IN THE CIRCUIT COURT FOR CUMBERLAND COUNTY, TENNESSEE

Filed: 2/28/2022
@ 12:08 p.m.

BRYANT C. DUNAWAY, et. al.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 2018-CV-6347**
	)	
PURDUE PHARMA, L.P., et. al.,	)	
	)	
Defendant.	)	

ORDER BY THE COURT ON PLAINTIFFS' MOTION FOR SANCTIONS, INCLUDING DEFAULT JUDGMENT AGAINST ENDO DEFENDANTS

On November 24, 2021, Plaintiffs filed a Motion for Sanctions, Including Default Judgment on the Issue of Liability, Against Endo in the above-styled matter. The Motion was supported by a Memorandum and the Declaration of Tricia Herzfeld with Attachments A-U thereto. In the Motion, Plaintiffs moved for sanctions including a default judgment on the issue of liability against Defendants Endo Health Solutions, Inc. and Endo Pharmaceuticals, Inc. (collectively, "Endo"), as well as 8 other sanctions enumerated at Page 19 of Plaintiffs' Memorandum. On January 19, 2022, Endo filed a Response in Opposition with two exhibits thereto. On February 3, 2022, Plaintiffs filed a Reply, in support of which they filed the Declaration of Tricia Herzfeld with Attachments W through FF (sequentially relative to the initial declaration). The Court heard oral argument on the Motion on February 10, 2022. As explained below, the Court finds that there was a coordinated strategy between the Arnold and Porter firm and Endo to willfully withhold documents that were responsive and critical to the Plaintiffs' case. The Motion is

accordingly **GRANTED in part and DENIED in part**, a default judgment hereby enters against Endo on liability as a sanction, and certain other targeted sanctions are awarded.

LEGAL STANDARD

As the Tennessee Court of Appeals explained in *Alexander v. Jackson Radiology Associates,* 156 S.W.3d 11, 15 (Tenn. Ct. App. 2004), "trial courts possess the inherent authority to take actions to prevent abuse of the discovery process." *See also Langlois v. Energy Automation Systems, Inc.*, 332 S.W.3d 353, 359 (Tenn. Ct. App. 2009). Under its inherent powers, the trial court can issue a case-dispositive sanction – even where the party did not violate a prior court order. *Alexander*, 156 S.W.3d at 15. Even a single infraction can suffice. *See Alexander*, 156 S.W.3d at 15; *Potts v. Mayforth*, 59 S.W. 3d 167, 172 (Tenn. Ct. App. 2001). Also, in *Langlois*, the court explained that "the most severe in the spectrum of sanctions must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of a deterrent." (*Id.* at 357-58 (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976)).

Under Tennessee Rule of Civil Procedure 26, the scope of civil discovery is broad. Parties are expected to produce discoverable information except to the extent that it is privileged, and are expected to identify for the other side when discoverable information is not being produced.

APPLICATION

After the reviewing the parties' submissions and hearing argument, the Court finds Plaintiffs' submissions and arguments to be accurate and persuasive.

Plaintiffs have brought claims against Endo for violating Tennessee Drug Dealer Liability Act ("DDLA"), Tenn. Code Ann. § 29-38-101 *et seq.*, as reflected in their complaint.

It is clear to the Court from the correspondence in the record and the statements of counsel at oral argument that Endo (acting through its attorneys at Arnold & Porter) sought to respond to discovery in both *Dunaway* and the *Staubus v. Purdue Pharma* case ("*Staubus*") at the same time. Plaintiffs' counsel explained that, in the interest of efficiency and ***at Endo's request***, the parties agreed that records provided in response to formal discovery requests in the *Staubus* matter would apply in the *Dunaway* as well and that depositions of Endo witnesses would occur in both cases at the same time. The record corroborates this. Attachment C to the First Herzfeld Declaration is a November 6, 2018 letter from Josh Davis to Plaintiffs' counsel. It contains a case caption for ***both*** *Staubus* and *Dunaway* and states that Endo was making productions "[i]n response to your First and Second Requests for Production of Documents, dated June 26, 2017 and October 27, 2017, respectively, . . . and further to our recent communications[.]" The letter also states as follows: "Please note that given the *Dunaway* plaintiffs' agreement to be bound by the MDL Protective Order, as stated in Ms. Herzfeld's October 30, 2018 email, **we hereby deem as produced in *Dunaway* the materials included with this letter, as well as the materials previously produced by Endo in the *Staubus* litigation**, subject to a full reservation of rights and objections." (Emphasis added.)

