SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

IN RE OPIOID LITIGATION

*This document relates to:*
*The People of the State of New York v. Purdue Pharma L.P.,* Case No. 400016/2018

Index No.: 400000/2017
Part 48
Hon. Jerry Garguilo
Mot. Seq. No. ___

**PLAINTIFF THE STATE OF NEW YORK'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION BY ORDER TO SHOW CAUSE TO VACATE THE DISMISSAL OF TEVA PHARMACEUTICAL INDUSTRIES, LTD. FOR A LIMITED PURPOSE AND FOR POST-TRIAL RELIEF PURSUANT TO CPLR 5229 AND THIS COURT'S INHERENT POWERS**

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Plaintiff, the People of the State of New York (the "State"), by Letitia James, Attorney General of the State of New York, respectfully submits this memorandum of law in support of its Motion by Order to Show Cause to Vacate the Court's Order Dismissing Teva Pharmaceutical Industries, Ltd. ("Teva Parent") for a Limited Purpose and for Certain Post-Trial Relief from the Teva Defendants[1] Pursuant to CPLR 5229 and this Court's Inherent Powers.[2]

## PRELIMINARY STATEMENT

To escape these proceedings, Teva Pharmaceutical Industries, Ltd. swore unequivocally to this Court that it transacted *no* business in the United States and that it had *no* office, property, employees, or registered agent within the country. This is demonstrably false. By convincing this Court of these and other falsehoods, Teva Parent insulated itself from substantive discovery, and the likely finding of liability to flow from that, to which the State was rightfully entitled. But Teva Parent, acting together with the Teva Defendants, is likely operating to deprive the State of even more. The State has uncovered concerning evidence that demonstrates that Teva Parent has the capacity to use shell corporations and blatant misrepresentations to judgment-proof itself and its subsidiaries, including Defendants. While the State secured a verdict in its favor, due to the Court's careful administration of the nearly seven-month liability trial, there is a real concern that

[1] "Teva Defendants" or "Defendants" refers herein collectively to all Defendants against whom the State won a finding of liability, by the December 30, 2021 jury verdict, namely Cephalon, Inc., Teva Pharmaceuticals USA, Inc., Actavis Pharma, LLC, Actavis, LLC, and Watson Laboratories.

[2] "The requirement in CPLR 5015(a) that the vacatur motion be made 'with such notice as the court may direct' means that it should be brought on by order to show cause." Siegel, N.Y. Prac. § 426; *see also* NYCRR 202.70, Commercial Division Rule 19 ("Motions shall be brought on by order to show cause only when . . . a statute mandates so proceeding."); *Maa-Sharda, Inc. v. First Citizens Bank & Tr. Co.*, 149 A.D.3d 1484, 1485 (4th Dep't 2017) ("A litigant's remedy for alleged fraud in the course of a legal proceeding lies exclusively in that lawsuit itself, *i.e.*, by moving pursuant to CPLR 5015 to vacate the [judgment] due to its fraudulent procurement, not a second plenary action collaterally attacking the judgment.") (internal citations and quotation marks omitted).

any judgment will not be satisfied, unless Teva Parent and its relationship with the Teva Defendants are meaningfully examined in two ways.

First, Teva Parent's dismissal (*see* NYSCEF No. 2069,) strongly appears to have been brought about by a fraud on the Court. Teva Parent shamelessly shape-shifts. It presents itself in New York courts in any way that serves its immediate purposes, regardless of flagrant inconsistencies in corporate form. Among other facts that have come to light, Teva Parent directly maintained a contractually required facility in Cincinnati at the time it denied such ties to this Court, and later availed itself to the jurisdiction ***of this Court***, appearing as a Plaintiff seeking relief and damages based on business it conducted from 2016 onwards under New York law. Sometimes, it is "identical" to a U.S. subsidiary; at other times, it directly "develops, manufactures, and distributes a broad portfolio of pharmaceutical products in the United States and abroad." *See infra* at I.B. What is the truth? It should be revealed whether, when the facts are laid bare, Teva Parent should have been permitted to avoid participating in these proceedings. For that reason, the State moves to vacate the Court's order dismissing Teva Parent for the limited purpose of conducting a hearing and making a determination on that issue.

Second, apart from this limited relief concerning the artificially empty seat Teva Parent left, the State seeks limited related relief against the Teva Defendants properly before this Court at this post-trial juncture. Much of the same evidence that establishes this Court's jurisdiction over Teva Parent, also establishes a likely improper relationship between Teva Parent and its U.S. subsidiaries, necessitating discovery into Defendants' inter-company business dealings, pursuant to CPLR 5229. CPLR 5229 is a protective tool, and without assessing the extent of any transfer of value out of Defendants into Teva Parent, or any other activity intended to judgment-proof the

Teva Defendants, the State's liability verdict is at serious risk of resulting in a judgment that is uncollectable from the Teva Defendants.

Finally, now that the Teva Defendants' post-trial motions will be deemed fully submitted shortly, the State's instant application for injunctive relief flowing from the verdict is ripe. The Teva Defendants are out of excuses and delays. More than six months ago, by their verdict, the jury determined that the State proved by clear and convincing evidence that each Defendant's "conduct or omissions caused, contributed to, or maintained a substantial and unreasonable interference with a public right that amounts to a public nuisance **that persists** in the State of New York." (NYSCEF No. 8953 at Question 1) (emphasis added). Limited injunctive relief and information concerning Defendants' ongoing conduct or omissions will assist in abating the persisting nuisance at this earliest possible juncture.

This Court took Teva Parent at its word and excused it from these proceedings. However, that faith was misplaced and, without scrutiny now, it may result in an even greater injustice to the People of the State of New York. To protect the integrity of this Court's proceedings and the State's rights, the State's instant motion should be granted in full.

## RELEVANT FACTS AND LEGAL POSTURE

Teva Parent moved to dismiss the State's case on July 5, 2019, (*see* NYSCEF Nos. 1261-1265,) the State opposed that motion on July 31, 2019, (*see* NYSCEF No. 1347,), and Teva Parent replied on August 30, 2019, (*see* NYSCEF No. 1475.)

