IV. Relevant Procedural History

This Court has had to issue numerous orders concerning discovery misconduct by Endo. Those violations are accurately summarized in Plaintiffs' previous submissions which the Court incorporates by reference.

A. Plaintiffs' First Set of Discovery Requests and the Court's September 28, 2018 Order to Compel.

Plaintiffs served discovery requests with their Complaint in June 2017, including a First Set of Requests for Production that sought, among other things, Endo's prescriber-related files. Endo requested and obtained an extension of time to respond. Endo then moved to stay all discovery pending adjudication of its motion to dismiss, but the Court denied that request.[17] After the parties disputed the sufficiency of Endo's responses to this first set of discovery, Plaintiffs filed a Motion to Compel. On September 28, 2018, the Court issued an order (the "9/28/18 Order to Compel") granting that motion in part and ordering Endo to produce certain records within 90 days.[18] This included directing Endo to produce, for all of its prescription opioids from June 13, 2007 to the present:

> "(3) Endo's knowledge of suspect practices concerning the drugs, including but not limited to high-volume prescribers who were likely engaged in diversion or over-prescribing,"

[17] *See* 11/29/17 Order Denying the Manufacturer Defendants' Motion for Protective Order to Stay Pending Resolution of Their Motions to Dismiss Plaintiffs' Complaint.
[18] *See* 9/28/18 Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel Endo.

(4) Endo's policies, practices, and procedures for addressing potential abuse and diversion of its drugs, and

(5) the volume of Endo Opioids streaming into the relevant geographic area and the illegal drug market."[19]

In response to this Order, it is now clear that Endo knowingly did not fully comply with it. Endo did not search the files of any of its 86 Tennessee sales representatives, any of 18 District Sales Managers with responsibility for Tennessee, or the files of its non-executive level compliance officials. Incredibly, it did not produce its formal "Reports of Suspected Diversion" that sales representatives had filled out concerning Tennessee prescribers. Nor, relative to Tennessee prescribers, did it produce the various iterations of its Global Exclusion List or the District Manager Exclusion List. Instead, as it admitted in response to Plaintiffs' Motion for Sanctions, it simply searched the files of custodians that it had identified in the separate Multi-District Litigation proceeding that did not involve Tennessee-specific discovery. Most of those custodians were executive-level officials and department heads. During the discovery period, it never told Plaintiffs or the Court that it had self-limited its response to the September 28, 2018 Order to Compel in this way.

Instead, Endo engaged in obfuscation and delay. While it did make some productions during that time frame, it refused to specify which records, if any, were responsive to the Court's Order and whether Endo's Court-ordered production was complete.[20] When Plaintiffs asked Endo to certify that it had fully complied with the Court's 9/28/18 Order to Compel, Endo's counsel stated vaguely that Endo had "complied" with the Court's Order (**This wasn't true.** [(1)])

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[19] *Id.*

[20] *See* Pltfs. 4/9/20 Motion for Sanctions, Ex. N thereto (emails with A&P Attorney Josh Davis).

[(1)] Endo and its attorneys' **first** false statement

referred Plaintiffs to the "millions of pages" of documents it had produced, and stated that Endo had "neither the obligation nor the inclination to certify" whether it had fully complied.[21]

B. Plaintiffs' Third Set of Requests for Production.

Having reached a dead end in their dialogue with Endo about compliance with the Court's Order to Compel, Plaintiffs served a third set of requests for production in March 2019. Those requests specifically demanded that Endo produce its files concerning suspect practices by Tennessee prescribers and pharmacies, including compliance-related files.[22] In April 2019, in response to those requests, Endo served responses containing **14 pages of general objections** and **1-2 pages of specific objections to each discovery request**, stating (after asserting all of these objections) that it would produce an unspecified subset of records located after conducting a "reasonable search."[23] Endo still did not produce its Reports of Suspected Diversion or provide complete copies of the various versions of its Global Exclusion List and District Manager Exclusion Lists. Nor did it search the files of Tennessee sales representatives, district managers, or non-executive compliance officials. Once again, it did not inform Plaintiffs that it was limiting the production in this fashion. The record shows that Plaintiffs tried multiple times to have Endo clarify what it would be producing, what it was withholding, and when it would be producing documents responsive to particular categories of records – without success.[24] In the course of those communications, after Plaintiffs asked whether Endo had produced the records

[21] *See* Pltfs. 4/9/20 Motion for Sanctions, Ex. N thereto (emails with A&P Attorney Josh Davis).
[22] *See, e.g.*, Pltfs. 4/9/20 Motion for Sanctions, Ex. F thereto, 3rd RFP Nos. 5 (records concerning the monitoring, detection, and reporting of suspicious practices in Tennessee), 9 (data reflecting the shipment of opioids into Tennessee); 3rd RFP No. 13 (opioid prescription data for Tennessee), 12 (communications concerning suspect practices by Tennessee prescribers and pharmacies), and 19 (corporate compliance records concerning prescribers, pharmacies, and distributors in Tennessee).
[23] *See id.*
[24] *See* Pltfs. 4/9/20 Motion for Sanctions, Ex. N thereto (emails with A&P Attorney Josh Davis).

