07-1107-cv

To be Argued by: Steven Brock

United States Court of Appeals
for the
Second Circuit

ELI LILLY & CO.,

Movant-Appellee,

- v -

JAMES B. GOTTSTEIN,

Respondent-Appellant,

Vera Sharav, Alliance For Human Research Protection, John Doe, David S. Egilman, Laura Ziegler, Mindfreedom International, Judi Chamberlin, Robert Whitaker, Terri Gottstein, Jerry Winchester, Dr. Peter Breggin, Dr. Grace Jackson, Dr. David Cohen, Bruce Whittington, Dr. Stephen Kruszewski, Will Hall, David Oaks and Eric Whalen,

Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLANT

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PRELIMINARY STATEMENT

James B. Gottstein is a public interest lawyer who has won four precedent-setting cases in the Alaska Supreme Court in the last four years, effectively rewriting Alaska mental health law and greatly expanding the rights and protections for mental patients. He has been appointed by the Chief Justice of the Alaska Supreme Court to a committee to revise Alaska mental health procedural rules, and serves as an officer or board member of national and international organizations and nonprofit corporations providing alternative mental health services.

The District Court's labeling of Mr. Gottstein as a criminal is unwarranted, unfair, and at odds with the rest of his exemplary career as a lawyer, before or since December 2006. The District Court erroneously found that Gottstein subpoenaed Zyprexa documents subject to a protective order in *In re Zyprexa Products Liability Litigation*, MDL-1596, in a case "wholly unrelated to Zyprexa" that Gottstein used as a "pretense" for the subpoena. A–9. Based on that fundamental error, the District Court misinterpreted Gottstein's actions and intentions and found that Gottstein was not acting as a lawyer but as a conspirator with others to knowingly violate the District Court's protective order. That finding was clearly in error at the time, and court records now subject to this Court's judicial notice definitively document that Zyprexa was directly relevant and at issue. The District

Court's findings as to Gottstein are untenable, and its opinion as to Gottstein should be reversed.

The case in question was a guardianship proceeding. The ward, William Bigley, retained Gottstein on December 5, 2006, to remove the guardian's power to consent to administration of psychiatric drugs. On December 6, 2006, Jim Gottstein filed papers on behalf of William Bigley in the Alaska guardianship proceeding seeking such relief and served subpoenas on two state officials involved in Bigley's care and two experts on psychiatric drugs.

One of those experts, Dr. David Egilman, was an expert for plaintiffs in *In re Zyprexa Products Liability Litigation,* MDL–1596. Egilman, a stranger to Gottstein, had called a week earlier to tell Gottstein that Zyprexa documents produced by Eli Lilly & Co. (Lilly) in MDL-1596 could be useful in his mental health rights legal work. The documents were subject to a protective order (CMO-3), Egilman had signed it, and Egilman said he would comply with it. The protective order required Egilman to give Lilly notice and a "reasonable opportunity to object" before producing documents.

There is no middle ground here. Either the Bigley case had nothing to do with Zyprexa and the subpoena was a sham, or Gottstein was acting properly. As Bigley's lawyer, Gottstein would be accountable for his subpoena in the Alaska

courts, not the District Court, unlike Egilman, who as a signatory of CMO-3 would be accountable to the District Court.

Having found that Bigley's case was "wholly unrelated to Zyprexa," the District Court concluded that Gottstein's subpoena was a "pretense" and that Gottstein was conspiring with Egilman and others in a "scheme" to release the documents in violation of CMO-3. A–9.

However, Zyprexa was in fact relevant, and Gottstein was acting in his client Bigley's interests, not Egilman's. The documents would have supported Bigley's claims and those of future Gottstein clients. Gottstein expected that Lilly was likely to object to production and litigate its objections in the Alaska court. The evidence before the District Court was that Zyprexa was widely used in people with Bigley's serious psychiatric diagnosis. Evidence that the guardian did not appreciate the risks of Zyprexa would support removing his power to consent over Bigley's objection.

Court records in subsequent Alaska litigation involving Bigley report that Bigley was in fact being forcibly medicated with Zyprexa contemporaneously with Gottstein's subpoena to Egilman, and has been on occasion since. Gottstein gained Bigley a favorable settlement removing the guardian's power to consent and has continued to represent Bigley in numerous involuntary medication and commitment cases as well as the guardianship proceeding. In *Bigley v. Alaska*

Psychiatric Institute, 208 P.3d 168 (Alaska 2009), the Alaska Supreme Court recently held that the psychiatric hospital had violated Bigley's right to due process by obtaining an involuntary medication order without disclosing its proposed medication or allowing Gottstein access to Bigley's medical chart before the hearing.

Since Zyprexa was relevant, Gottstein's subpoena was proper. The Court need not reach the novel questions raised in this appeal by Lilly's attempt to enforce a discovery order against a nonparty as if it were an injunction. The Court can and should reverse the District Court's opinion as to Gottstein on the simple and straightforward ground that he was acting properly on behalf of his client.

JURISDICTIONAL STATEMENT

The District Court has subject matter jurisdiction over cases pending in MDL-1596 under 28 U.S.C. §§ 1331 (federal question) and 1332 (diversity).

This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 (final orders) and 1292(a)(1) (orders granting or denying injunctions). The District Court's orders were entered on February 13, 2007 and March 6, 2007. SPA-3, 81, 82. Gottstein filed his notice of appeal on March 13, 2007. SPA–83-85.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The District Court erred in concluding that Gottstein violated, or aided and abetted a violation of, Case Management Order 3 (CMO-3).

2. The District Court erred in failing to properly determine whether the documents at issue were confidential and whether Lilly had waived confidentiality.

3. The District Court did not have personal jurisdiction over Gottstein, and erred in finding a waiver of that jurisdictional defect.

STATEMENT OF THE CASE

MDL-1596 was assigned to Judge Weinstein on April 19, 2004. CMO-3 provided for management of confidential information in discovery in MDL-1596, was "agreed to and submitted by the parties," SPA-19, and signed by Magistrate Judge Chrein and Judge Weinstein on August 3, 2004. Judge Weinstein qualified his signature "as approving act of magistrate judge and parties, no objection having been made." A–46.

Around midnight on December 15, 2006, Special Discovery Master Peter Woodin in New York emailed Mr. Gottstein in Alaska an *ex parte* order finding Gottstein "in violation of CMO-3" and ordering him to "immediately return" all documents produced by Lilly in MDL-1596 that he had received from Dr. David Egilman or anyone else (Egilman Documents).

On December 18, 2006, without notice, Magistrate Judge Roanne Mann ordered Gottstein to participate in a telephonic hearing. A–104. Later that day, Gottstein was ordered to participate in a telephonic hearing before Judge Brian M. Cogan. Judge Cogan granted the "emergency oral joint motion" by counsel for

Lilly and members of the Plaintiffs' Steering Committee, and issued an oral Order for Mandatory Injunction followed by a written order of the same date requiring Gottstein, among other things, to "immediately return" the Egilman Documents in his possession and "take immediate steps to retrieve" and return other copies of the Egilman Documents "regardless of their current location." A–136, 141-43.

On December 29, 2006, Judge Cogan issued an Order for Temporary Mandatory Injunction against some of the parties identified by Mr. Gottstein as recipients of the Egilman Documents enjoining them from further dissemination of the documents. A–563. This Temporary Mandatory Injunction was modified and continued until February 13, 2007. A–490.

On January 4, 2007, Lilly agreed to pay up to $500 million to settle 18,000 Zyprexa suits in MDL-1596.[1] Lilly had previously settled 8,000 Zyprexa suits in 2006 for $700 million, and 2,500 individual suits for undisclosed amounts. Approximately 1,200 Zyprexa suits remained pending in MDL-1596.

Judge Weinstein held hearings on January 16 and 17, 2007, on an array of motions by the parties, nonparty Gottstein, and various interveners. A–293; A–290.

On February 13, 2007, the District Court issued a Memorandum, Final Judgment, Order & Injunction ruling on the motions. Gottstein and several others

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[1] Lilly Settles with 18,000 Over Zyprexa, N.Y. Times, January 5, 2007, http://query.nytimes.com/gst/fullpage.html?res=9F00E5DB1430F936A35752C0A9619C8B63.

were permanently enjoined from disseminating the Egilman Documents. The District Court found specifically as to Gottstein that the guardianship proceedings in *In re William Bigley* were "wholly unrelated to Zyprexa," that the Egilman Documents subpoenaed "bore no relevance to the Alaska litigation," and that "the administration of Zyprexa was not an issue." SPA–9, 25. On that basis, the District Court found the intervention and subpoena in *In re William Bigley* a "pretense" or "scheme" to conceal a "knowing violation" of CMO-3. SPA–9, 15, 24.