In support of its motion, Teva Parent submitted the Affidavit of Doron Herman, dated July 3, 2019 (notarized July 2, 2019), NYSCEF No. 1263 ("Herman Affidavit"), at ¶ 2; *see also* NYSCEF No. 2316 (Certificate of Conformity). By the Herman Affidavit, Teva Parent represented certain facts supporting its contention that it was not subject to personal jurisdiction in the United States, or by extension in New York courts. *See generally id.* Teva Parent also

argued that its jurisdictional standing was resolved in its favor by other courts, suggesting that it had never been found subject to jurisdiction in this country, and that this Court should follow suit:

> [C]ourts across the country have dismissed claims against Teva Ltd. for lack of personal jurisdiction. And similar claims—involving nearly identical opioid related allegations to those made here—were considered and rejected as insufficient to establish personal jurisdiction over Teva Ltd. more than two years ago in *City of Chicago v. Purdue Pharma L.P.*, No. 14 C 4361, 2015 WL 2208423, at *7 (N.D. Ill. May 8, 2015). **Nothing has changed since then. The Court should follow that precedent.**

(NYSCEF No. 1262 at 2 (emphasis added), 13-15; *see also* NYSCEF Nos. 1475 at 3, n.1.)

This Court resolved that motion, (NYSCEF Seq. No. 76,) in Teva Parent's favor, on December 2, 2019, and denied the State jurisdictional discovery. (NYSCEF No. 2069.) The Court based its decision on the significant, yet simple, representations made in the Herman Affidavit, specifically that "Teva USA and Cephalon are separately managed and financially independent subsidiaries, that [Teva Parent] does not exercise day-to-day control over such subsidiaries' operational or marketing activities or their corporate policies, and that such subsidiaries were not formed to insulate [Teva Parent] from liability." *Id.* at 4.

Shortly thereafter, the Court used its discretion to narrow the administration of this case by (i) prioritizing Plaintiff's public nuisance claims over all others, and (ii) bifurcating trial on that claim. (NYSCEF Nos. 3838, 1875.) Consistent with those orders, the Court conducted a jury trial that commenced with jury selection on June 8, 2021 and concluded by verdict on December 30, 2021. By that verdict, the State secured an historic finding of liability against the Teva Defendants for their role in creating, maintaining, or contributing to the public nuisance that ultimately resulted in the opioid epidemic. Specifically, in the State's case, the jury found the Teva Defendants to be 90% responsible for the public nuisance that gave rise to the opioid epidemic across the State. (NYSCEF No. 8953.)

Through the facts admitted at trial and certain others uncovered following an investigation into Teva Parent's business practices relating to the issues before this Court, the State has uncovered many new facts that demonstrate that, throughout the time this Court was considering Teva Parent's Motion to Dismiss and through today, Teva Parent and the Teva Defendants have been aware that the facts it represented in the Herman Affidavit are false. Moreover, the Teva Defendants' business conduct and relationship with Teva Parent is a serious threat to the State's ability to recover on its forthcoming judgment, pending the abatement trial, an amount commensurate with the Teva Defendants' established liability.

## LEGAL STANDARD

CPLR 5015(a)(3) provides that a court that has "rendered a judgment or order may relieve a party from it upon such terms as may be just, . . . upon the ground of: . . . fraud, misrepresentation, or other misconduct of an adverse party." Courts broadly construe the meaning of "fraud" in CPLR 5015(a)(3) and have ordered vacatur where a party made false statements upon which the court relied in determining dispositive motions. *See Belesi v. Connecticut Mut. Life Ins. Co.*, 272 A.D.2d 353, 354 (2d Dep't 2000); *Peterson v. Melchiona*, 269 A.D.2d 375, 375 (2d Dep't 2000); *see also* Siegel N.Y. Prac. § 429 (citing 3d Rep. Leg. Doc. No. 17, p. 204 (1959); *Ladd v. Stevenson*, 112 N.Y. 325 (1889)).

CPLR 5229 provides that "[i]n any court, before a judgment is entered, upon motion of the party in whose favor a verdict . . . has been rendered the trial judge may order examination of the adverse party and order him restrained with the same effect as if a restraining notice had been served upon him after judgment." "The restraint has even been held available after the entry of an interlocutory judgment . . ., well before any decision or verdict at all on the damages element. . . ." Practice Commentary CPLR 5229 (McKinney) (citing *Kaminsky v. Kahn*, 46 Misc.2d 131 (Sup.Ct. N.Y. Cty. 1965)); *see also Sequa Cap. Corp. v. Nave*, 921 F. Supp. 1072 (S.D.N.Y. 1996).

When an examination is ordered under CPLR 5229, CPLR 5223 applies to the examination. It provides: "At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment . . ." That is "a generous standard [which] permits the creditor a broad range of inquiry through either the judgment debtor or any third person with light to shed on the debtor's property, present or potential." Practice Commentaries CPLR 5223 (McKinney); *see also Riverside Cap. Advisors, Inc. v. First Secured Cap. Corp.*, 28 A.D.3d 452, 455 (2d Dep't 2006) (upholding the Supreme Court's exercise of its discretion and award of post-trial injunctive relief "given the record . . .including the existence of numerous transfers to interlocking corporations controlled by the same principals . . .to prevent the judgment from being rendered ineffectual.").

Finally, this Court may properly "exercis[e] its discretion to fashion appropriate injunctive relief after trial. . ." *Tsui v. Chou*, 203 A.D.3d 619 (1st Dep't 2022) (affirming trial court's use of discretion to fashion appropriate post-trial injunctive relief arguably outside the scope of the statutory claim's express remedies); *see also Arcamone-Makinano v. Britton Prop., Inc.*, 156 A.D.3d 669, 673 (2d Dep't 2017) ("[T]he balance of the equities favors the imposition of the limited injunctive relief granted by the court.").

## ARGUMENT

### I. The Court Should Vacate its Order Dismissing Teva Parent from the Instant Action for the Limited Purpose of Determining Whether Teva Parent Committed a Fraud on the Court.