responsive to Plaintiffs' production requests, Endo responded by stating that certain responsive records that Plaintiffs requested were "already in Plaintiffs' hands."[25] **That was not true.** [(2)]

In January 2020, Plaintiffs asked Endo to identify responsive Bates' ranges and production dates for prescriber files, registration-related files, and other responsive documents that Plaintiffs had been requesting for some time. Endo's counsel responded by stating as follows: "We will respond with additional detail, but the short response is that Endo supplemented its responses as agreed. That supplementation happened between October 22 and 25."[26] **This was not true.** [(3)] Endo had not actually produced the referenced records, nor did it provide more detail as promised.

C. Plaintiffs' Further Efforts to Compel Compliance.

Plaintiffs filed a Motion to Compel on January 9, 2020. In response, Endo stated that it had already made a "reasonable search" for responsive records, and accused Plaintiffs of making "a transparent attempt to manufacture a non-existent dispute concerning Endo's discovery compliance[.]"[27] Endo also represented to the Court that it had been "transparent with Plaintiffs for months about the objections on which it was standing[.]"[28] **This was not true.** [(4)] As Plaintiffs and the Court later learned, Endo in fact was withholding responsive records (such as Reports of Suspected Diversion, sales communications about Tennessee prescribers, and other

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[25] *See* Endo 3/25/20 Defs. Opp. to Pltfs' Motion for Sanctions and Against Endo for Failing to Produce Documents Responsive to 3rd RFP No. 2, Ex. E thereto (6/14/19 Letter from A&P Attorney Josh Davis).

[(2)] Endo and its attorneys' **second** false statement.

[26] *See* Pltfs. 4/9/20 Motion for Sanctions, Ex. H thereto (emails with A&P Attorney Josh Davis).

[(3)] Endo and its attorneys' **third** false statement.

[27] *See* 1/15/20 Endo Defendants' Response in Opp. to Motion to Enforce the Courts' Order Compelling Endo's Production of Documents and Motion to Compel Endo's Supplementation of Discovery Responses, at p. 1.

[28] *Id.* at p. 7 n.2.

[(4)] Endo and its attorneys' **fourth** false statement.

critical records), had not conducted a "reasonable search," and had not been transparent about the fact that it was withholding those records.[29] Nevertheless, to induce Plaintiffs to pull down their Motion to Compel, Endo on January 16, 2020 represented to Plaintiffs that it had produced all responsive records and was not withholding any responsive documents based on its previously stated objections.[30] **This was not true.** [(5)] Plaintiffs pulled down their motion based on that representation.

D. Endo's Misconduct Concerning its Rule 30.02(6) Deposition.

In the meantime, Plaintiffs had served a Rule 30.02(6) Notice of Deposition to Endo on December 13, 2019, noticing the deposition for January 21 and 22, 2020 on twelve topics.[31] The Court held a status conference on December 19, 2019, at which Endo made no mention of any objection to that notice. **On the night of January 15, shortly before the next scheduled status conference the following morning, Endo served 34 pages of objections to the deposition notice, including objections to the words "person," "opioids," "efforts," "communicate," "diversion," "district attorneys," "due diligence", "Opana ER" (its own product), and the word "pharmacy."**[32] At the January 16, 2020 status conference, Endo

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[(5)] Endo and its attorneys' **fifth** false statement.

[29] In August 2019, Plaintiffs served two production requests specific to two Tennessee sales representatives, Lisa McNabb and Tami Triplett. Endo produced records for those two Tennessee sales representatives but no others. As discussed elsewhere herein, Endo did not search for or produce files from Tennessee sales representatives in response to Plaintiffs' First Set of Requests for Production, the Court's September 28, 2018 Order to Compel, or Plaintiffs' 3rd Set of Requests for Production.

[30] *See* Pltfs. 4/19/20 Motion for Sanctions, Exhibit E thereto (1/16/20 email).

[31] *See* Pltfs. 1/21/20 Expedited Motion to Compel and For Sanctions Against Endo Concerning Rule 30.02(6) Deposition Notice.

[32] *See* Endo's 1/22/20 Opposition to Plaintiffs' Expedited Motion to Compel and Motion for Sanctions, Ex. B thereto (Objections of Endo to Plaintiffs' Amended Notice of Deposition Pursuant to Rule 30.02(6).

expressed no issue with the deposition proceeding on January 21 and 22 as scheduled. A few hours after the conference concluded, Endo emailed Plaintiffs seeking to confer about the deposition.[33] Plaintiffs immediately responded, stating that they would be available to discuss the matter the next day.[34] Endo then unilaterally stated that it would not present a witness on January 21 or 22 as noticed.[35] On January 21, Plaintiffs moved the Court for expedited relief, and the Court heard the matter through telephonic hearings on January 23 and 24. As memorialized in a February 12, 2020 Order, the Court granted Plaintiffs' Motion and ordered Endo to present a Rule 30.02(6) deponent on dates selected by the Plaintiffs before the February 14 fact discovery cutoff.[36] That Order also incorporated an agreement by Endo to identify the Bates' ranges of data responsive to Topic 7 of the Rule 30.02(6) notice before the deposition.[37]