On September 7, 2007, Dr. Egilman settled with Lilly in a stipulated order that was approved by the District Court on the same day. A–738. In a declaration accompanying the settlement, Dr. Egilman admitted that he violated CMO-3, specifically by discussing the contents of Lilly's confidential documents with a New York Times reporter. A–737. Egilman acknowledges providing documents to Gottstein but does not indicate that doing so was a violation of CMO-3. *Id.*

STATEMENT OF FACTS

I. Zyprexa Litigation in Alaska

A. PsychRights and Early Zyprexa Documents and Litigation

In 2002, Mr. Gottstein co-founded PsychRights®[2], a non-profit public interest law firm. He serves as its President, devoting his time *pro bono* to its campaign against unwarranted forced psychiatric drugging: a campaign involving strategic litigation to establish and protect individual rights, creation and support of alternative mental health services, and public education regarding the risks, benefits, and alternatives to psychiatric drugs. A–63, 160, 185, 189, 207,340, 366. *See* A–165, 192, 194-219. To further those efforts, he also serves on the boards of directors of other national and international organizations with similar philosophies[3] and has served as CEO of three non-profit corporations providing alternative mental health services.[4]

In Gottstein's work, "Zyprexa has been an important focus of concern, as it is one of the most-prescribed neuroleptic drugs." A–64, 160. In 2003, as part of

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2 *See* http://psychrights.org.

3 National Association for Rights Protection and Advocacy (President, 2006-2007) http://www.narpa.org; International Center for the Study of Psychiatry and Psychology, Inc., http://www.icspp.org.

4 Soteria-Alaska, http://soteria-alaska.com; CHOICES, Inc., http://choices-ak.org; Peer Properties, Inc., http://peerproperties.org.

PsychRights' public education efforts,[5] Gottstein posted on the PsychRights website two important collections of Zyprexa documents obtained by others from the FDA through FOIA requests: an FDA analysis of Zyprexa studies and a database of Zyprexa adverse event reports, A-65.

In *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 240 (Alaska 2006), a case involving Zyprexa, Gottstein successfully argued that the Alaska involuntary medication statute was unconstitutional. *Myers*, which Professor Michael Perlin has called "the most important State Supreme Court decision on the question of the right to refuse treatment in perhaps two decades,"[6] held that involuntary medication is permissible only if determined to be in the patient's best interests and there is no less intrusive alternative – legal determinations to be made by the Alaska courts, not by the treating psychiatrists. *Myers* stressed the expert psychiatric testimony introduced by Gottstein in opposition to the Alaska Psychiatric Institute's (API) psychiatrists, noting in particular "specific testimony" on Zyprexa that concluded that Zyprexa, "despite being widely prescribed," was a "very dangerous drug of dubious efficacy." *Id.* at 240. Such testimony on Zyprexa

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[5] The PsychRights web site provides public access to an extensive collection of legal, scientific, and other materials on psychiatric drugs and alternative mental health services. *See* http://psychrights.org.

[6] 1 Perlin & Cucolo, Mental Disability Law: Civil and Criminal, at iii (2d ed. Supp. 2007) (footnotes and internal quotation omitted).

supported *Myers'* rejection of API's claim that "doctors alone are the 'proper arbiters' of patients' best interests." *Id.* at 240.

Since *Myers*, Gottstein has won three more precedent-setting victories in the Alaska Supreme Court: *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371 (Alaska 2007) ("gravely disabled" construed to mean unable to survive safely in freedom to preserve constitutionality); *Wayne B. v. Alaska Psychiatric Institute*, 192 P.3d 989 (Alaska 2008) (strict compliance by masters with requirement for transcript); and *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168 (Alaska 2009). *See* Gottstein, Involuntary Commitment and Forced Psychiatric Drugging in the Trial Courts: Rights Violations as a Matter of Course, 25 Alaska L. Rev. 51, 55-59 (2008) (discussing *Myers*, *Wetherhorn*, and further litigation needed to protect rights of psychiatric patients).

In the wake of *Myers*, Chief Justice Dana Fabe of the Alaska Supreme Court appointed Gottstein to a newly created committee charged with revising the procedural rules for involuntary medication and commitment proceedings.[7] The Judge's Guide, Handling Cases Involving Persons with Mental Disorders (2008), prepared by Alaska judges, cites *Myers*, *Wetherhorn*, and *Wayne B.* a total of

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[7] *See* Involuntary Commitment, 25 Alaska L. Rev. at 100 n. 268; http://psychrights.org/States/Alaska/CtRules/ltrfrmsp062907.pdf (appointment letter appreciating Gottstein's "help and expertise in revising the procedural rules that govern these difficult and important cases."

seventy-three times and a handful of other Alaska cases in which Mr. Gottstein was not involved one to three times.[8]

Most recently, Gottstein won a ruling from the Alaska Supreme Court in *Bigley* that an involuntary medication order entered without adequate notice of the specific treatment proposed or access to patient medical records violated due process. Under *Myers*, possible alternative treatments as well as the specific treatment eventually proposed by API in court were considered. As in *Myers*, the record in *Bigley* included evidence on hazards of Zyprexa and other psychiatric drugs. Furthermore, as the *Bigley* opinion demonstrates, it is now a matter of public record that Mr. Gottstein's client in *Bigley*, Mr. William S. (Bill) Bigley, is the "B.B." upon whose behalf Mr. Gottstein served the subpoena for Zyprexa documents, found by the District Court to be a "pretense."

B. Representation of William (Bill) Bigley (B.B.)

On September 29, 2006, Gottstein reported on the *Myers* decision to PsychRights members and supporters nationwide, emphasizing the need for further litigation to implement it, A–194, 210-16, PsychRights' ongoing efforts to find an "appropriate case" or "suitable plaintiff" to bring such litigation, A–211-15, and development of additional evidence on "the truth about the drugs" for use in

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[8] *See* www.state.ak.us/courts/judges/benchbook.pdf.

litigation and education of professionals and the general public. A–213; *see* A–184-85, 189-91, 215-16.

On November 28, 2006, Gottstein received a telephone call from Dr. David Egilman, an expert for plaintiffs in MDL-1596 who had documents subject to a protective order relating to hazards of Zyprexa. A–66-67, 250-51. While Egilman did not discuss the specific contents of his documents, A–348-49, Gottstein understood they could be useful in litigation opposing forced treatment under *Myers* and would also be reported in the *The New York Times* (*Times* or NYT), increasing public awareness of hazards of psychiatric drugs.

Accordingly, he undertook to find a "suitable case" for a subpoena to Egilman, based on what he described as "dual purposes": implementing his then recent victory in *Myers* and publicizing significant hazards of Zyprexa. A-259. Gottstein understood that Egilman would not provide any documents except pursuant to subpoena (A–360) and would give Lilly notice of the subpoena and a reasonable opportunity to object in compliance with the protective order before producing any documents. Gottstein expected Lilly would object and his right to the documents, and any conditions on access to them, would be litigated in the trial court in Alaska. A–375-77. He hoped the court might unseal the documents even

though they were under a protective order in MDL-1596,[9] so that he could use them in litigation and for public and media awareness and post them on the PsychRights web site.

C. ***In re William Bigley*** **and the Egilman Subpoena**

On the evening of December 5, 2006, Gottstein found an appropriate case, and on December 6 entered his appearance and filed papers on behalf of his client William Bigley in *In the Matter of the Guardianship of William S. Bigley*, No. 3AN-04-545 P/G (Alaska Super. Ct., 3d Dist.) (*In re William Bigley*), seeking termination of the guardian's power to "approve administration of psychotropic medication" and other relief. A-67. Under *Myers*, consenting to medication would involve consideration of the risks and benefits of proposed medications and alternative medications and other treatments. To develop evidence regarding the guardian's competence to decide such questions for Bigley, Gottstein subpoenaed four witnesses: two state employees responsible for Bigley's care, Dr. Grace E. Jackson, the psychiatrist who had testified in *Myers* on the hazards and limited efficacy of Zyprexa and other psychiatric drugs, and Dr. Egilman. All received a *subpoena duces tecum* for documents relating to their roles in the case.

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[9] In *Alaska v. Eli Lilly & Co.*, No. 3AN 06-5630 CI, Superior Court, Third Judicial District, State of Alaska, the Alaska state court did in fact unseal a large volume of Lilly documents used in that case at the request of Bloomberg News, notwithstanding Lilly's objection that the documents were designated confidential in MDL-1596. RA–43-45.

When questioned on his grounds for the Egilman subpoena, Gottstein testified that Bigley ("B.B." in the transcript) was a man, probably in his fifties, who had been "in and out of the psychiatric hospitals many times" with "numerous court ordered involuntary psychiatric druggings." A–350. Gottstein knew that Zyprexa was "perhaps the biggest seller" among neuroleptic drugs, A-64, 352, and B.B.'s diagnosis was "one of the serious ones," for which Zyprexa was commonly prescribed. A--351. He was aware of evidence that the FDA trials of Zyprexa were not reliable and believed Eli Lilly had withheld relevant information on Zyprexa from the FDA. A--344. He knew people who had taken Zyprexa and suffered negative side effects. *Id.* And he thought B.B. might have been forcibly medicated with Zyprexa and suffered adverse side effects. A--349.