#### A. Teva Parent Deliberately Misrepresented Other Courts' On-Point Findings.

As summarized above, in support of its July 2019 motion to dismiss, Teva Parent argued to this Court that the issue of its personal jurisdiction had been analyzed and resolved in its favor by courts across the country, such that this Court should likewise dismiss Teva Parent on

jurisdictional grounds. In support of this argument, Teva Parent cited dismissals in a string of non-opioids related cases, *e.g.*, *Whitener v. PLIVA, Inc.*, 606 F. App'x 762, 765 (5th Cir. 2015), *Smith v. Teva Pharms. USA, Inc.*, No. 17-61058-CIV, 2018 WL 550252, at *8 (S.D. Fla. Jan. 24, 2018), *Hosain-Bhuiyan v. Barr Lab'ys, Inc.*, No. 17-CV-114 (VB), 2017 WL 4122621, at *3 (S.D.N.Y. Sept. 14, 2017). (NYSCEF No. 1262 at 13-15). Teva Parent urged particular reliance on its dismissal in *City of Chicago v. Purdue Pharma L.P.*, No. 14-C-4361, 2015 WL 2208423, at *15 (N.D. Ill. May 8, 2015), telling this Court that opioid-related allegations similar to those made by the State had been considered and rejected as insufficient to establish personal jurisdiction and that "nothing has changed since then." NYSCEF No. 1262 at 2. By this statement, Teva Parent intentionally implied to this Court that there had been only one opioid-related case to consider whether Teva Parent was subject to jurisdiction in 2015, which was resolved in its favor. By its explicit misstatement that "nothing ha[d] changed" since that 2015 determination, Teva Parent misled this Court.

Things had indeed changed. In 2018, prior to Teva Parent filing its motion to dismiss in this Court, the Ohio Court of Common Pleas in Ross County denied Teva Parent's motion to dismiss for lack of personal jurisdiction, citing sufficient evidence to support a *prima facie* showing of personal jurisdiction. *State, ex rel. Dewine v. Purdue Pharma L.P.*, No. 17-CI-261, 2018 WL 4080052, at *8 (Ohio Com.Pl. Aug. 22, 2018). Also, in February 2019, Special Master David Cohen issued an oral ruling in the MDL requiring defendants to respond to discovery on the specific topic of personal jurisdiction. *See In re Nat'l Prescription Opiate Litig.*, MDL No. 2804, 2019 WL 3553892, at *1 (N.D. Ohio 2019). Since that date, the MDL parties engaged in meaningful jurisdictional discovery, including a deposition of Doron Herman that was held mere weeks before Teva Parent submitted the Herman Affidavit here. In August 2019 (the same month

Teva Parent replied on its motion here), Judge Polster recognized that there were significant factual disputes related to Teva Parent's business practices in the United States and its relationship with its American subsidiaries and declined to dismiss Teva Parent until after the "Track One trial." *Id*. Teva Parent not only failed to apprise this Court of these on-point rulings and ignored the discovery materials that disproved the overly simplistic position they were taking in this Court, but they explicitly represented to the Court the very *opposite*.

Also, prior to and after its Motion to Dismiss, several courts ruled that Teva Parent was indeed subject to jurisdiction in cases involving claims unrelated to opioids. *See e.g.*, *Teva Pharmaceuticals Industries v. Ruiz*, 181 So.3d 513, 517-518 (Fla. Dist. Ct. App. Oct. 16, 2015); *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 636-39 (N.D. Cal. 2020); Affirmation of Monica Hanna, dated July 8, 2022 ("Hanna Aff."), Ex. A, Amended Pretrial Rulings Order at 5-6, *State of West Virginia v. Purdue Pharma*, No. 21-C-9000 (W. Va. Mar. 25, 2022).

Independent of any specific facts that emerged from the MDL's jurisdictional discovery exercise or other cases, Teva Parent acted inappropriately before this Court. It hid both the fact of the directly relevant jurisdictional discovery that was already underway and also Judge Polster's related ruling. Judge Polster issued the operative order on August 5, 2019, but Teva Parent made no mention of it in the reply it submitted to this Court just three weeks later. Instead, at that time, Teva Parent dug in and *again* worked to persuade this Court using cherry-picked cases where it achieved its desired result—dismissal. (*See* NYSCEF No. 1475 at 3, n.1.) As this Court has noted, coordinating with Judge Polster and the MDL has been a significant and important efficiency. (*See, e.g.*, NYSCEF No. 755 (recognizing Judge Polster's "Protocol" as "exquisitely detail[ing] the mechanics of coordination concerning matters, which can generally be described as discovery,

duplication, adaptation, and/or adoption all to avoid unnecessary and time consuming duplicity throughout the country.") By its obfuscation, Teva Parent frustrated that coordination and artificially diminished the State's position as compared to its MDL counterparts.

But it is not just the Courts that have ruled in conflicting ways over whether Teva Parent is properly subject to jurisdiction; Teva Parent itself flip flops on the issue. In 2021, Teva Parent affirmatively availed itself to the jurisdiction of ***this Court*** and filed a complaint, seeking relief and damages based on U.S.-touching business conducted under New York law. *Teva Pharmaceutical Industries Ltd. vs. Dr. Reddy's Laboratories*, Amended Complaint filed 1/26/2022 Index No. 656499/2021 ("*Teva Parent v. Dr. Reddy*"), NY Sup. Ct., NY County, Comm. Division, (NYSCEF No. 29.) Sometimes Teva Parent presents itself as "identical" to a U.S. subsidiary, and in other instances it admits that it directly "develops, manufactures, and distributes a broad portfolio of pharmaceutical products in the United States and abroad." The only variable dictating when Teva Parent denies any U.S. business over when it forcefully admits it is its self-interest at the moment. *See infra* at I.B.

This Court and the State took Teva Parent at its word, as delivered by the short and simple Herman Affidavit. As it turns out, and as detailed below, Teva Parent's U.S. dealings and its relationship with the Teva Defendants are far more complex, and when pieced together demonstrate that very little, if any, of the Herman Affidavit was true at the time it was filed or is true today. For that reason, a hearing is necessary, and the State should be granted jurisdictional discovery in advance of that hearing.