The parties set the deposition for February 4 and 5. Endo did not immediately provide Bates' ranges as to Topic 7. Plaintiffs followed up on January 29, but Endo still did not identify Bates' ranges.[38] However, on the morning of February 4, approximately 90 minutes before the deposition was to begin, Endo finally identified 13 documents responsive to Topic 7.[39] Endo had not actually produced 7 of those documents to Plaintiffs. Plaintiffs raised this issue at the deposition that morning. Endo's counsel responded as follows, on the record:

> MR. LIMBACHER: You just didn't find out about these documents this morning. These documents were produced to you months ago. You've known about them. If you haven't done the preparation necessary to bring the appropriate documents to ask this witness questions, that's not my fault and that's not his fault. . . . And you've known about these documents that are referenced right here for, I assume,

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[33] *See* Pltfs. 1/21/20 Expedited Motion to Compel and For Sanctions Against Endo Concerning Rule 30.02(6) Deposition Notice, Exhibit A thereto.
[34] *See id.*
[35] *Id.*
[36] *See* 2/12/20 Order Concerning Endo and Mallinckrodt Depositions.
[37] *Id.*
[38] *See* Pltfs. 2/10/20 Renewed Motion for Sanctions Against Endo, Ex. D thereto.
[39] *See* Pltfs. 2/10/20 Renewed Motion for Sanctions Against Endo, Ex. E thereto.

for many months, if you'd bothered to look at them.[40]

However, Endo had not in fact produced these records, [(6)] and issues related to their non-production consumed a substantial amount of time on the first day of the deposition. At the deposition, Endo also presented Plaintiffs with compliance files related to three Tennessee prescribers that Plaintiffs had not seen before. Endo also produced to Plaintiffs what purported to be a Global Exclusion List.

On the night of February 4 (between Day 1 and Day 2 of the Rule 30.02(6) deposition), Plaintiffs emailed Endo's counsel to (1) reiterate that Plaintiffs had not yet received 7 of the 13 datasets that Endo had identified that morning, and (2) ask again whether Endo had produced all responsive prescriber-related files.[41] On the first point, Endo's counsel accused Plaintiffs of "attempt[ing] to manufacture an issue where none exists." But Plaintiffs were correct: Endo had not in fact produced those records, as Endo admitted on the record the next day.[42] On the second issue, Endo responded as follows:

> As to the prescriber records, you point to the production of fewer than 10 documents identified during the course of our preparation of Endo's corporate representative. Those documents represent less than .01% of the total documents produced by Endo in this litigation. You now have ***all*** documents regarding TN prescribers responsive to plaintiffs' requests that Endo has been able to identify following a reasonable search.[43]

Again, it is now clear that this representation was not true either. [(7)]

E. The Court's Discovery Cutoff Certification Order.

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[40] *See* Pltfs. 2/10/20 Renewed Motion for Sanctions Against Endo, Ex. F thereto.
[(6)] Endo and its attorneys' **sixth** false statement.
[41] Pltfs. 4/9/20 Motion for Sanctions, Ex. O (emails with Josh Davis).
[42] *See* Pltfs. 2/10/20 Renewed Motion for Sanctions Against Endo, Ex. G thereto, Excerpt of Endo 30.02(6) Dep. Day 2 via Brian Lortie.)
[43] Pltfs. 4/9/20 Motion for Sanctions, Ex. O thereto (email from Josh Davis) (emphasis added.)

In advance of the discovery cutoff, the Court issued an Order directing each party to certify by February 14, 2020 – the fact discovery cutoff – whether it had produced all responsive records and to identify whether it was withholding any records based on an objection.[44] The Court's Order gave the Endo defendants and their attorneys a chance to admit their wrongdoing and correct it but, instead, they doubled down and on February 14, 2020, Endo certified its compliance with that Order, stating that it had made a "reasonable search" for records but not identifying any specific categories of documents that it had withheld.[45] **Again, this was not true.** [(8)]

F. Sanctions Concerning the Continued Rule 30.02(6) Deposition.

At a February 20, 2020 hearing, the Court granted Plaintiffs' Renewed Motion for Sanctions relative to the Rule 30.02(6) deposition of Endo.[46] The Court ordered Endo to re-appear for three hours of testimony on all previously noticed topics and awarded fee shifting to Plaintiffs.

G. The Court's Order to Compel Additional Responsive Documents and Warning to Endo of Severe Sanctions, Including Default Judgment, for Any Further Non-Compliance.

Plaintiffs also had issues obtaining Tennessee registration records and other communications responsive to Plaintiffs' 3rd RFP No. 2 (served in March 2019). After asserting a host of boilerplate objections to the request, Endo repeatedly misrepresented that it had

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[(7)] Endo and its attorneys' **seventh** false statement.