When asked: "You haven't offered any evidence that DB [*sic*] was taking Zyprexa on December 6 when you issued the subpoena or at any time since December 6 [through January 17, 2007], is that correct?" Gottstein acknowledged "That's correct." A–260. Gottstein did not have this information because Bigley's guardian was asserting "basically complete control" under the guardianship order and denying Gottstein access to Bigley's medical records. A--350. He explained that evidence that Bigley had been given Zyprexa:

> hasn't been produced in this proceeding yet. I'm not sure that he has never been. At this time I'm not sure that he has ever been. He certainly was potentially subject to it and Eli Lilly's apparently illegal marketing activity was

> certainly relevant to the question of whether of [*sic*] not he should be ordered to take this drug against his will.

A–260. But in fact he was.

D. Forced Treatment of Bigley with Zyprexa

Alaska court records now public and properly subject to judicial notice show that Bigley had in fact been forced to take Zyprexa at the time Gottstein agreed to represent him and subpoenaed Zyprexa documents from Egilman, and that Bigley was forcibly administered Zyprexa again in March 2007, and thereafter.[10] The discharge summary for Bigley's hospitalization from November 29, 2006 to January 3, 2007, recorded that Bigley was under an "existing court order" providing for forced medication after he "refused medications," and stated Bigley "wanted to be off Zyprexa because he thought it made him hungry and his medication was changed to Seroquel." RA–8. Nevertheless, Bigley's order sheet for March 21, 2007, recorded an intramuscular [IM] injection of olanzapine, Zyprexa's chemical name. RA–9. While Risperdal has recently been the more commonly proposed drug, Zyprexa continues to appear in Mr. Bigley's hospital records. RA–130, 131.

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10 The Alaska Supreme Court took judicial notice of this and other court filings from cases involving Bigley without objection from API. RA–43-45.

E. Favorable Settlement in *In re William Bigley*

On July 27, 2007, Bigley entered into a highly favorable settlement agreement negotiated by Gottstein with the guardian and API modifying the original terms of guardianship. It prohibited the hospital from accepting the guardian's consent to psychiatric drugs if Bigley objected and increased Bigley's involvement in decisions regarding his mental health services, housing, discretionary spending, and other matters. RA–113.

F. Continuing Litigation for Mr. Bigley Involving Zyprexa

Mr. Gottstein continued to represent Bigley in a series of hotly contested involuntary commitment and treatment proceedings. RA–1-132. Bigley has won two jury verdicts defeating applications for involuntary commitment, one in which Gottstein acted as his attorney and the other in which he testified on Bigley's behalf. RA–5, 53. He has prevailed in some forced treatment proceedings, but not others. Mr. Gottstein has continued to subpoena documents and witnesses and present expert testimony on behalf of Bigley and others as to the risks and benefits of Zyprexa and other common antipsychotic drugs. *See, e.g.*, RA–57-62.

G. Zyprexa Evidence in *Bigley* Record

In *Bigley*, the Alaska Supreme Court held API's practice of proceeding with forced treatment hearings without notice of the particular drugs proposed and

without providing medical records violated Bigley's right to due process. 208 P.3d at 181, 184.

As Bigley's recent medical chart and the specific drugs with which API proposed to treat Bigley were not known in advance of the lower court hearing, Gottstein had submitted documentation of medical history and expert affidavits on Zyprexa and other common antipsychotic drugs drawn from his previous submissions on Bigley's behalf in other such cases. *Id.* at 176; RA–10, 24. While it did not reach the merits of the underlying forced treatment order, the court accepted that such broad responses were appropriate, noting that Bigley's expert witnesses testified that "psychotropic medications" were often ineffective, and that non-drug treatments would be more effective for Bigley. *Id.* at 186. Though API had proposed Risperdal at the hearing, the court found that the affidavits submitted by Gottstein addressing Zyprexa and other atypical antipsychotics presented a "vigorous challenge" to the API psychiatrists. *Id.* at 182.

II. Lilly Documents and CMO-3 in the Eastern District of New York

MDL-1596 began in April 2004, and Case Management Order 3 (CMO-3), governing the handling of confidential information during discovery, was agreed to by the parties and approved by the court on August 3, 2004. Since that time, Lilly has produced "more than 20 million pages" of documents in MDL–1596, RA–273, designating virtually every one as confidential, including published scientific

articles, newspaper articles, and press releases. A–56, 440; *In re Zyprexa*, 242 F.R.D. 29, 31 (E.D.N.Y. 2007).

A. Third Party Payors Request Declassification in 2005

Parties in *UFCW Local 1776 v. Eli Lilly & Company*, 05-CV-4115, and similar cases in MDL--1596 (Third Party Payors or TPP), have made repeated requests pursuant to ¶9 of CMO-3 for declassification of specific documents relied on in their class action complaints and substantive motions. RA–263-267.

On November 7, 2005, the Third Party Payors filed a class action complaint against Lilly and simultaneously requested declassification of approximately 200 documents cited in the complaint (TPP Complaint Documents). A–484-85. On January 16, 2006, Lilly moved for a protective order to maintain the documents as confidential. The Third Party Payors argued the documents had automatically lost their confidentiality designation when Lilly failed to file a motion keeping them confidential by December 24, the 45-day deadline under ¶9 of CMO-3. A–41. The Third Party Payors voluntarily refrained from disseminating the documents pending a ruling on Lilly's January 16 motion. That motion "was never resolved." *In re Zyprexa*, 242 F.R.D. at 32.

B. Subpoena for the Egilman Documents

Mr. Gottstein subpoenaed the Egilman Documents for use in litigation on behalf of his PsychRights client and to educate the public on hazards of Zyprexa.

He did not know Dr. Egilman prior to receiving a call from him "out of the blue" on November 28, 2006, and acted in his own interest, not to assist Egilman. A-54, 66-67, 159-63. Gottstein's intention to obtain the Egilman Documents legally by subpoena, not in violation of CMO-3, and litigate in an Alaska state court whether the documents should remain confidential or be unsealed were discussed above. *See* A–69, 159-63, 303-05, 315, 346-48, 360-61, 373-74

Gottstein expected Egilman to comply with CMO-3 in giving notice to Lilly of his subpoena, and upon receipt of the subpoena on December 6, Dr. Egilman immediately gave notice by fax to Lilly, the "designating party," as specified in CMO-3. A-43-4, A-53-6.

Gottstein told Egilman that he had to comply with CMO-3, A–254, 276, 278, and "repeatedly" advised Egilman to retain counsel. A-276. He "made it clear" that he was "not [Egilman's] attorney" and that Egilman "needed to consult his own attorney and that it was his [Egilman's] obligation to comply with the order [CMO3]." A–278. Egilman apparently did not retain his own attorney. *Id.*. Mr. Gottstein asked Dr. Egilman to send a copy of CMO-3, but Dr. Egilman declined to do so. A–254,-55. Dr. Egilman did read certain portions of it to Mr. Gottstein, however, including ¶14, relating to subpoenas. A–276.

The December 6 subpoena provided for Egilman to bring the documents to a telephonic deposition on December 20. A–54. While Gottstein had expected Lilly

to litigate the subpoena, on December 11, having still received no objection from Lilly, Gottstein served an amended subpoena. It clarified that Dr. Egilman was to provide the documents to Gottstein in Alaska "prior to' December 20 to allow review in advance of the telephonic deposition on that date. A–72, 76-68, 73, 269-70. In an email, Gottstein asked Egilman to send the documents "as soon as you can," A–72, meaning "as soon as he could under the protective order." A-269. Mr. Gottstein told Dr. Egilman repeatedly to provide Lilly with notice of the amended subpoena, but Dr. Egilman did not do so. A–270.

Having received no response or direction from Lilly, Dr. Egilman determined Lilly had been given a reasonable opportunity to object and began producing the documents on December 12, almost a week after notice to Lilly.

C. Distribution of the Egilman Documents

Gottstein believed that the Egilman Documents were no longer subject to CMO-3, as Lilly had waived its claim of confidentiality by failing to object. A–285, 301, 305, 315, 369. He proceeded to provide copies of the produced documents to various people, including *Times* reporter Alex Berenson[11] , and Dr. Steven Cha, a member of United States Congressman Waxman's staff. A–157. Had

[11] Berenson called Gottstein beforehand to say that the Times would not publish a report on the documents if another news outlet broke the story first. A-309-10. Berenson asked for priority over other news outlets, and Gottstein agreed because the Times was "the best place to have had this happen from my perspective." A-310.

he prevailed in obtaining the documents in the Alaska state courts unrestricted by a protective order, he would have similarly been entitled to disseminate them and would have done so. A–375-77.