### B. Teva Parent Controverted the Herman Affidavit with Directly Contradictory Statements and Admissions Before Other Courts.

In prosecuting its case against Dr. Reddy, Teva Parent makes statements that directly contradict the Herman Affidavit: it admits, among other things, that Teva Parent "is a multinational

pharmaceutical company that develops, manufactures, and distributes a broad portfolio of pharmaceutical products in the United States and abroad." *Teva Parent v. Dr. Reddy*, (NYSCEF No. 31 [Dr. Reddy Laboratories Counterclaims], ¶ 6; NYSCEF No. 33 [Teva Parent Reply and Affirmative Defenses to Counterclaims], ¶ 6.) By its Complaint, filed on November 15, 2021, in the Supreme Court of the State of New York, Teva Parent also details its direct activities, submissions, and dealings with the Food and Drug Administration and the Federal Trade Commission, and describes a "Cincinnati manufacturing facility" it was "required by the parties' contracts" to maintain. *See Teva Parent v. Dr. Reddy*, (NYSCEF No. 2 [Complaint] at ¶¶ 2, 9, 20-22; *see also* NYSCEF No. 29 [Amended Complaint], at ¶¶ 9, 42, 64.) Shockingly, Teva Parent specifically describes staffing levels at its contractually required Cincinnati facility that were effective on **August 28, 2019**. *See Teva Parent v. Dr. Reddy*, (NYSCEF No. 2 [Complaint] at ¶¶ 66, *see also id.* at ¶¶ 9, 36, 58; *see also* NYSCEF No. 29 [Amended Complaint], at ¶ 72.) So, in one New York Supreme courtroom, Teva Parent demands relief based on claims arising out of a contractually required Cincinnati facility, but in *this* New York Supreme courtroom, Teva Parent doubled down on its absolute and unqualified contention that it has "no business" or facilities in the United States in a reply that was filed **two days** after its Cincinnati staffing level determination, (*see* NYSCEF No. 1475.)

In another action, Teva Parent and its subsidiary, Defendant Teva USA, admitted that they **both** "manufactur[e] and distribut[e] generic drugs for sale and use throughout the United States, including in" the District of New Jersey. *Adapt Pharma Operations Limited v. Teva Pharmaceuticals USA, Inc.*, 16-cv-07721, ECF No. 9 ¶ 8 (D.N.J. 2017).

Elsewhere before the New York Supreme Court, Teva Parent has acknowledged that it "**directly and through its subsidiaries** is engaged in the business of manufacturing and selling

pharmaceutical products and API used to make pharmaceutical products." *Zydus Worldwide DMCC v. Teva Pharmaceuticals Industries Inc.*, Docket No. 654824/2019 ("*Zydus*"), NYSCEF No. 1 at ¶ 7 (emphasis added); NYSCEF No. 54 at ¶ 7. Teva Parent even went so far in the *Zydus* case to argue that it was "**substantially identical**" to one of its wholly-owned subsidiaries such that dismissal was warranted under CPLR 3211(a)(4), where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." *Zydus*, (NYSCEF No. 15 [Teva Parent's Motion to Dismiss] at 14-16 (Nov. 11, 2019); NYSCEF No. 42 at 3-5 [Teva Parent's Reply] (Jan. 23, 2020) (emphasis added)). More concerning, Teva Parent made these arguments ***after*** Teva Parent's Motion to Dismiss was *sub judice* here.

These statements concerning Teva Parent's fundamental business dealings in the United States squarely contradict the broad, unqualified denial in the Herman Affidavit. If there were nothing else, these conflicting statements and admissions before other tribunals alone would merit an inquiry into the veracity of the Herman Affidavit, but unfortunately, there is more.

### C. The Herman Affidavit Is Demonstrably False in Four Material Ways.

In its decision dismissing Teva Parent, this Court relied exclusively on the representations made by Doron Herman, Senior Vice President and "Head of Tax" at Teva Parent. (*See* NYSCEF No. 2069 at 2, 4.) This Affidavit contains, at best, overgeneralized statements that amount to misrepresentations, or, at worst, deliberately false statements. There is ample evidence that Teva Parent has all the hallmarks of a business subject to the jurisdiction of this Court, but that Teva Parent evaded this Court with falsehoods.

**1. False Statement: "Teva [Parent] has no office, property, employees, or registered agent in the United States and does not transact business in the United States."[3]**

By its own words (that it has tried to keep outside of this Court), Teva Parent owns, operates, or directly participates in the sale of factories within the United States—such as those in Cincinnati, OH and Fajardo, PR—that manufacture medical devices and pharmaceutical products for American consumers. *See Teva Parent v. Dr. Reddy* (NYSCEF No. 38 [Teva Parent Letter dated May 24, 2022] ("Teva [Parent] manufactured Veraring for DRL in Teva's facility located in Cincinnati, Ohio, . . . . In contrast, Teva [Parent] manufactured the Teva Product in a separate facility in Fajardo, Puerto Rico."); s*ee also* NYSCEF No. 31 [Dr. Reddy Laboratories Counterclaims], ¶¶ 62-63; NYSCEF No. 33 [Teva Parent Reply], ¶ 63 (admitting that Teva Parent manufactured batches of NuvaRing as late as May 2021); NYSCEF No. 29 [Amended Complaint], ¶¶ 3, 4, 38, 39, 44, 46.) Additionally, on at least one occasion, Teva Parent employees Thomas Donatelli and Boaz Cohen, acting on behalf of Teva Parent, signed deed transfers for a manufacturing facility in Rockland County, NY. Hanna Aff. at Ex. B (2019 Deed Transfer to Rockland County Property).

Beyond brick-and-mortar facilities, Teva Parent also owns business lines in the United States. *Zydus*, (NYSCEF No. 1 [Complaint], ¶ 15 ("Among the assets to be divested by Teva were the 'Rotigotine Product Assets,' consisting of Teva's rights, title, and interest in and to all assets related to Teva's business in the United States related to the 'Rotigotine Products.'"); NYSCEF No. 54 [Answer], ¶ 15.) Teva Parent has also developed and launched lines of pharmaceuticals within the United States. *Zydus*, (NYSCEF No. 1 [Complaint], ¶ 10; NYSCEF No. 54 [Answer], ¶ 10 ("Teva [Parent] developed a line of generic rotigotine products, . . . . Teva filed the Rotigotine

[3] Herman Affidavit at ¶ 2.