[44] *See* 2/12/20 Order on Certain Discovery Motions by the Manufacturer Defendants.

[45] Pltfs. Motion for Sanctions, Attach. J thereto (email from Josh Davis) (emphasis added.)

[(8)] Endo and its attorneys' **eighth** false statement.

[46] *See* 5/26/20 Order Concerning Plaintiffs' Renewed Motion for Sanctions Against Endo (memorializing February 20 bench ruling).

produced responsive records.[47] **That was not true.**(9) On March 20, 2020, Plaintiffs moved for relief.[48] As it turned out, Endo had not produced any responsive registration files through the date of that motion. On March 25, the day before the motion was to be heard, Endo produced two responsive documents to Plaintiffs. It also submitted a brief to the Court stating that it had simply overlooked a "small number" of responsive records.[49] **That turned out not to be true.**(10)

On March 26, the Court ruled from the bench that Endo had given an evasive response to 3rd RFP No. 2 that amounted to a failure to answer under Rule 37.01(3).[50] The Court ordered Endo to produce all responsive records in 5 days. It also warned under that any further non-compliance could result in severe sanctions, up to and including default judgment, as well as potential referral to the Board of Professional Responsibility.[51]

Following the Court's Order, Endo informed Plaintiffs that there were, in fact, thousands of responsive records. Between March 31 and April 6, Endo produced over 3,000 documents responsive to 3rd RFP No. 2 alone.[52] In the meantime, Endo filed a Motion for Summary Judgment, which, in part, it sought summary judgment on the basis that it had always been

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[47] These misrepresentations are accurately summarized in Plaintiffs' 2/10/20 Motion for Sanctions Against Endo, including untrue statements by Endo's counsel in June 2019, January 8, 2020, January 16, 2020, and on February 14, 2020 (including through a formal discovery response).

(9) Endo and its attorneys' **ninth** false statement.

[48] *See* Pltfs. 3/20/20 Motion for Sanctions Against Endo for Failing to Produce Documents Responsive to 3rd RFP No. 2.

[49] Pltfs. 4/9/20 Motion for Sanctions, Attach. L thereto, (Brief Excerpt).

(10) Endo and its attorneys' **tenth** false statement.

[50] *See* 4/9/20 Order on Plaintiffs' Motion for Sanctions, at p. 2.

[51] *See id.* at pp. 3-4.

[52] *See* Pltfs. 4/9/20 Motion for Sanctions at p. 6 n.21; *see also* Pltfs. 4/23/20 Reply in Support of Motion for Sanctions, Attach. S thereto, Chart of Endo Productions After Fact Discovery Closed).

properly registered and had never violated the conditions of registration.[53] And on April 22, 2020, in response to Plaintiffs' Motion for Partial Summary Judgment as to Manufacturers' Duties as Tennessee Registrants, Endo contended that it was not obligated to monitor and report suspicious orders because its "Manufacturer/Wholesaler/Distributor" license does not render it a "wholesaler."[54]

H. Plaintiffs' Continued Inability to Obtain Complete Prescriber Files and the Ensuing Motion for Sanctions and/or Order to Show Cause

In the meantime, on March 20, Plaintiffs pressed Endo yet again about whether it had produced all responsive prescriber files. On or about April 6, Endo produced several categories of records, including 13 Reports of Suspected Diversion corresponding for Tennessee prescribers. Endo indicated that it would be producing additional unspecified records.

On April 9, 2020, Plaintiffs filed a Motion for Sanctions and/or Order to Show Cause. In the Motion, Plaintiffs maintained (*inter alia*) that Endo's prescriber files still appeared to be deficient. Plaintiffs contended that they were still missing certain Reports of Suspected Diversion, communications involving Tennessee sales representatives and district managers about suspicious Tennessee prescribers, and files concerning the Global Exclusion List (including communications about how that list was formed). Plaintiffs also asserted that Endo had not conducted a reasonable search for records in this litigation, but instead had been simply

[53] *See* Manufacturer Defendants' 4/2/20 Statement of Facts Filed in Support of their Motion for Summary Judgment Against Governmental Plaintiffs, Fact No. 69 ("There is no evidence that Endo . . . lacked any license required by TN BOP to manufacture and sell prescription opioids medications during the relevant time period or violated the terms of that license.").

[54] *See* 4/22/20 Response in Opp. to Plaintiffs' Motion for Summary Judgment as to Manufacturers' Duties as Tennessee Registrants, at pp. 9-10.

producing subsets of its MDL productions without actually undertaking a meaningful independent search through Tennessee custodians.[55] Plaintiffs were correct.