Gottstein acknowledged a strong desire for the Egilman Documents to become public legally. He anticipated that Lilly would tie up release of the documents through legal proceedings even if they had lost any protection under CMO-3 due to Lilly's failure to make timely objection, and wanted to distribute the documents widely "to make it impossible to get them back." A–276.

This strong desire was based on Gottstein's extensive prior research and experience that Lilly and other pharmaceutical companies have often misled the FDA, the courts, and the public with deceptive claims exaggerating the benefits and minimizing the risks of psychiatric drugs such as Zyprexa, A–64, 343-44, and might bring vast resources to bear on him without regard to the merits of his position.

D. Publication in *The New York Times*

Within days of receiving the Egilman Documents from Gottstein, the *Time*s began publishing a series of front-page articles on them written by Berenson and an editorial calling for Congressional hearings (the *Times* articles). *See Eli Lilly Said to Play Down Risks of Top Pill*, N.Y. Times, Dec. 17, 2006, at A1, RA--133; *Drug Files Show Maker Promoted Unapproved Use*, N.Y. Times, Dec. 18, 2006, at

A1, RA–137; *Playing Down the Risks of a Drug* [Editorial], December 19, 2006, RA–141; *Disparity Emerges in Lilly Data on Schizophrenia Drug*, N.Y. Times, Dec. 21, 2006, at A1, RA–142. The District Court has described these articles as reporting, among other things, that Lilly had engaged in "a decade-long effort to play down the health risks of Zyprexa" and had "withheld information about the risk of Zyprexa in causing diabetes" from the FDA, physicians, and the public. *In re Zyprexa*, 549 F.Supp.2d 496, 529 (E.D.N.Y. 2008). The December 18 article further reports that Lilly marketed Zyprexa for dementia, an unapproved use.

E. Gottstein Voluntarily Suspends Dissemination at Lilly's Request

Counsel for Lilly contacted Gottstein by fax on the evening of December 14, 2006, eight days after receiving notice from Egilman, and asked Gottstein to "refrain from further seeking production" pending a ruling by the Alaska court. A–76-77. Gottstein agreed temporarily to do so while reserving his rights and requesting that Lilly provide authority supporting its legal position, and advising Lilly that certain material had already been produced. A–78..

On Friday, December 15, without hearing from Mr. Gottstein, Special Master Woodin ordered Mr. Gottstein not to disseminate the Egilman documents and return them to him. A–59-60. On Saturday, December 16, Gottstein responded to Special Master Woodin, questioning the propriety of the order but nevertheless confirming that he had "voluntarily ceased further dissemination"

upon receipt of the fax from counsel for Lilly and would give notice before resuming any dissemination. A–61.

F. Gottstein Voluntarily Returns Documents

On Monday, December 18, 2006, Mr. Gottstein voluntarily participated in a telephone conference before Judge Cogan, acting in the absence of Judge Weinstein, and was ordered to return all Egilman Documents in his possession, request return of any such documents disseminated, and provide certain additional information. Despite having serious questions as to the court's jurisdiction over him and preserving his objection to jurisdiction, Mr. Gottstein voluntarily complied, as set forth in his December 21, 2006 letter to Special Master Woodin. A–154-58. The court's ruling was based largely on Lilly's false representation that it had received and relied on assurances from Egilman's counsel that ‘no document production would be made.” A–80, 122, 134.

G. TPP Documents 2007: Declassify “As Promptly As Practicable”

After the conclusion of the injunction proceedings, the District Court granted the Third Party Payors application for declassification review of the confidential documents cited in their complaint, which had not been ruled on since it was first made in November 2005. *In re Zyprexa*, 242 F.R.D. at 32. The court granted the application because it sought to use the documents to litigate a case, distinguishing similar motions by nonparties brought “in the public interest” which the court had

denied. The documents were not made public. The court directed the Special Master to proceed "as promptly as practicable" to declassify any of the TPP Documents not protected under Rule 26(c)(7) and also to declassify any documents that were confidential unless Lilly "demonstrates an extraordinary reason to keep them under seal." *Id.* at 33. The court did not then and has never since ruled on whether Lilly had waived confidentiality by failing move for a protective order within 45 days as required by CMO-3, ¶9 to preserve confidentiality. A-41.

H. Judge Weinstein Rules Times Articles Contained No New Information

In March 2007, a securities class action was filed in MDL-596 based on the Egilman Documents, alleging damages due to Lilly's fraudulent material misrepresentations regarding Zyprexa. Lilly moved to dismiss on grounds directly contrary to its assertion below in this case, i.e., that there was really nothing new in the Egilman documents and therefore plaintiffs' securities' claims were barred by the two-year statute of limitations. Plaintiffs responded that the *Times* articles in December 2006 "publicly disclosed for the first time" Lilly's fraudulent conduct, so their March 2007 suit was timely. *See In re Zyprexa*, 549 F.Supp.2d 496, 500 (E.D.N.Y. 2008).

The District Court surveyed in detail the publicly known information about the allegations regarding Zyprexa beginning in 1996 and concluded that "[t]hese allegations against Lilly had been current in the medical, legal and investment

worlds since at least 2001," and plaintiffs' claims were dismissed as barred by the statute of limitations. *Id*. at 529; *see* 549 F.Supp.2d at 501-29.

I. The FDA Response to the Times Articles

On January 12, 2007, the FDA wrote Lilly expressing concerns regarding the *Times* articles and requesting updated information. It wrote again on March 28, 2007, noting that Lilly's response had "not been particularly helpful in addressing these concerns." RA–155. *See* U.S. Wonders If Drug Data Was Accurate, NYT, April 25, 2007. RA–189. On August 28, 2007, the FDA wrote Lilly requesting strong new warnings on Zyprexa labeling relating to weight gain and other conditions discussed in the *Times* articles based on documents shared by Gottstein. RA–192-97. Lilly promptly did so. *See* Lilly Adds Label Warnings for Mental Drug Zyprexa, N.Y. Times, October 5, 2007, RA–213.

J. TPP Documents 2008: "Old" and "Outdated"

Citing the public interest, the unsealing of Lilly documents in Alaska, and the fact that any commercial information in the documents was likely "old" and "outdated," the district court on September 5, 2008, ordered the TPP Complaint Documents and additional confidential documents cited in motions to dismiss, motions for summary judgment, motions for class certification, and the court's rulings on these motions to be unsealed. *In re Zyprexa (TPP Class Action)*, 253

F.R.D. 69, 208 (E.D.N.Y. 2008). The District Court approved plaintiffs' plan to post these documents on a website, citing “due process and fundamental fairness” and the right of the public to know the evidence "in view of the significance of the case." *Id.* at 209. However, unsealing was stayed and the matter was referred to the special master for further consideration of whether any individual documents should nonetheless still be redacted or remain under seal. The court noted that “the vast majority of Lilly documents produced in discovery” remained under seal pursuant to CMO-3. *Id.*

The court discussed the Egilman Documents, which “overlap” with the documents being unsealed, as follows:

> Some documents have already been released. *See In re Zyprexa Injunction*, 474 F.Supp.2d 385 (E.D.N.Y. 2007). Most are so old as to be unlikely to reveal current secrets.

Id. The District Court appears to state in retrospect that “most” of the Egilman Documents are also “so old as to be unlikely to reveal current secrets,” like the TPP Complaint Documents.[12] The alternative would be that the District Court found the Egilman Documents contained confidential competitive information whose release would cause Lilly irreparable harm in 2007, but the similar,

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[12] In addition to overlapping, the “already . . . released” Egilman Documents and the TPP Complaint Documents both range from the mid-1990s to 2004. *Compare* RA–381 (Egilman Documents date from 2004 to 1995) with http://www.zyprexalitigationdocuments.com/unsealed.php (TPP Complaint Documents concentrated in years 1999 to 2004 with a few earlier in the 1990s).

overlapping TPP Complaint Documents were too old to contain current secrets in 2008.

K. "No Sign of Potential Criminal Liability"; Lilly Pleads Guilty

On July 17, 2008, at the hearing on a motion for class certification by the TPP's, the District Court encouraged the parties to settle. *In re Zyprexa Products Liability Litigation*, 2008 WL 2783155 at *4 (E.D.N.Y.). The court reiterated its view that there was only a "thin basis for the entire Zyprexa personal injury litigation." *Id.* at *1. It went on to reject "the threat" of "criminal litigation." While noting that it was 'not privy to ongoing investigations, if any," the District Court stated:

> In the enormous cache of discovery documents it has reviewed, *no sign of potential criminal liability* has been observed by this court. . . .

Id. at *3 (emphasis added).