Furthermore, Attachment D to the First Herzfeld Declaration also contains a chart identifying 35 production letters that Endo sent with simultaneous productions in *Dunaway* and in *Staubus*. Endo also cross-noticed 16 witnesses in *Dunaway*. (*See* Attach. E to First Herzfeld Decl.) The cross-notices were captioned in *Dunaway* and invoke the applicable Tennessee Rules of Civil Procedure. (*Id.*) Endo cannot honestly claim that no formal discovery took place in this case.

It is clear to the Court from Plaintiffs' submissions and the documents filed under seal that Endo did not turn over millions of pages of documents that Plaintiffs were seeking to discover in support of their claims in *Dunaway*[1] and were using a coordinated strategy to do so. This included, among other things, reports of suspected pill mills, including documents related to Endo's sales targeting of David Florence and Mark Murphy, two Tennessee pill mill doctors. Endo should have, but did not, search the files of Tennessee sales representatives for responsive documents that were not produced until after the 16 depositions. The Court finds that the records withheld were relevant to showing that Endo participated in the illegal drug market in Tennessee and therefore go to the heart of this case. As reflected in two Endo documents that Plaintiffs presented at oral argument, Endo knew that 75% of nationwide abuse of its flagship opioid product Opana ER was occurring in Tennessee. It is apparent that Endo must have derived significant revenue from selling this product in Tennessee. Endo therefore should have been on a heightened alert about the significance of discovery concerning its operations

[1] The Parties have disputed just how many millions of pages were withheld from Endo's productions. The Plaintiffs said it amounted to 50 million pages and Endo had no set figure, but did not think it was that high. The Court finds the Plaintiff's estimate to be more credible, but despite the actual number it was is significant.

in Tennessee. Also, when Endo produced documents in *Dunaway* and cross-noticed witnesses in *Dunaway*, this clearly put Endo on notice that the documents and depositions would be used in *Dunaway* as well as in *Staubus*. Both cases involve similar facts and legal theories.

Endo is a very highly sophisticated entity. It hired Arnold & Porter, a supposedly well-respected law firm, to handle discovery in this case. Endo knew what information should have been produced and knew how to conduct discovery. Although Endo attempted to coordinate discovery in *Dunaway* with *Staubus*, as reflected at Page 11 of Plaintiffs' Memorandum, it made false statements to the *Staubus* court about discovery that applied in *Dunaway* as well. It is clear that Endo knew that additional information existed that should have been produced in *Dunaway*, but did not produce it. Civil court is supposed to be fair. Unlike criminal cases, where there are constitutional protections that protect the criminal defendant and heighten the burden on the state to prove guilt, in civil cases the Tennessee Rules of Civil Procedure and the Court's inherent powers regulate the parties and must be followed to ensure fairness to the plaintiff. The Court also finds that the Tennessee Rules of Civil Procedure apply to every case in a Circuit Court of Tennessee the moment it is filed and this case is no exception. Every first-year law student understands that requirement with or without an order. The Argument that Endo only had to comply with discovery if an order compelling discovering is entered, completely flies in the face of years of precedent in Tennessee. Furthermore, the Court finds that Endo agreed to be bound by this Court by its own actions of combining discovery.

Endo has not taken responsibility for its actions. For example, at oral argument, its attorneys asserted that Endo had "inadvertently" failed to produce the documents identified by the Plaintiffs. The Court finds that the withholding of documents by Endo was willful, not inadvertent and part of a long-term pattern of behavior. The Court also finds that the Plaintiffs were greatly harmed by this delay in that they had expended thousands of hours and millions of dollars in discovery that is now worthless. Furthermore, any attempts to cure these issues by redeposing the witnesses would not be as beneficial as the deponents have seen the Plaintiff's roadmap and are locked into their answers.

Accordingly, for the Court to allow Endo to continue denying responsibility to Tennessee trial courts would not serve the public policy interest that parties and their attorneys are to engage with each other in good faith and with candor, and that discovery must be made fully when it is requested and when it is given to the other side. Attorneys take an oath to be truthful to each other. Thus, if an attorney is asked by a Court or by another attorney whether the client has produced everything, the answer should be yes or no. And if the answer is no, the attorney must explain why the client did not produce the documents, where the documents are located, and how long it would take to retrieve them. The Endo attorneys were extremely vague and misleading in their answers. Clearly, these obligations were not followed here, and Endo and Arnold & Porter abused the discovery process. Although Endo has stated that it recently produced some of the documents that it previously withheld, the Court disagrees that this entitles Endo to a full restart. Furthermore, in addition to millions of pages of documents produced

after the depositions that Endo cross-noticed, at oral argument, the attorney for Endo acknowledged that there are still a large number of documents outstanding that Endo has not produced.