Mere hours after Plaintiffs moved for sanctions, Endo produced over 60,000 documents. Endo produced an additional 7,500 documents before the April 24, 2020 hearing on Plaintiffs' Motion for Sanctions. Then, at the April 24 hearing, Endo told the Court that Plaintiffs were "trying to create a false separation between what they consider to be Tennessee specific searches and what was produced in the MDL."[56] Endo stated that it had produced everything it found after a "reasonable search" and should not be faulted for failing to produce "every scrap of paper" in its possession that was responsive.[57] **This was not true.** [(11)] Despite these representations, Endo did admit that its "reasonable search" in response to Plaintiffs First Set of Requests for Production, the Court's September 28, 2018 Order to Compel, and Plaintiffs' Third Set of Requests for Productions did not include Tennessee-based custodians.

I. The Court's May 4, 2020 Contempt Order.

On May 4, 2020, this Court issued an order (the "Contempt Order") granting Plaintiffs' Motion and holding both Endo and its lawyers in contempt for failing to conduct a reasonable search and for making a series of false statements regarding the same.[58] The Court ordered Endo to produce certain categories of records, stated that it would consider ordering additional depositions, and reserved judgment on imposing remedial and punitive sanctions for the contempt.[59]

V. Endo's Post-Sanctions Productions

[55] *See* Pltfs. 4/9/20 Motion for Sanctions at p. 13.
[56] Apr. 24, 2020 Hearing Transcript, at 23:17-10.
[57] *Id.* at 33:15-24.
[(11)] Endo and its attorneys' **eleventh** false statement.
[58] *See* May 4, 2020 Order on Plaintiffs' Motion for Sanctions Against Endo Defendants.
[59] *Id.*

In response to the Court's Contempt Order, Endo retained an additional law firm, Redgrave LLP ("Redgrave"), to address the production deficiencies. Redgrave negotiated with Plaintiffs about running specific search terms through the files of certain custodians, including (*inter alia*) compliance officials and sales personnel. The parties agreed upon some limited extensions of time for Endo to supplement. On June 30, 2020, Endo completed those productions.

Endo's post-contempt productions included **255,000 documents** (over 170,000 of which Plaintiffs had never seen before) and approximately **1 million Bates' stamped pages**. Among those documents were nearly **100,000 spreadsheets, 8,500 PowerPoints, additional Reports of Suspected Diversion, 9,000 documents containing the word "diversion,"** over **1,700 documents with the phrase "pill mill,"** and **additional exclusion lists.**[60] Plaintiffs' July 14 and November 4 submissions describe the substance of these productions. Most of these records should have been produced in response to the Court's September 28, 2018 Order to Compel, and others should have been produced no later than February 14 in response to this Court's February 2020 Certification Order. In substance, the records included:

- Hundreds of versions of the Global Exclusion List and District Manager Exclusion Lists, showing when prescribers were added or taken off of those lists.
- Documents showing that, on the Global Exclusion List previously produced to Plaintiffs, 67 of the 170 listed prescribers – including Endo's co-defendant Mohamed – were only "excluded" from promotional activities ***after*** Endo ceased detailing in the State of Tennessee and terminated its sales force. For example, the records showed that Endo did not "exclude" Mohamed from promotional sales activity until October 2019, nearly three years after Endo cut its sales force and two years into Mohamed's federal prison term.
- Examples of Endo removing certain Tennessee prescribers from an exclusion list (*i.e.*, resuming detailing) without any explanation.[61]

[60] Pltfs. 11/4/20 Reply at 7.
[61] Pltfs. 11/4/20 Reply at 9.

- Records showing Endo waiting to place prescribers on an exclusion list until years after learning of potential diversion by the prescriber;
- Emails concerning potential diversion by suspect prescribers in Tennessee.[62]
- Emails reflecting knowledge of diversion in Tennessee by certain Endo employees.[63]
- Emails concerning suspect sales practices by Endo, such as purposely targeting certain high-volume Tennessee prescribers.[64]

Some of the documents also contradicted sworn testimony by Endo witnesses. For example, an individual named Frank McNiel is currently imprisoned for crimes relating to his prescribing habits at a pill mill clinic in Knoxville.[65] His wife Janet McNiel also wrote prescriptions out of the same clinic. At the Rule 30.02(6) deposition of Endo, Endo testified that Ms. McNiel was never on Endo's Global Exclusion List.[66] **This was not true.**[(12)] However, based on the post-Contempt Order productions, Plaintiffs now know that Ms. McNiel actually had been placed on Endo's Global Exclusion List and that she was detailed by Endo ***after*** being placed on that list.[67] Also, in February 2020 (in a deposition taken just after the close of fact discovery), Endo's Chief Compliance Officer testified that he was unaware of any prescribers ever being removed from the Global Exclusion List, but records produced in response to the Contempt Order demonstrate the prescribers in fact were removed from the Global Exclusion List.[68]

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[62] *See, e.g.*, Exs. 1 and 2 to Plaintiffs' 7/14/20 Report.
[63] *Id.*, Exs. 5 and 6 thereto.
[64] *See, e.g., id.*, Exs. 7-9.
[65] *See* 11/10/20 Hearing Tr. at 80:17-81:13; *see also* Pltfs. 4/13/20 Response in Opposition to Motion for Stay at p. 6 n.22 (referencing McNiel's federal guilty plea).
[66] *Id.*
[(12)] Endo and its attorneys' **twelfth** false statement.
[67] *Id.*
[68] Pltfs. 7/14/20 Report to the Court Concerning Endo Compliance with May 4, 2020 Contempt Order at p. 4 and Exhibits 3 and 4 thereto.