On January 15, 2009, the Justice Department announced that Lilly was pleading guilty to promoting Zyprexa for 'off-label" uses not approved by the FDA, causing false claims to be submitted to federal programs such as Medicaid, and conducting an illegal marketing campaign to primary care physicians knowing that there were virtually no approved uses of Zyprexa in that market. In addition to pleading guilty to this criminal charge, Lilly agreed to pay $1.415 billion, consisting of a criminal fine of $515 million, asset forfeitures of $100 million, and

civil settlements up to $800 million. RA–249-51. The Justice Department stated that this was ‘the largest criminal fine for an individual corporation ever imposed in a United States criminal prosecution of any kind.” RA–249.

Persons involved in the investigation stated that the civil investigation had begun earlier but “gained momentum” after the publication of the *Times* articles, and that criminal allegations were eventually initiated afterwards. RA–242.

L. TPP Documents 2009: Court Approves Posting on the Internet

On referral from the District Court for declassification review, the Special Master determined that TPP Documents and other similar documents would still be considered confidential if Lilly could demonstrate that release would cause Lilly “competitive harm in its current marketing, promotional and sales efforts for Zyprexa.” Case Management Order No. 9 dated March 20, 2009. Lilly was invited to identify all documents among the TPP Documents and hundreds of similar documents which it had designated as confidential under CMO-3. Lilly identified only 11 documents which it claimed could cause current competitive harm. The Special Master ordered two unsealed, two unsealed in part, and found seven properly designated as confidential in their entirety.

On May 4, 2009, the District Court affirmed the Special Master's order unsealing all the hundreds of TPP Complaint Documents and similar documents except for seven and parts of two others. RA–374. The Third Party Payors then

posted 148 formerly confidential documents on their web site.[13] The bulk of these documents dated from 2000 to 2004 and were initially unsealed by the District Court because any confidential information was "old" and "outdated" and unlikely to have current competitive value. *In re Zyprexa (TPP Class Action)*, 253 F.R.D. at 208. The Egilman Documents date from the same time period and overlap – containing many of the same documents.[14] *See* 381.

M. Current Status of CMO-3 in MDL-1596

All but a few hundred of the 30,000 cases in MDL-1596 have been settled. Almost all of the 20 million pages of documents produced and designated confidential by Lilly remain under seal and have never been reviewed to determine whether they are in fact confidential or whether Lilly could reasonably have designated them confidential "in good faith" as required by CMO-3. The small numbers of documents that have been reviewed for confidentiality have almost all been found not confidential and unsealed.

The *Times* articles reporting the gist of the Egilman Documents have been found to contain information public since before 2001 – hence not confidential – and the similar, overlapping TPP Complaint Documents have been found too old to

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13 *See* http://www.zyprexalitigationdocuments.com.

14 *See* http://www.furiousseasons.com/zyprexadocs.html.

contain current secrets. Some of these documents which Lilly designated confidential contained evidence of criminal conduct to which Lilly has pled guilty.

Mr. Gottstein remains labeled a criminal and subject to a permanent injunction predicated on findings that his litigation on behalf of Mr. Bigley in Alaska was a sham having nothing to do with Zyprexa, and that the Egilman Documents he obtained by subpoena and sent to the Times were actually confidential.

SUMMARY OF ARGUMENT

Mr. Gottstein acted completely properly as an attorney for his client, within the bounds of the law and without violating the protective order in this case. It was proper for Mr. Gottstein to seek the documents *via* the legitimate subpoena he caused to be issued for the dual purposes of using them in his litigation and disseminating them if possible legally. He expected Lilly to make an objection prior to production and litigate his entitlement to them in the Alaska courts. When Lilly sat on its rights so long that Dr. Egilman determined Lilly had been given the required reasonable opportunity to object and produced the documents to Mr. Gottstein, he was entitled to disseminate them. The District Court's conclusion that the subpoena was a "pretense" is unsustainable as a matter of law.

In addition, the district court never considered that the documents in controversy had automatically lost their protection a year before Mr. Gottstein

subpoenaed them, when Lilly also failed to meet another deadline provided in the protective order.

Finally, the District Court erred by invoking the extraordinary reach of F.R.C.P. 65(d), which by its terms and precedent applies only to injunctions, to Mr. Gottstein, a non-party who was not bound by the protective order.

STANDARD OF REVIEW

Appellate courts review a district court's entry of a permanent injunction "for abuse of discretion, which may be found where the Court, in issuing the injunction relied on clearly erroneous findings of fact or an error of law." *Knox v. Salinas*, 193 F.3d 123, 129 (2d Cir. 1999). *See also Rosen v. Siegel*, 106 F.3d 28, 31 (2d Cir. 1997).

ARGUMENT

I. Mr. Gottstein Acted At All Times As A Lawyer Representing His Client Within The Bounds Of The Law

A. The Subpoena Was Properly Grounded in Law and Fact

The District Court's critical finding with respect to Gottstein was that the subpoena of Zyprexa documents from Dr. Egilman was a "pretense," part of a "scheme" – a legal nullity – because Zyprexa was "wholly unrelated" and had "no

relevance" to Bigley or his guardianship proceeding, *In re William Bigley.* SPA-9. Gottstein was entitled to pursue discovery on Zyprexa if he reasonably anticipated it would be relevant to his ongoing guardianship, for example, proposed for Bigley in the future or investigated as a cause of harm to him in the past. A lawyer may file a claim and seek discovery of supporting evidence without already having proof in hand, so long as the lawyer has reasonable grounds to believe such evidence can be obtained in discovery. *See* F.R.Civ.P. Rule 11.[15] The documentation that Bigley was being forced to take Zyprexa contemporaneously with the subpoena and from time to time thereafter renders the District Court's finding even more clearly untenable. RA–8. Given that Zyprexa was relevant, the subpoena to Egilman was properly grounded. Gottstein must be recognized as acting independently as Bigley's lawyer, not as Egilman's tool. The conspiracy theory, at least as to Gottstein, must fail as a result.

The District Court failed to appreciate that evaluation of a mental patient's best interests involves a range of alternatives, their risks and benefits, and their restrictiveness compared to other alternatives – a broad inquiry that will look to the patient's past medication and medical history, present circumstances, and likely

15 Rule 11 of the Alaska Rules of Civil Procedure, like most of Alaska's procedural rules, is based on the corresponding Federal Rule. The Alaskan courts commonly look to federal count interpretations when Alaskan precedent is lacking. *State of Alaska v. Eli Lilly & Co.*, No. 3AN-06-5630 (Alaska Super. Ct. June13, 2008), RA-215. 222.

future situation. *See Myers.* This is not an automobile accident involving a Ford, where the brakes of Chevrolets might be irrelevant. Given Zyprexa's preeminent market position, it is hardly surprising it was and would remain relevant to Bigley's interests even if he were not taking it contemporaneously with the Egilman subpoena – which he was.

The same considerations apply to Bigley's challenge to his guardianship. Removing the guardian's power to consent on Bigley's behalf was absolutely necessary to protect Bigley's rights. Information on Zyprexa and several other psychiatric drugs from Dr. Jackson and Dr. Egilman would be used to show that the guardian was not well informed about the risks and benefits of Zyprexa and other common psychiatric drugs and, consequently, was ill-equipped to judge whether proposed forced drug treatment over Mr. Bigley's objection or alternative drugs or treatments were in his best interests. *See Myers*, *supra*.

The Alaska courts have considered expert evidence on Zyprexa in cases involving involuntary medication even where it was not the focus of the proceedings. *See, e.g.*, *Bigley,* 208 P.2d at 176, 186. Gottstein has successfully used evidence on Zyprexa and other common antipsychotic drugs in this representation of Bigley. *See* RA–57. He achieved a strikingly favorable result in *In re William Bigley,* the case the District Court considered a mere "scheme" and "pretense."

Accordingly, the district court erred by rejecting *In re William Bigley* and the subpoena to Dr. Egilman as a sham, effectively stripping Mr. Gottstein of his rights to act as a lawyer and denying Mr. Bigley his rights to obtain relevant evidence to support his claims through a lawful subpoena.

Mr. Gottstein was quite candid about his dual purposes: to obtain evidence for use in Bigley's case and other future cases, and make evidence of suppressed hazards or illegal marketing or other evidence of Zyprexa hazards and Lilly misconduct known to the public. He was also firm that he would only make them public legally. His subpoena was proper, adequately grounded in law and in fact. He was willing to act quickly when Lilly blundered and failed to object after a "reasonable opportunity." At the same time, he complied with Lilly's written request that he refrain from further dissemination of the Egilman Documents pending a ruling by the Alaska court and returned the Egilman Documents and otherwise complied with the District Court's orders notwithstanding its doubtful jurisdiction.

Nevertheless, the District Court effectively found that Mr. Gottstein's desire that the Egilman Documents become public was improper and outweighed his proper legal purposes and actions on behalf of Mr. Bigley. However, both the Alaska Supreme Court and the Second Circuit have ruled that legal papers that are

objectively justified and not frivolous may not be sanctioned based on a court's finding of a subjective improper purpose.