ANDA to obtain FDA approval to make and sell these products.");) *Teva Parent v. Dr. Reddy*, (NYSCEF No. 33 [Teva Parent Answer], ¶ 65 ("Teva obtained FDA approval for the Actavis generic NuvaRing ANDA and commercially launched the product in January 2021.")

Moreover, Teva Parent regularly engages in business practices that subject it to jurisdiction in this State. For example, Teva Parent negotiated the terms of the substantial NuvaRing contract with Dr. Reddy Laboratories in New York County. *Teva Parent v. Dr. Reddy*, (NYSCEF No. 31 [Dr. Reddy Laboratories Counterclaims], ¶ 7; NYSCEF No. 33 [Teva Parent Answer], ¶ 7;) *see* CPLR 3018(a); *DeSouza v. Khan*, 128 A.D.3d 756, 758 (2d Dep't 2015) ("The failure to deny an allegation in a complaint constitutes an admission to the truth of that allegation.").

Teva Parent also employs American residents to operate its American factories. In fact, Teva Parent's recent lawsuit against Dr. Reddy seeks to recoup the costs it incurred from employing dozens of U.S.-based staff between August 2019 and May 2020. *Teva Parent v. Dr. Reddy*, (NYSCEF No NYSCEF No. 29 [Amended Complaint], ¶¶ 61-65, 68-69, 71, 73.)

Without even the benefit of jurisdictional discovery and based only these public records recently compiled by the State, there can be no doubt that the Herman Affidavit did not accurately state Teva Parent's U.S. properties and ties, warranting a hearing.

**2. False Statement: "At no time has Teva Ltd. manufactured, promoted, or sold opioid prescription medicines, including Actiq and Fentora or any generic opioid prescription medicines, in the United States."[4]**

In the Herman Affidavit, Teva Parent summarily denied its American opioids business. But as determined by admissible evidence at trial, Teva Parent was directly involved in the Defendants' opioids business. Indeed, it was Teva Parent, **not** Defendant Teva USA, that made the ultimate call on whether to ship suspicious opioid orders, and Teva Parent functioned as the

[4] Herman Aff. at ¶ 3.

designated recipient of internal compliance reports. Hanna Aff., at Ex. C (P-03662) ("TGO [Teva Global Operations] was informed, so there was no need to inform DEA Compliance of the launch."). In the same vein, Teva Parent, **not** Defendant Teva USA, audited the Teva Defendants' central suspicious order monitoring system to determine whether the system was effective at stopping suspicious shipments of controlled substances. (NYSCEF No. 9237, at 326 (P-03646) (identifying "False Approval and release of suspicious sales orders" as a potential risk to the system).)

Teva Parent's day-to-day involvement in Defendants' opioid business also included overseeing the launch of certain opioid lines in the United States. *See* Hanna Aff., at Ex. D (TEVA_MDL_A_06904379) (listing Dorit Nimrod as "Project Champion" of IR Hydrocodone US project). Beyond that, Teva Parent employs staff in Washington, D.C. to conduct lobbying related to opioids on its behalf. *See* Hanna Aff., at Ex. E, Debra Barrett Dep. at 24-26. Teva Parent executives routinely travel to meet with numerous senior federal government officials in connection with their opioid products, and Teva Parent noted in travel materials relating to one such trip that such meetings are not only critical to Teva Parent's business, but based on longstanding relationships. *See, e.g.*, Hanna Aff., at Ex. F at 10 (TEVA_MDL_A_04208587) (2013 meetings); Ex. G (TEVA_SF_00104138) (detailing Teva Parent's executives' Washington D.C. meetings in 2016); Ex. H (TEVA_SF_00101575) (outlining a 2015 public policy engagement plan which recommends that Teva Parent's CEO extensively engage with various players and stakeholders in Washington D.C.).

Separate and apart from these new facts is evidence gathered in litigating an earlier Order to Show Cause against the Teva Defendants, dated October 1, 2021, that remains unrebutted.[5] (NYSCEF No. 8693, 8701.) At that time, the State revealed that Teva Parent conducted an opioid-focused advisory board meeting with American physicians in Grand Lakes, FL in 2014. (*See* NYSCEF No. 8695 at 226.) Notable among the Key Opinion Leader ("KOL") attendees are Xiulu Ruan, charged with, among other offenses, conspiracy to violate the Controlled Substances Act and conspiracy to receive illegal kickbacks from Insys Therapeutics, and Melanie Rosenblatt, the Teva Defendants' trial expert witness and retained expert on pain management. In its response to the Order to Show Cause, the Teva Defendants merely represented that several of the participants were employed by Defendant Teva USA, but this is beside the point. It remains uncontroverted that **Teva Parent** convened this panel to understand how "recent changes in pain management" would impact **Teva Parent's** American opioid business, regardless of who employed these presenting individuals for any other general purpose.

In October 2021, among other evidence, the State also revealed that numerous pain management KOLs have independently reported receiving payments directly from Teva Parent, including Dr. Argoff, a New York KOL. In addition, Teva Parent led the development of Vantrela, a branded opioid intended for the U.S. market, and Teva Parent's name is inscribed on the front of the Vantrela Dossier. (*See* NYSCEF No. 8695 at 219.)

[5] The State incorporates by reference herein all arguments and materials submitted in support of its October 2021 Order to Show Cause. (NYSCEF No. 8393-8695, 8716-8717.) That motion was withdrawn by stipulation, but the State reserved the right to "seek further remedies from the Court in connection with the issues raised in the Motion," and the appointed Referee, Hon. Joseph J. Maltese based his corresponding recommendations, at least in part, on that reservation. (NYSCEF No. 8770, 8771.)