VI. The Consequences of Endo's Voluminous Productions in Response to the Contempt Order

Between the close of fact discovery on February 14, 2020 and the Court's sanctions hearing on April 24, Endo produced over 127,000 documents.[68] After the Court issued its sanctions order, Endo produced another 255,000 documents.[69] This means that, in total, Endo produced nearly 400,000 documents after the close of fact discovery – despite certifying on February 14 (per this Court's Certification Order) that its productions were complete and it had not withheld any responsive documents.

By the time that Endo had completed these productions, all pretrial deadlines had run. The parties had completed expert disclosures and expert depositions, filed and fully briefed numerous summary judgment motions (filed by Plaintiffs and by Endo), filed and fully briefed numerous motions *in limine*, filed and fully briefed numerous expert exclusion motions by Endo, and exchanged witness lists, exhibit lists, and deposition designations.

VII. The Parties' Submissions Concerning the Issue of Further Sanctions

After completion of these productions, the parties submitted a series of reports and briefs concerning Endo's supplemental productions and whether further sanctions are warranted.[70] In substance, the parties disputed whether and to what extent any further sanctions are warranted, up to and including a default judgment. The Court heard the matter on November 10, 2020.

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[68] *See* Plaintiffs' 4/23/20 Reply as to Motion for Sanctions Against Endo And/or Motion for Order to Show Cause, Exhibit S thereto (Chart of Endo Production After Close of Fact Discovery).

[69] *See* 7/16/20 Joint Report, p. 3.

[70] These include a July 14 Report by Plaintiffs, a July 16 Joint Report, a July 16 Report by Endo, a November 4 Reply Brief by Plaintiffs, and a November 8 Supplement by Endo.

LEGAL STANDARD

Under Rules 37.02(C), 37.03, and 16.06 of the Tennessee Rules of Civil Procedure, the trial court is expressly authorized to dismiss an action for failure to abide by discovery rules or court orders.[71] Under T.C.A. § 16-1-103 and T.C.A. § 29-9-101 *et seq.*, this Court also has the independent power to punish contempt, including disobedience of (or resistance to) the judicial process or any court orders.[72] These powers enable courts to maintain the integrity of their orders.[73] Also, per *Tatham v. Bridgestone Americas Holding, Inc.*, 473 S.W.3d 734, 742 (Tenn. 2015), trial courts inherently have broad discretion to impose sanctions to preserve the integrity of the discovery process.

Evasive discovery responses and consistent violations of a court's pretrial orders, scheduling orders, and discovery orders justifies severe sanctions, including default judgment where there is a "clear record of delay or contumacious conduct."[74] Default judgment is a harsh sanction.[75] However, Tennessee courts have granted default judgment under appropriate circumstances.[76] In the case of *SpecialtyCare IOM Servs., LLC v. Medsurant Holdings, LLC*, the

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[71] *See* Rule 37.02(C) (stating that, where a party fails to comply with a discovery order, the Court may issue an order "striking out pleadings . . . or rendering a judgment by default against the disobedient party."); Rule 37.03(1) (stating that, where a party fails to supplement, the court may impose sanctions under Rule 37.03(C), *i.e.*, the sanction of dismissal); 16.06 (stating that, where a party fails to obey a scheduling order or pretrial order, the court may issue "any of the orders provided in Rule 37.02").

[72] *See* T.C.A. § 29-9-102.

[73] *Wilson v. Wilson*, 984 S.W.2d 898, 904 (Tenn. 1998).

[74] *Shahrdar v. Global Housing, Inc.*, 983 S.W.2d 230, 236 (Tenn. Ct. App. 1998); *see also Vanderbilt Univ. v. TechGem Diamond Tools, Inc.*, 2002 WL 31890889, at *3-4 (Dec. 31, 2002) (citing *Brooks v. United Uniform Co.*, 682 S.W.2d 913, 915 (Tenn. 1984)).

[75] *Holt v. Webster*, 638 S.W.2d 391, 394 (Tenn. Ct. App. 1982) (affirming judgment in defendant's favor as a sanction under Rule 37.02(C) for noncompliance with a court order).