B. The District Court Erred by Disregarding a Subpoena Properly Grounded in Law and Fact Due to an Allegedly Improper Purpose

As noted previously, Gottstein had dual purposes in subpoenaing the Egilman Documents: defending his client against forced medication and seeking to make public documents with new information on the risks and benefits of Zyprexa. He had researched the issue and "satisfied [him]self through that research that it was proper." A-259. Under Alaska law, in order for the subpoena to have been improper, it must have "first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding." *Young v. Embley*, 143 P.3d 936, 949 (Alaska 2006). So long as the subpoena had a legitimate purpose, an "ulterior motive" is irrelevant under Alaska Law. *See also Jenkins v. Daniels*, 751 P.2d 19, 22 (Alaska 1988). More recently, the Alaska Supreme Court has held even more explicitly that "'actions taken in the regular course of litigation,' such as . . . requesting discovery, are not 'a proper basis for an abuse of process claim' even if done with an ulterior motive." *DeNardo v. Maassen*, 200 P.3d 305, 312 (Alaska 2009).

Thus, even if Mr. Gottstein's belief that the information about the hazards of Zyprexa suppressed by Lilly should be sought out and made public was improper,

the subpoena was proper. Gottstein focused on his own objectives in issuing the subpoena, regardless of those of others. A–251-53.

The same is true under Second Circuit precedent. *Sussman v. Bank of Israel*, 56 F.3d 450 (2d Cir. 1995). In *Sussman*, the lower court was found to have abused its discretion by using its inherent powers for its "expressed goal of deterrence" to impose sanctions for letters written prior to commencement of litigation because it was not proper for the court to deter litigants from asserting nonfrivolous claims. *Id.* at 460.

Judge Kearse surveyed the rulings of the Second Circuit and other circuit courts and concluded that in these circumstances it made no difference whether a litigant's purposes were considered proper or improper. If a filing was frivolous, sanctions were warranted; if not, then they were not – regardless of any improper purpose. The court was concerned that inquiring into counsel's subjective motives for filing objectively justifiable pleadings would have "harmful consequences, such as generating satellite litigation, inhibiting speech and chilling advocacy," *quoting* Schwartzer, Sanctions Under the New Federal Rule 11 – A Closer Look, 104 F.R.D. 181, 195-96 (1985). The court thus concluded that a litigant "should not be penalized for or deterred from seeking warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper." 56 F.3d at 359.

Having held that an improper purpose would be irrelevant as long as a claim was not frivolous, the court went on to rule that filing a complaint "with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity" was not an improper purpose as long as a claim was not frivolous. 56 F.3d at 459. The law did not "safeguard a defendant from public criticism that may result from the assertion of nonfrivolous claims," and deterring or punishing attorneys for speaking with the press could have "serious First Amendment implications" in many situations. *Id.*

Finally, the court made clear that its ruling was not specific to monetary sanctions under Rule 11, but reflected a more general policy against deterring or punishing nonfrivolous claims, whether under the courts' inherent powers or involving other types of sanctions intended to compensate rather than punish or deter. *Id.* at 459-60. Instead of inferring improper purposes (from an erroneous finding that the subpoena of Egilman was as pretense), the District Court was obligated to "resolve all doubts in favor of [Gottstein]." *Oliveri v. Thompson,* 803 F.2d 1265, 1275 (2d Cir. 1986).

Sussman speaks directly to the propriety of the District Court's evident consideration of improper purpose. The court below relied extensively on pejorative language and asides implying improper purpose: "agents in crime," "pretense," "scheme," "conspiracy," "stolen," "irresponsible," "illegal,"

"conspirators," "purloined," *etc.*, and treated purposes such as Gottstein's desire to see more Lilly documents unsealed as improper, SPA – 31, though that is no more improper than a desire to "exert[] pressure" on an adversary "through the generation of adverse and economically disadvantageous publicity," found proper in *Sussman*.

Similarly, it was not illegal or improper for Gottstein to subpoena Egilman instead of Lilly or not to notify Lilly of his request to receive the Egilman Documents in advance of the scheduled telephonic deposition. These is no obligation for the attorney subpoenaing documents to subpoena the original source or notify everyone that might claim some interest in the documents, even if he knows of such circumstances. *Howard v. Stover,* 240 F.3d 1073 (Table) (5th Cir. 2000) owner of business records had not right to notice of grand jury subpoena duces tecum to a person in possession of the documents); *Cinel v. Connick* , 15 F. 3d 1338 (5th Cir. 1994) (former clergyman had no right to notice of subpoena duces tecum to Catholic Church of material in which clergyman claimed privacy interest); *Dornan v. Sanchez,* 978 F.Supp.2d 1315 (C.D. Cal. 1997) (members of organizations do not have a due process right to notice of subpoena to organization for personal identifying or private information). A third party's claim of privilege only gives standing to object, not a right to notice and participation. *Langford v. Chrysler Motors Corp.,* 513 F.2d 1121, 1126 (2d Cir. 1975).

The District Court and counsel for Lilly particularly seized on the fact that Gottstein did not have an ongoing case or a specific client at the time he discussed using the Zyprexa Documents Egilman told him about in order to further the strategic purposes of PsychRights' mental health rights advocacy. Lilly's counsel in his examination of Mr. Gottstein repeatedly referred, almost mockingly, to the fact that Gottstein had "found a case" in which to pursue his the important interests at stake. It is useful to remember, as noted in the court below, that when lawyers undertake to advocate for their clients, particularly on matters of public interest in suits aimed at championing the civil rights of a class of individuals not in a position to readily protect their own interests against the powers of the government, that is not only engaging in activity that exemplifies the highest ideals of the legal profession, but in activity that is protected by the First Amendment as well. The First Amendment protects engaging in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. *In re Primus*, 436 U.S. 412 (1978); *see also Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Reaffirming the principle previously recognized in *NAACP* v. *Button*, 371 U.S. 415 (1963), the Supreme Court stated in *Primus* that "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." 436 U.S. at 431. Similarly, the solicitation of prospective litigants by a

group pursuing public interest litigation, including those with no prior connection with the group, “for the purpose of furthering the civil-rights objectives of the organization and its members was held to come within the right “ ‘to engage in association for the advancement of beliefs and ideas.’ ” *Id.* at 424, *quoting NAACP v. Alabama*, 357 U.S. at 460. Representing the interests of those diagnosed with serious mental illnesses through the Law Project for Psychiatric Rights, as Mr. Gottstein has done for years and continues at this moment through his representation of Mr. Bigley and others, is an activity squarely within the First Amendment, and this includes posting documents on PsychRights’ website, and subpoenaing documents or having documents evaluated by experts in connection with PsychRights’ strategic litigation.

Erroneous reliance on findings of improper purpose is pervasive in the district court's discussion of the Bigley guardianship litigation and subpoena. Like the lower court in *Sussman*, the district court relied on its inherent powers to reach beyond the usual confines of litigation "to deter further violations of this and other courts' orders," *e.g.*, by Mr. Gottstein and other nonparties. SPA-14. The district court's after-the-fact disregard of Mr. Gottstein's petition and subpoena as "pretenses" could well pose a greater risk of deterring litigants from asserting nonfrivolous claims than the sanction for pre-litigation "threatening letters" in *Sussman* and should be reversed for the same reasons as in *Sussman*.

C. Mr. Gottstein Acted Legally and Independently as a Lawyer in the Interest of His Client, Precluding Any Finding of Aiding and Abetting Others

A nonparty who "act[s] independently" of a party found in violation of a court order, *Regal Knitwear Co. v. NLRB,* 324 U.S. 9, 14 (1945), based on "a genuinely independent interest," *Heyman v. Kline*, 444 F.2d 65 (2d Cir. 1971), is not an aider and abettor of the violation. Mr. Gottstein acted as a lawyer on behalf of Mr. Bigley, a "genuinely independent interest" separate and distinct from the interests of either Dr. Egilman or Mr. Berenson or any parties to CMO-3 in MDL 1596. Mr. Gottstein had professional interests and obligations to vigorously represent his client, who himself had constitutional rights to decline unwarranted and dangerous psychiatric drugs and to petition the courts to vindicate his rights – rights which were prejudiced by the district court's ruling. *See Myers; In re: Primus.*

Regal Knitwear and *Heyman* start from the recognition that binding a nonparty to obey an injunction creates due process problems that must be resolved in a principled fashion. Under what circumstances can it be fair for an injunction to bind someone who was not a party to injunction proceedings and whose interests were never considered by the court? The precedents addressing this question can best be understood as considering whether one of the parties to the injunction

proceeding had interests aligned with the nonparty and could fairly be viewed as representing the nonparty's interests.