At the time the State raised these issues, the Teva Defendants offered another conclusory affidavit in rebuttal, this time executed by an employee of Defendant Teva USA, relaying only unsupported hearsay from other unidentified employees. (NYSCEF No. 8724.) This is insufficient to rebut the documentary evidence detailed by the State. *See Kramer v. Oil Servs., Inc.*, 56 A.D.3d 730, 730 (2d Dep't 2008). But even these self-serving, conclusory, hearsay denials only address a small segment of the troubling Teva Parent activities discussed here, and the veracity of even those limited denials should be tested at a fact-finding hearing, just the same as the Herman Affidavit.

Teva Parent and the Teva Defendants remain silent on the evidence that Teva Parent was integrally engaged in the American opioids business by convening advisory boards, making the ultimate decisions about whether to ship suspicious orders, directing the development and launch of pharmaceutical opioids into the U.S. market, and actively shaping the policies and regulations that govern its lucrative business. This evidence provides at the very least a "sufficient start" warranting a hearing and jurisdictional discovery. *See Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 467 (1974); *Shore Pharm. Providers, Inc. v. Oakwood Care Ctr., Inc.*, 65 A.D.3d 623, 624 (2d Dep't 2009).

**3. False Statement: "Cephalon and Teva USA operate separately and independently of Teva Ltd. Cephalon and Teva USA have their own separate management that sets their own policies. Teva Ltd. does not control Cephalon's or Teva USA's day-to-day activities, does not conduct or transact business on behalf of Cephalon or Teva USA, and does not manage the business affairs of Cephalon or Teva USA."[6]**

Consistent with the evidence admitted at trial, proper credit must be given to **Teva Parent** for, among other things, making the ultimate decisions about whether to ship or stop suspicious

[6] Herman Aff. at ¶ 6.

orders, and directing the development and launch of pharmaceutical opioids into the U.S. market. *See supra* at 13-15. But Teva Parent's direct day-to-day involvement in the affairs of the Defendants extends well beyond what we learned at trial. *See also* Hanna Aff., at Ex. I (TEVA_MDL_A_13580697, internal pharmacovigilance audit of Teva USA done at request of Teva Global Compliance); Ex. J (TEVA_MDL_A_02338969, management of Teva USA DEA Compliance Auditor by Teva Parent executives); Ex. K (TEVA_MDL_A_02974065, decision to withdraw NDA for Vantrela made by Teva Parent executives, including CEO Kåre Schultz). Accordingly, this statement is also false and there is no way to reconcile these facts and documents with the Herman Affidavit.

**4. False Statement: "Teva [Parent] does not control Cephalon's or Teva USA's finances, and Cephalon and Teva USA are not financially dependent upon Teva [Parent]."[7]**

Teva Parent's simple, absolute denial in the Herman affidavit that it controls Defendants' finances and that these U.S. subsidiaries are financially dependent was demonstrably false based on documents Teva Parent produced in the MDL. In early 2019, before Teva Parent moved to dismiss the State's case here, Teva Parent produced many documents over the course of meaningful jurisdictional discovery in the MDL, including a large number of documents relating to the financial relationship between Teva Parent and its U.S. subsidiaries, including Defendants.

With the benefit of those materials, which included Teva Parent's Articles of Association under the Israeli Companies Law, Teva Parent's tax returns, and Teva Parent's general ledger of inter-company transactions, the MDL Plaintiffs were able to engage the services of Alec Fahey, a Certified Public Accountant and Certified Fraud Examiner who is certified in financial forensics.

[7] Herman Aff. at ¶ 7.

With those documents, Fahey was able to conduct an analysis of the financial control exercised by Teva Parent over its U.S. subsidiaries. Fahey's review of Teva Parent's produced materials led him to conclude that Teva Parent exercised control over the finances, revenues, sale and assignment of assets, and assumption of debt to such an extent that U.S. subsidiaries "have no control over their fate or existence." Hanna Aff., Ex. L, Fahey Declaration, at 5. In fact, Teva Parent's foundational governing documents under Israel Companies Law, its Articles of Association, *mandates and directs* that Teva Parent and its Board of Directors exercise *sole discretion* over and retain the earnings and profits of U.S. and foreign subsidiaries. Specifically, Fahey found that:

- Teva Parent "maintains shared and commingled corporate assets in development centers in the U.S." *Id.* at 11.

- Teva Parent had sole discretion to make decisions and made the sole decision to use cash flows and earnings from its U.S. subsidiaries, including those selling opioid products in the U.S., to fund the expansion of Teva Parent's business and to pay Teva Parent's debts. *Id.* at 14.

- Teva Parent's general ledger of inter-company transactions showed that Teva Parent had "integrated billions of dollars of its subsidiaries' cash resources resulting in a single business enterprise." *Id.* at 15.

- Teva Parent pays down its own debt using cash flows generated by its subsidiaries, including those U.S. subsidiaries engaged in the sales of opioid products. *Id.* at 14.

- Teva Parent uses subsidiaries' cash flows, including those of U.S. subsidiaries engaged in the sale of opioid products, to fund the repurchase of Teva Parent's own shares and to fund dividends to Teva Parent shareholders. *Id.* at 26.

- Teva Parent obtains substantial tax benefits in Israel as a result of owning and operating its U.S. subsidiaries under the umbrella of "One Teva." Teva Parent has also obtained a tax benefit in the U.S. under the U.S.-Israel Tax Treaty by claiming the income Teva Parent derives from the U.S. (from its subsidiaries) is derived in connection with the active conduct of its trade or business in Israel. *Id.* at 31-32.

While the State was deprived of notice and direct access to the jurisdictional discovery materials upon which Fahey relied to ultimately reach his conclusions, Defendants' bank records,

and other materials, will support his conclusions. Indeed, based on the BNE's licensing files, the State is aware of at least two bank accounts in the name and interest of Defendant Teva USA, including one at Bank of America and one maintained at PNC Bank. *See, e.g.*, Hanna Aff., at Ex. M, Teva 2021 BNE Registration Application; Ex. N, P-05876; Ex. O, P-05877. Notably, the signatory on Defendant Teva USA's account with PNC Bank is Richard Egosi, who, at the time the checks to BNE were written, was the Executive Vice President and Chief Legal Officer for Teva Parent. Hanna Aff., at Ex. N, P-05876. Among many other sources of proper jurisdictional discovery and discovery pursuant to CPLR 5229, the State respectfully and specifically requests that Defendant Teva USA immediately produce its records relating to these accounts. The State anticipates that those records will detail transfers of large sums of money—totaling in the billions, consistent with the volume of its U.S. business—out of Defendant Teva USA's accounts and into offshore accounts belonging to intermediary entities owned and controlled by Teva Parent, as described superficially in various public filings. Following the money trail here will illustrate the siphoning of money out of a named Defendant's account to the benefit and use of the single business enterprise that escaped a liability verdict.