This case is now in its fourth year. Plaintiffs filed their First Amended Complaint in *Dunaway* against Endo in August 2018, shortly before Endo began producing documents and cross-noticing depositions in both cases per the parties' discovery agreement referenced above. Rather than tell Plaintiffs that it was withholding certain documents, Endo instead willfully withheld documents and provided no explanation for doing so. The Court finds that there was a coordinated strategy between the Arnold & Porter firm and Endo to willfully withhold documents that were responsive and critical to the Plaintiffs' case. This included withholding reports of Tennessee pill mills (including the reports related to Defendants Florence and Murphy as noted above), all of which are directly related to the problem that this lawsuit concerns.

The Court finds that because discovery in *Dunaway* was coordinated with that in *Staubus*, certain findings by Chancellor Moody concerning Endo's discovery misconduct are relevant here and are independently adopted by this Court. Although this Court did not hold the hearings in *Staubus*, the *Staubus* court effectively determined issues relevant to discovery here because the discovery was the same. This Court also understands why, per their agreement to coordinate discovery in both cases, the parties had their discovery disputes resolved by one court. In September 2018, the *Staubus* court issued an order compelling Endo to produce certain records responsive to the first set of discovery requests, which are the same requests for which Endo was providing parallel and

simultaneous productions in *Staubus* and in *Dunaway*. This Court agrees with Chancellor Moody that Endo knowingly withheld records highly responsive to those requests – even after the *Staubus* court issued the Order to Compel – and that those records therefore should have been produced in *Dunaway* as well. These include records such as reports of suspected diversion by Tennessee prescribers, email correspondence concerning suspect practices by Tennessee prescribers, and complete versions of Endo's Global Exclusion List and District Manager Exclusion Lists. These documents were, without question, central to Plaintiffs' DDLA claims in *Dunaway* just as they were in *Staubus*. This Court also agrees with the *Staubus* court that Endo knowingly violated its discovery obligations by not searching the files of its employees in Tennessee or who were responsible for Tennessee, including Tennessee sales representatives, for documents that also should have been produced in *Dunaway*.

The undersigned has been on the bench for seven years. The discovery misconduct in this case constitutes the most blatant abuse of the discovery process that this Court has ever seen. The conduct is truly awful, knowing, has delayed the progression of this case for years, and has caused thousands of hours of unnecessary litigation. The Court does not enter into this default lightly as it understands the severity of this sanction. However, Endo's actions were so severe that any lighter sanction would simply be a slap on the wrist and would not dissuade others in similar circumstances to refrain from doing the same thing. This Court has not only the integrity of this case, but the integrity of all cases filed in Tennessee to protect. The Court understands the public's frustrations with the courts over highly visible cases and to allow a sophisticated client to

simply pay legal fees and suffer no other consequences will chill the open discovery precedent in the State of Tennessee.

For all of these reasons, the Court hereby rules as follows as to the sanctions requested by Plaintiffs:

1. The Court enters an order of default against Endo, with damages to be proven at trial.

2. All documents issued in response to the May 5, 2020 Order in the *Staubus* matter are deemed authentic and admissible to the extent that the Plaintiffs – not Endo – seek to introduce them at the trial;

3. Plaintiffs will be permitted to explain those documents to the jury at the trial;

4. The Court will instruct the jury that Endo willfully withheld material evidence from the Plaintiffs in this case and that this action violated its obligations under the Rules of this Court;

5. With respect to Plaintiffs' costs and fees associated with re-reviewing documents, the Court awards them only to the extent that Endo did not already pay those costs and fees as a sanction in the *Staubus* matter. In other words, Plaintiff shall not "double dip" on any costs and fees previously paid to them for the same work in the *Staubus* matter;

6. Similarly, to the extent that Plaintiffs incur reasonable costs and fees for reviewing documents produced in other opioid litigation to determine whether Endo improperly concealed additional documents not disclosed in this case, the Court awards those costs and fees only to the extent that they were not already reimbursed to Plaintiffs in *Staubus*; and

7. Plaintiffs are awarded costs and fees associated with their Motion for Sanctions.

As discussed at the hearing, the Court also severs Endo from the remaining defendants and sets this matter for a damages trial for **April 17, 2023**. Proceedings against Endo shall be on a separate track. To the extent that there are any discovery problems relating to the damages trial that the parties cannot resolve, they should bring those disputes to

the Court's prompt attention for resolution. However, the Court reminds all attorneys in this matter, that the Court takes a very liberal policy to discovery and unless something is clearly privileged or barred by statute then it is discoverable.

BE IT SO ORDERED.

This the 28th day of Feb, 2022.

Honorable Jonathan Young, Circuit Court Judge

Certificate of Service on next page.

The Court certifies that a copy of this Order is being sent to the following attorneys and pro se litigants via email and/or U. S. mail with the original mailed to the Clerk of this Court:

Original mailed to:

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