Thus, *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 874 n.1 (2d Cir. 1988), states that Rule 65(d) binds nonparties "so identified in interest with those named in the decree that it would be reasonable to conclude that their rights and interests have been represented and adjudicated in the original injunction proceeding." *Id.* at 874 n.1, *quoting* 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2956. Analyzed in these terms, a nonparty abettor of a party would be bound because its interests with respect to the injunction would be aligned with the party abetted. But a "genuinely independent interest" of a nonparty would not be represented by any party or adjudicated in the original proceeding, and thus would not be bound.

In *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930), Judge Learned Hand recognized that binding a nonparty raised the "deep" concern that "he is condemned without a hearing" unless his interests are aligned with those of a party. 42 F.2d at 833. His famous exposition of the limits on the power of the courts leads him to identify two categories of nonparties who can properly be bound:

> [N]o court can make a decree which will bind any one but a party. . . . [I]t cannot lawfully enjoin the world at large, no matter how broadly it words its decree. . . . Thus, the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has the power to forbid, an act of a party. This means that the respondent must either

> abet the defendant, or must be legally identified with him. . . .

42 F.2d at 832-33. These two categories in *Alemite*–a nonparty who abets a party and a nonparty who is legally identified with a party–are essentially the two categories of nonparties in today's Rule 65(d) that may be bound by an injunction: "officers, agents, servants, employees, and attorneys" of a party (legally identified) and "those persons in active concert or participation with them who receive actual notice of the order" (aiders and abettors). *Alemite* reflects the Supreme Court's caution that an injunction does not "make punishable the conduct of persons *who act independently and whose rights have not been adjudged according to law*." *Regal Knitwear*, 324 U.S. at 13 (emphasis added).

Heyman is particularly instructive because the court did not find it relevant that the husband and wife appear to have worked together hand-in-glove to preserve their property. The husband had transferred half of his interest in the property to his wife five months before suit was brought against him, their interests in the property appear to have been undivided, and their legal strategy seems coordinated. Yet the wife was not found to be abetting or acting in concert with her husband because she had a "genuinely independent interest," which as a matter of property law would not have been adequately protected by another co-owner (husband or not) in the initial proceeding against her husband. Working together

toward a common goal did not did not mean that the wife was aiding and abetting her husband.

Gottstein's interests as a lawyer representing Bigley, and Bigley's interest in subpoenaing evidence to support his claims – which were implicated when court orders interfered with Gottstein's pursuit of entirely proper, certainly nonfrivolous legal strategies on Bigley's behalf – are precisely the sort of independent interests which were unrepresented when CMO-3 was entered. Gottstein's responsibility as a lawyer was to advocate on Bigley's behalf. Under *Sussman,* his advocacy is protected so long as it is not frivolous, and he is generally free to publicize claims and evidence in Bigley's interest, even if that proves unpleasant and costly for others.

Gottstein's and Bigley's interests are in many respects contrary to those of any party or signatory of CMO-3. They were not represented when the parties agreed to CMO-3 or when the District Court signed CMO-3 "as is" based on that agreement. Egilman's obligations as an expert and signatory of CMO-3 are also quite different from Gottstein's as Bigley's attorney. Imposing aiding and abetting liability on Gottstein in such circumstances violates due process.

D. CMO-3 Can Not Be Enforced As A "Quasi-Injunction"

Rule 65 governing injunctions explicitly provides that it binds certain nonparties (those legally identified with a party, and those aiding and abetting a

party) and also includes protective requirements of specificity and detail so that it will be fair to do so. It is the only Federal Rule with such provisions. Rule 26(c) does not purport to bind nonparties aiding and abetting a party and does not include protective requirements to ensure due process in such circumstances.

The district court erred by assuming "inherent authority" to use its power to enforce injunctions under Rule 65(d) to enforce a protective order under Rule 26(c) instead. *Rosen v. Siegel*, 106 F.3d 28, 33 n.3 (2d Cir. 1997) ("inherent authority does not free the court from the procedural requirements regarding injunctions").

The District Court in effect implied aiding and abetting liability under Rule 26(c) despite the lack of any explicit provision in its text. Whether particular federal rules or statutes should be enforced against nonparty aiders and abettors is a legislative question for Congress, not the courts. The Supreme Court has declined to imply aiding and abetting liability where Congress has not explicitly created it. Thus, the phrase “directly or indirectly” in the Securities and Exchange Act §10(b) was held not to impose "aiding and abetting" liability. The Supreme Court explained that Congress "knew how to impose aiding and abetting liability when it chose to do so." *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176 (1994).

E. CMO-3 Can Not Be Enforced Against Gottstein Because It Does Not Provide the Protections Required to Enforce Injunctions

CMO-3, a discovery order specifying the procedures to be followed by the parties regarding confidential documents, bears no resemblance to an injunction and, most importantly, did not provide Mr. Gottstein with the protections which are mandated in injunctions if they are to be construed to bind nonparties. Rule 65(d) requires that for an injunction to be enforceable it must, among other things, include a detailed description of the act or acts sought to be restrained. CMO -3 fails to provide nonparties with a specific and detailed description of the acts required or prohibited.

The provision that is the focus of the district court's findings regarding Mr. Gottstein is contained in ¶ 14 of CMO-3 governing subpoenas of documents designated confidential under CMO-3 and states: "In no event shall confidential documents be produced prior to the receipt of written notice by the designating party and a reasonable opportunity to object." A-44. This provision does not on its face impose any obligation on nonparties. Indeed, nothing in ¶ 14 of CMO-3 imposes any requirements on nonparties, even though this paragraph explicitly anticipates subpoenas by nonparties. The protective order does not attempt to impose any requirements on the nonparty serving the subpoena, presumably because the nonparty is beyond the district court's jurisdiction and would have no obligation to comply.

Nevertheless, the District Court essentially held that Gottstein was personally bound to give Lilly “a reasonable opportunity to object.” However, a “reasonable opportunity” to object – a term negotiated by Lilly with other parties – is far too vague to be enforced as an injunction and certainly not as a “quasi-injunction.” There is no way to determine definitely from the face of CMO-3 what periods of time would be in compliance and what periods of time would not.

The history of the negotiation of ¶ 14 provides a graphic demonstration of its inadequacy to inform a nonparty such as Mr. Gottstein specifically what would constitute compliance . Interestingly, a late draft provided "ten (10) business days" for Lilly's objection, but was changed to "reasonable opportunity to object" in the final version. A-30; A-44.

The ten day provision would have allowed Gottstein to know with sufficient precision when production of the documents could proceed based on Lilly's waiver of objection. The "reasonable opportunity to object" language that was finally adopted by the parties in MDL-1596 does not allow Mr. Gottstein to know what conduct would constitute compliance or noncompliance with CMO-3.

This Court has found injunctions using the term ”similar” to be impermissibly vague and unenforceable for reasons equally applicable to the “reasonable” term in CMO-3. In *Diapulse Corp. of America v. Carba, Ltd.,* 626 F.2d 1108, (2d Cir. 1980), this Court refused to approve an injunction against

manufacture of a specified device or “similar devices,” stating that “[a] court is required to frame its orders so that those who must obey them will know what the court intends to forbid,” *citing Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (“basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.”). In *Time Warner Cable, Inc. v. DirectTV, Inc.*, 475 F.Supp.2d 299, 309 (S.D.N.Y.), *modified on other grounds*, 497 F.3d 144 (2d Cir. 2007), the court modified an injunction proposed by the parties against airing a specified advertisement or “substantially similar” advertisements due to vagueness. *See Federal Election Comm’n v. Furgatch*, 869 F.2d 1256, 1264 (9th Cir. 1989) (injunction against future "similar violations" of federal election law impermissibly vague). *Common Cause v. Nuclear Regulatory Comm’n*, 674 F.2d 921, 926 (D.C. Cir. 1982) (injunction "susceptible to more than one interpretation" fails to identify the precise conduct prohibited).

The district court apparently concluded, as Lilly suggested below, that Lilly would not have had a "reasonable opportunity to object" until its deadline for moving to quash the subpoena had passed. That period would give Lilly the maximum possible time, as opposed to a "reasonable opportunity." Moreover, the opportunity to object refers to Lilly's opportunity to notify Dr. Egilman, the person receiving the subpoena, whether Lilly objects to production or not – after which the recipient of the subpoena will be obligated either to prepare to respond to the

subpoena or to cooperate with Lilly in proceedings to contest the subpoena. It would have been unreasonable for Lilly to wait until the deadline before notifying Dr. Egilman that it planned to object to production.

Since all that was required of Lilly was a simple statement that it objected to production, a decision which Lilly apparently made internally almost immediately, the six days Lilly received clearly provided it with a reasonable opportunity to notify Dr. Egilman that it objected to production. In comparison, CMO-3 provides only three business days for Lilly to file a motion to object to disclosure of confidential information to a competitor. While the "reasonable opportunity" provision is too vague to be enforced, particularly against nonparties, if the Court were to attempt that task it would be necessary to give nonparties the benefit of any doubt as to compliance. Given that Lilly negotiated and agreed to CMO-3, it must be deemed to admit that three business days gave it a reasonable opportunity to object to the subpoena at issue here.