[76] *See, e.g., Metro Gov't of Nashville & Davidson Cnty, v. Prime Nashville, LLC*, 2020 WL 4248516 (Tenn. Ct. App. July 23, 2020) (affirming court's entry of a default judgment as a sanction for failure to comply with a discovery order); *see also Gilliam v. Blankenbecler*, No. E2017-00252-COA-R3-CV, 2017 WL 6502885 (Tenn. Ct. App. Dec. 19, 2017) (affirming trial

Tennessee Court of Appeals canvassed case law to date (then 2018) and identified circumstances in which a default judgment is warranted and circumstances in which it is not.[77] That court determined default judgment is warranted where a party's failure to respond to discovery was (1) repeated, (2) without reasonable excuse, (3) involved perjured discovery responses, or (4) resulted in a delay over a year. The court also found that a default judgment generally is not warranted where: (1) discovery responses are proffered within the bounds of the scheduling order issued by the trial court; (2) the discovery delay was the result of "excusable neglect;" (3) both parties contributed to the delays; or (4) the delay was relatively short, *e.g.*, less than one year.[78] **Endo has met all of the criteria in favor of granting a default judgment and it has failed to meet any of the criteria for not granting a default judgment.**

Also, as explained in *Langlois v. Energy Automation Systems*, "[t]here are compelling reasons to dismiss a party's claims when a trial court determines that sanctions are necessary."[79] Tennessee trial courts "must and do have the discretion to impose sanctions such as dismissal in order to penalize those who fail to comply with the Rules and, further, to deter others from flouting or disregarding discovery orders."[80]

The Court also has discretion to impose any sanctions short of dismissal "as are just,", including but not limited to fee shifting, adverse jury instructions, and evidentiary sanctions such

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court's entry of default judgment against party that willfully failed to provide discovery responses by an ordered date); *Shahrdar v. Global Housing, Inc.*, 983 S.W.2d 230 (Tenn. Ct. App. 1998) (entering default judgment based on "contumacious" record of delay).

[77] *See* 2018 WL 3323889 (Tenn. Ct. App. July 6, 2018).

[78] *SpecialtyCare*, 2018 WL 3323889, at *21.

[79] *Langlois v. Energy Automation Sys. Inc.*, 332 S.W.3d 353, 357 (Tenn. Ct. App. 2009).

[80] *Langlois*, 332 S.W.3d at 358 (quoting *Holt v. Webster*, 638 S.W.2d 391, 394 (Tenn. Ct. App. 1982)).

as establishing certain facts as admitted, precluding a defendant from supporting a particular defense, or precluding a defendant from introducing designated matters into evidence.[81]

[81] *See, e.g.*, Rule 37.02(A), (B); Rule 37.03, Rule 16.06.

APPLICATION

The Court has already held Endo and its lawyers in contempt of court for failing to conduct a reasonable search and for failing to produce responsive documents in responsive to Plaintiffs' discovery requests. The Court is especially concerned about the many false statements to Plaintiffs' counsel and to the Court by the Endo Defendants' attorneys in the course of the discovery process. Now that Endo has completed its productions, the only remaining question is what sanctions to impose.

At the November 10, 2020 hearing on this matter, Endo repeatedly tried to characterize its discovery misconduct as a simple "misunderstanding" between Plaintiffs' counsel and defense counsel in the discovery process. The Court finds that the record demonstrates otherwise. It is clear to the Court that Endo and its counsel at Arnold & Porter willfully withheld responsive records in violation of this Court's September 28, 2018 Order to Compel, in violation of this Court's February 12, 2020 Certification Order, and (more generally) in derogation of Plaintiffs' reasonable document requests and Endo's discovery obligations. Many of the records that Endo knowingly withheld were highly relevant, including Reports of Suspected Diversion by Tennessee prescribers, correspondence by sales representatives, District Sales Managers, and non-executive compliance officials regarding potential diversion by Tennessee prescribers, and previously unproduced versions of Endo's exclusion lists. It is apparent that Endo intended to defend itself at trial by touting its anti-diversion measures, while simultaneously depriving Plaintiffs of evidence that would have undercut that defense. Accordingly, the Court finds that Endo willfully withheld this information during the discovery phase to gain a litigation advantage at trial. The Court further finds that Endo and its attorneys' false statements violated the Tennessee Rules of Civil Procedure and the Tennessee Rules of Professional Conduct.

The Court also finds that Endo's willful discovery violations were severely prejudicial to Plaintiffs. During that time, Plaintiffs conducted numerous depositions of Endo witnesses across the country during the two-year discovery phase, served expert reports, prepared motions for summary judgment and pretrial motions, created trial cuts of video deposition testimony, focus grouped their case for trial and otherwise fashioned their entire litigation strategy against Endo based on the documents and evidence they had received. It is now clear that they did so without highly relevant records that Endo had willfully withheld, some of which even directly contradict testimony by Endo witnesses. Plaintiffs cannot remedy this without retaking dozens of depositions, revising expert reports, re-taking expert depositions, running additional focus groups, re-cutting trial depositions, and re-briefing summary judgment and other pretrial motions. This would effectively force Plaintiffs to start discovery over in a case that is trial ready and has been litigated for over three years. Delaying the trial long enough to allow Plaintiffs time to complete all this work would prejudice Plaintiffs severely. At least three people die of an opioid overdose every day in Tennessee and Baby Doe continues to grow older. Plaintiffs should not be forced to choose between going to trial without this highly relevant information -- which Endo and its attorneys intentionally hid from Plaintiffs and the Court – or delaying the trial for months or even a year. That would lead to additional harm to the Plaintiffs, as well as the potential that other trials will go prior to their case and that could render Endo judgment proof.