**D. This Court Must Resolve Whether There Was a Fraud on the Court.**

It is impossible to square all of these facts—Teva Parent's manufacture of pharmaceuticals at its contractually required American factories, its employees signing real property records in New York State, its executives' travels to maintain longstanding relationships with its U.S. regulators, its employment of U.S. staff, its day-to-day involvement with various aspects of its opioids business, among all else evidenced just from the materials the State could access to date—with the Herman Affidavit.

A "court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our

system of justice." *CDR Creances S.A.S. v. Cohen*, 23 N.Y.3d 307, 318 (2014). "Fraud on the court involves wilful conduct that is deceitful and obstructionistic, which injects misrepresentations and false information into the judicial process 'so serious that it undermines . . . the integrity of the proceeding.' It strikes a discordant chord and threatens the integrity of the legal system as a whole, constituting 'a wrong against the institutions set up to protect and safeguard the public.'" *Id.* (internal citations omitted). There is a fraud on the court when there is "clear and convincing evidence that the offending party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action." *Id.* at 320 (internal quotations and citations omitted). "A court must be persuaded that the fraudulent conduct, which may include proof of fabrication of evidence, perjury, and falsification of documents[,] concerns issues that are central to the truth-finding process." *Williams v. Scafidi*, 205 A.D.3d 1175, 1177 (3d Dep't 2022). In situations like this one, where a party offers sworn statements that are subsequently contradicted, courts order evidentiary hearings. *Zimmerman v. Poly Prep Country Day Sch.*, 2012 WL 2049493, at *25-26, 35 (E.D.N.Y. 2012).

The State respectfully requests a meaningful opportunity to discover the full extent of Teva Parent's misrepresentations and present its case at a hearing for a determination on whether Teva Parent perpetrated a fraud on the court to secure dismissal. There is already considerable evidence to satisfy the fraud on the court standard under New York law. Teva Parent told this Court repeatedly and absolutely that it does not transact business in the United States, only to then invoke this Court's jurisdiction based on facts to the clear contrary that developed **at the very same time** Teva Parent was pushing its falsehoods here, *see supra* at 12-13. Teva Parent's intent to deceive both the State and this Court is clear, and its statements struck at the very core of the judicial process.

As such, the State respectfully requests that the Court vacate its dismissal of Teva Parent for the limited purpose of a hearing on this issue, including the in-person examination of Doron Herman, and that the State be allowed jurisdictional discovery in advance of that hearing.

## II. The Court Should Order Discovery Under CPLR 5229.

In addition to the relief requested relating to Teva Parent, this Court should grant the State relief from the Teva Defendants standing before it. Specifically, the Court should order examinations and discovery into the Teva Defendants' ability to satisfy the forthcoming judgment, stemming from the recent liability verdict. New York sets a low bar for prevailing parties seeking discovery into their adversaries' ability to pay a judgment.

> Neither [the] cases, the commentaries, nor the statute itself requires the prevailing party to submit evidence that assets are definitively being disposed of or diverted as a prerequisite to obtaining injunctive relief. Such evidence often may only surface on examination of the adverse party, ordered pursuant to CPLR 5229. A requirement of a showing that the adverse party has already disposed of assets runs counter to the purpose of CPLR 5229, which is a preventative measure designed to frustrate the adverse party from disposing of assets before such disposition takes place.

*Gallegos v. Elite Model Mgmt. Corp.*, 1 Misc. 3d 200, 207 (Sup. Ct. N.Y. Cty. 2003). Put simply, "[o]ther than having received a favorable verdict or decision, there are no prerequisites to obtaining the relief provided in CPLR 5229. … [t]he only statutory requirement is that the application for 5229 relief be made by the prevailing party." *Demirovic v. Ortega*, 296 F. Supp. 3d 477, 481 (E.D.N.Y. 2017) (internal quotes and citations omitted). The State satisfies this low threshold.

"One situation in which CPLR 5229 has special utility is where an interlocutory judgment establishes liability, but where a final judgment must still abide a trial of damages. A restraint in the interim can prevent the defendant from selling off his property and frustrating collection of the ultimate judgment." Siegel, N.Y. Prac. § 516; *see also Sequa Cap. Corp. v. Nave*, 921 F. Supp. 1072 (S.D.N.Y. 1996) (awarding CPLR 5229 relief midway through bifurcated litigation). While

it is not a prerequisite to relief, the financial condition of the adverse party is also "an issue for the court to consider in assessing the utility of CPLR 5229." *Id.* at 206. These additional conditions exist here, further warranting CPLR 5229 relief.

The facts here raise serious concerns with respect to Defendants' ability to satisfy the forthcoming judgment, which remains some distance away considering that the abatement trial date has not been set yet. First, the Teva Defendants' liability in New York is easily valued at several tens of billions of dollars. *See, e.g.*, https://www.cdc.gov/mmwr/volumes/70/wr/mm7015a1.htm (valuing New York's combined cost of opioid use disorder and fatal opioid overdose in the tens of the billions of dollars). The size of the potential award is an important consideration in deciding a CPLR 5229 motion, and here this factor could not weigh more heavily in the State's favor. *Leser v. U.S. Bank Nat. Ass'n*, 2013 WL 867153, at *2 (E.D.N.Y. Feb. 21, 2013), *report and recommendation adopted*, 2013 WL 867151 (E.D.N.Y. Mar. 7, 2013) (noting that irrespective of evidence of dissipation, $38 million verdict award was sufficient to give rise to possibility that losing party could not satisfy it).