The Court finds that the Plaintiffs' Supplement as to Default Judgment Against Endo to be accurate and incorporates it by reference. It clearly shows that Endo and its attorneys have **still** not learned their lesson. It appears to the Court that Endo and its attorneys, after delaying trial, have resorted to trying to improperly corrupt the record.

Endo has proposed that the Court simply order Plaintiffs to take additional depositions at Endo's expense. However, the Court finds that sanction to be manifestly insufficient and unjust because it would necessitate reopening fact discovery, expert discovery, and pretrial motion practice, disadvantage Plaintiffs, and cause further delays in this long-pending case.

Under the circumstances, the Court finds that entry of a default judgment is warranted. This case involves a "clear record of delay or contumacious conduct."[82] This Court had to compel or sanction Endo to participate fully in discovery multiple times, which was part of a pattern of delay. Endo's discovery misconduct (and untruthful statements to the Plaintiffs and the Court) were repeated, without reasonable excuse, delayed various aspects of discovery by more than a year, and were intensely prejudicial. Plaintiffs did not contribute to these delays. The Court finds that this was part of a coordinated strategy between Endo and its counsel to delay these proceedings, deprive Plaintiffs of information that would support their case, and interfere with the administration of justice. Accordingly, this case squarely involves the types of misconduct that *SpecialtyCare* found would justify a default judgment.

Furthermore, as the court in *Langlois* recognized, this Court can consider the deterrent effect of an entering a default judgment as a sanction. The Court strongly disapproves of the manner in which Endo and its counsel have conducted themselves in this case, including the false statements made to the Court and Plaintiffs' counsel, as well as the minimal regard in which they have treated this Court's Scheduling Order and discovery orders.

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[82] *Shahrdar v. Global Housing, Inc.*, 983 S.W.2d 230, 236 (Tenn. Ct. App. 1998); *see also Vanderbilt Univ. v. TechGem Diamond Tools, Inc.*, 2002 WL 31890889, at *3-4 (Dec. 31, 2002) (citing *Brooks v. United Uniform Co.*, 682 S.W.2d 913, 915 (Tenn. 1984)).
[84] *See Plaintiffs Nov. 18, 2020 Supplement as to Default Judgment Against Endo.*

It is obvious that monetary sanctions are not sufficient. Endo and its attorneys have not shown any remorse, admitted their wrongdoing or apologized to opposing counsel or the Court for their actions.

For all of these reasons, the Court hereby enters a **DEFAULT JUDGMENT** in favor of the Plaintiffs. Although this is a harsh sanction, justice demands it under the circumstances. Anything less would make a mockery of the attorneys who play by the rules and the legal system.

The Court also issues the following additional sanctions:

(1) Plaintiffs are awarded their costs for processing and hosting documents produced by Endo after the February 14, 2020 fact discovery cutoff, along with reasonable costs and attorney's fees incurred in reviewing those documents.

(2) All documents produced by Endo after February 14 are deemed authentic and admissible to the extent that Plaintiffs – not Endo – seek to introduce them at trial;[83]

(3) To enable Plaintiffs to utilize these documents (and to cure the issue that Plaintiffs will not be able to cross-examine witnesses being presented through deposition videos), Plaintiffs shall be allowed to introduce these documents to the jury and explain them.

(4) Plaintiffs are awarded their costs and fees associated with all motions to compel against Endo that have been granted in whole or in part, including, specifically, the April 9, 2020 Motion for Sanctions and all proceedings concerning Endo's compliance with the Court's Contempt Order, including but not limited to, preparing and reviewing associated filings, participating in hearings, and engaging in meet and confers;

(5) Plaintiffs are awarded their costs and fees associated with the depositions listed in **Exhibit 12** to Plaintiffs' April 9, 2020 Motion for Sanctions, whose depositions Plaintiffs took in 2018 or 2019 without the benefit of complete records.

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[83] *See McCartt v. Kellogg USA, Inc.*, No. CV 5:14-318-DCR, 2015 WL 12978152, at *2 (E.D. Ky. July 20, 2015) (where party made untimely production, precluding that party from utilizing the documents but permitting the non-offending opposing party to utilize the documents at trial as a Rule 37 sanction); *James Stewart Entm't, LLC v. L&M Racing, LLC*, No. EDCV1249JGBSPX, 2013 WL 12248146, at *5 (C.D. Cal. June 28, 2013).

Within 15 days of this Order, the attorneys for the Plaintiffs shall identify the attorneys for the Defendants who made the false statements referred to herein.

Within 30 days of this Order, each of the Arnold and Porter attorneys who are partners or shareholders and who have been admitted *pro hac vice* in this case shall Show Cause why their *pro hac vice* admissions should not be revoked.

The Court reserves further sanctions.

The Court reserves entering final judgment pending a damages trial.

It is so **ORDERED.**

ENTER:

Chancellor E.C. Moody

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served by Email and/or U.S. Mail on this the 6th day of April, 2021, as follows:

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