Second, Fahey's findings, described above, *see supra* at 18, together with Teva entities' broad and publicly known debt that is in excess of $21 billion creates the very real scenario that the Teva Defendants may be made judgment-proof. Teva Parent's filings have attested to their precarious financial condition for years and that lament continues through this calendar year:

> [S]ubstantial level of debt and lower levels of cash flow and earnings have severely impacted our business and resulted in a restructuring plan between 2017 and 2019. Our substantial net debt could also have other important consequences to our business, including, but not limited to … making it more difficult for us to satisfy our obligations ….

Ex. P, Teva Pharmaceutical Industries, Ltd. 2020 Form 10-K at 31; *see also* Hanna Aff., Ex. Q, Teva JPM Conference PowerPoint, dated January 11, 2022, at 7. Moreover, Teva Parent's consistent use of its subsidiaries' cash flows to pay off its debts, *see* Hanna Aff. at Ex. L at 14,

raises the additional concern that the Teva Defendants may be looted by Teva Parent and its foreign intermediary entities through a series of fraudulent conveyances ultimately intended to frustrate the State's ability to collect on its forthcoming judgment. Teva Parent's statements, in combination with its use of its U.S. subsidiaries as its personal piggy bank, further militate in favor of ordering discovery. *See Berg v. Au Cafe, Inc.*, 2009 WL 1905143 (Sup. Ct. N.Y. Cty. 2009) (weighing losing party's statements that collecting on the judgment would be difficult in CPLR 5229 analysis).

Equally concerning, Teva Parent's CEO publicly communicates that (what Fahey recognized is) the Teva "single business enterprise" will not be required to pay the judgment arising out of the liability verdict anytime soon, if at all. When asked regarding the timing of payments arising out of the New York verdict on an earnings call, he went on at length, concluding with "So it will be a while." Hanna Aff., at Ex. R, Teva JPM Conference Transcript at 9.

When asked what he meant by "a while," Teva's CEO clarified that "this could take God knows how long" and that "maybe you've got to fight it out forever and eventually win in the Supreme Court but will probably take 10 years." *Id.* at 9. All the while, as Fahey points out, Teva Parent maintains the sole discretion to use cash flows and earnings from its U.S. subsidiaries including those in the opioids industry, to pay Teva Parent's substantial debts. Put another way, Teva Parent and Defendants are pursuing a strategy of delay, and effectively borrowing from Plaintiffs in order to continue to pay other, less deserving debts in the meantime. Given that there is ample evidence—and more to be found—that Teva operates with one shrinking purse, CPLR 5229 discovery into Defendants' ability to pay New York's forthcoming judgment is necessary.

***Finally***, Defendants' liabilities and risk elsewhere are considerable. In addition to the considerable exposure that Defendants face in opioid litigations across the country, Defendants

recently settled an unrelated securities class action MDL for $420 million in *cash payments*. Hanna Aff.. Ex. S, *In re Teva Securities Litigation*, ECF No. 919-1. Substantial payments like that also endanger the State's collection on its forthcoming judgment.

In light of the jury's verdict, and the likelihood that the amount of the anticipated judgment will reach well into the billions, Plaintiffs are entitled to the greatest possible assurance that the judgment will be fully satisfied—with interest. That is the purpose behind CPLR 5229, and this case is ripe for relief thereunder.[8]

## III. The Court Should Order Certain Injunctive Relief that Is Consistent with the Jury's Verdict.

Finally, the States respectfully requests a limited set of injunctive relief consistent with the jury's finding of a persisting public nuisance. (NYSCEF No. 8953.) The specific injunctive relief sought by the State is as follows, that the Defendants be directed to:

> 1. Report to the New York State Department of Health's Bureau of Narcotics Enforcement ("BNE") the finding of liability against them by the December 30, 2021 jury verdict;
>
> 2. Identify to Plaintiff any and all of Teva Parent's or any Teva Defendant's direct or indirect subsidiaries or affiliates that have applied to the BNE for any controlled substance license(s) between December 30, 2021, and the present;
>
> 3. Produce to Plaintiff any and all publications disseminated to any third party or the public from December 31, 2021, through the present, relating to any opioid product, which was produced, created, or funded by Teva Parent or any Teva Defendant or any direct or indirect subsidiaries or affiliates thereof; and
>
> 4. Produce to Plaintiff any and all guidance, SOPs, or written policies and/or procedures relating to Teva Parent's or any Teva Defendants' anti-diversion efforts created on or after December 30, 2021 through the present, including but not limited to any revisions to previously produced materials or audit-related materials relating to any Suspicious Order Monitoring System.

[8] Although entitled to it, the State does not seek the restraints available under CPLR 5229 at this time. Instead, it wishes only to conduct meaningful discovery that would allow it to determine whether restraints are necessary, and if so, how best to tailor them to be least restrictive.

This Court should exercise its discretion and inherent power "to fashion appropriate injunctive relief after trial." *Tsui*, 203 A.D.3d at 619; *see also Arcamone-Makinano*, 156 A.D.3d at 673. This initial limited relief is appropriate to determine the degree to which the Teva Defendants persist in the conduct forming the basis of their liability, namely failing to report such findings to the BNE, avoiding their licensing obligations by shifting them to other subsidiaries or affiliates, and persisting in their illegal marketing and anti-diversion efforts. Once the State is afforded this requested relief, it can work from a better-informed place to stop Defendants from engaging in the conduct that caused, maintained, or contributed to the public nuisance. Accordingly, the State's request for this initial set of injunctive relief conforms to its urgent need to abate the public nuisance and is within this Court's discretion and inherent power to award.

## CONCLUSION

For the foregoing reasons, this Court should (i) vacate Teva Parent's dismissal for the limited purpose of a hearing on whether Teva Parent committed a fraud on the court, and allow the State jurisdictional discovery in advance of that hearing, (ii) grant the State examinations and discovery, pursuant to CPLR 5229, from the Teva Defendants, and (iii) grant the State injunctive relief concerning Defendants' ongoing conduct or omissions that will assist in abating the persisting nuisance, consistent with the jury's findings.

July 8, 2022

Respectfully submitted,

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