The district court found that Lilly was "unable to make a timely objection" because Egilman and Gottstein had misled Lilly as to the date of production. SPA-9. This is patently erroneous for several reasons. It assumes the provision sufficiently definite to be enforceable, which it is not. Moreover, Lilly had already failed to respond in a "reasonable" time before the alleged misleading. Furthermore, all that was required from Lilly was brief notice to Dr. Egilman. The

record is clear that a single e-mail, fax, or simple phone call to Gottstein also would have sufficed to protect Lilly's interests. *See, e.g.,* A–78. Lilly was not "unable" to give that notice for almost a week. Finally, it assumes what it seeks to prove, first binding Gottstein under CMO-3 to notify Lilly, then creating jurisdiction over Gottstein for a "violation" of CMO-3 and holding him bound by CMO-3.

For all these reasons, CMO-3 was not enforceable against Mr. Gottstein.

II. The Egilman Documents Did Not Contain Confidential Information

CMO-3, like many protective orders, defines confidentiality in terms of "information," and documents are stamped confidential because of the information they contain. A-35. The critical issue in determining confidentiality of the Egilman Documents is whether the *information* in those documents meets the standard for confidential treatment under Rule 26(c)(7).

The District Court has made extensive, substantive findings in related cases that the *information* in the Egilman Documents had been public "for years" before the current case arose, *In re Zyprexa (Statute of Limitations)*, 549 F.Supp.2d 496, 540 (E.D.N.Y. 2008), and that such *information* was out-dated and posed no substantial risk of current competitive harm for Lilly. *In re Zyprexa (TPP Class Certification)*, 253 F.R.D. 69, 208-09 (E.D.N.Y. 2008). Lilly has taken positions inconsistent with its claims of confidentiality here, and recent document-by-

document reviews of collections of documents Lilly designated confidential in MDL-1596, have declassified almost all the documents reviewed.

Furthermore, some of the information in the Egilman Documents that Lilly persists in claiming was properly designated as confidential relates to criminal charges of off-label marketing of Zyprexa for elderly patients with dementia to which Lilly has pled guilty, raising new and serious questions whether the documents were ever properly designated confidential in "good faith."

Lilly should be barred from continuing to assert that the Egilman Documents are confidential.

A. Proceedings in the District Court

The district court's findings of fact and conclusions of law are given at SPA-11, 31-32, 63-65, 70. The district court reviewed "a sampling" of the Egilman Documents and stated that "a substantial number" contain information whose publication:

> would be annoying, embarrassing, oppressive, and burdensome to Lilly; they reveal trade secrets, confidential preliminary research, development ideas, commercial information, product planning, and employee training techniques. [citation to the *Times* articles]
>
> These documents are covered by CMO-3. They are included within the kind of documents protectable under Rule 26(c).

SPA-31-32; *see* SPA–64. Release of "confidential proprietary material and trade secrets" in the Egilman Documents could "inflict severe commercial harm on [Lilly]." SPA-70 (citing Hoffmann Declaration).

Lilly was obligated to support its confidentiality designations document by document when challenged, and has never done so for the Egilman Documents, or almost all the rest of its 20 million pages of document production. The party seeking to prevent disclosure must substantiate its position on a document-by-document basis. *Baxter Int'l, Inc. v. Abbott Labs*, 297 F.3d 544, 548 (3d Cir. 2002); *Forst v. Smithkline Beecham Corp.*, 602 F.Supp.2d 960, 974 (E.D. Wis. 2009). The district court was obligated to make factual findings sufficient to permit Mr. Gottstein to challenge those findings and this Court to review them on appeal. *Knox v. Salinas*, 193 F.3d 123, 129 (2d Cir. 1999) ("Fed.R.Civ.P. 52(a) requires special findings of facts and conclusions of law in support of a permanent injunction."). These requirements assure that the district court exercises due care in ascertaining the facts, and aid the appellate court in understanding the basis of the district court's decision. *Davis v. New York City Housing Auth.*, 166 F.3d 432, 435 (2d Cir. 1999); *Knox v. Salinas*, 193 F.3d at 129; *Rosen v. Siegel*, 106 F.3d at 32.

While the District Court referred to CMO-3 as an "umbrella" order, CMO-3 did not authorize Lilly to designate all its document production as confidential as umbrella orders often do, though only for a limited time; Lilly was only permitted

to designate documents which it "in good faith" believed were confidential under Rule 26(c)(7). The Manual for Complex Litigation states that such a designations is to be treated as "equivalent to a motion for a protective order and subject to the sanctions of Fed.R.Civ.P. 37(a)(4)." Manual for Complex Litigation, Fourth at 64 n.134 (2004). A "particularized showing" supporting the designation "must be made whenever a claim under the order is challenged." *Id.* at 64. The party requesting declassification has no initial obligation to offer evidence that the challenged documents are not confidential. *Id.* at 65 n.140.

Aside from citations to the *Times* articles, the District Court opinion contains only legal conclusions. SPA–31-32, 64. The District Court has not described the contents of any individual documents so that the reliability of the conclusions on confidentiality could be challenged by Gottstein or reviewed by this Court.

That failure is all the more important because the opinion itself makes clear that the District Court's review of "a sampling" of the Egilman Documents proceeded under an erroneous legal standard. CMO-3 only permits Lilly to classify documents as confidential pursuant to Rule 26(c)(7) ("trade secret or other confidential research, development, or commercial information") A–35. The District Court reviewed for confidentiality under "Rule 26(c)," SPA–32, and explicitly considered the much broader categories of "annoying, embarrassing,

oppressive, and burdensome" information under Rule 26(c). It justified CMO-3 as protecting Lilly from "embarrassment and oppression," SPA–64, though release of trade secrets and other confidential commercial information to competitors would cause monetary harm instead.

Thus, the information in the *Times* articles is the only specific evidence cited by the District Court of the types of information the Egilman Documents contained that might support the District Court's finding that some were confidential. However, several subsequent rulings by the District Court all point to the contrary conclusion that neither the *Times* articles nor the Egilman Documents in fact contain confidential information. Absent adequate evidence of confidentiality, the opinion below should be reversed.

B. The District Court's Ruling in *In re Zyprexa (Limitations)*

In March 2007, plaintiff-investors filed a class action under Rule 10b-5 and the Securities Exchange Act of 1934 based squarely on the *Times* articles, alleging that these articles "publicly disclosed for the first time" Lilly's effort to mislead the public about Zyprexa's association with increased glucose levels and diabetes and Lilly's marketing of Zyprexa for unapproved off-label uses. 549 F.Supp.2d at 500. Lilly moved for summary judgment on the grounds that plaintiffs had failed to file suit "within two years from when they knew or reasonably should have known of their claims," the applicable period of limitations. *Id.* at 499.

The District Court surveyed the extensive documentary evidence submitted by Lilly on public debate, regulatory proceedings, government investigations, and litigation involving Zyprexa through 2005, *Id.* at 500-528, summarized the December 2006 *Times* articles, *Id.* at 528-29, and concluded that "[t]hese allegations against Lilly had been current in the medical, legal and investment worlds since at least 2001," *Id.* at 529. Since the information in the *Times* articles, the basis of plaintiffs' claims, had been public "for years," *Id.* at 540, the District Court granted summary judgment to Lilly based on these undisputed facts. *Id.* at 543.

Like the District Court, Lilly took the position that the *Times* articles "raised *no* new concern" when they were published because similar claims had been reported in the media for many years. *See* RA-394-96. (emphasis by Lilly). Yet in proceeding against Gottstein, Lilly claimed that the documents he provided to the *Times* "constitute[d] valuable and confidential competitive intelligence data" that was "of great value to competitors of Lilly" and had caused Lilly irreparable harm. A–6 (Dkt. 40, Lilly Memorandum at 10).

The District Court's findings that the information contained in the Egilman Documents was confidential here but had been publicly available "for years" in the securities fraud case are plainly inconsistent, as are Lilly's briefs.

C. The TPP Complaint Documents and Hoffmann Declaration

Lilly refiled the Hoffmann Declaration, RA–387, which had opined that 2,000 TPP documents were all confidential, as evidence that the Egilman Documents were also confidential because they "are of similar nature, and indeed, there is a substantial overlap in the documents in these two actions." A–6 (Dkt. 40, Lilly Memorandum at 10 & n.8). The District Court, Special Discovery Master Woodin, and plaintiffs Third Party Payors have similarly acknowledged this "overlap." RA–258; *In re Zyprexa*, 242 F.R.D. at 30, A–483-86; RA–380.[16]

Hoffmann stated that all the TPP documents he reviewed were confidential and contained information that "would be useful to Lilly's competitors." A–388-89. The district court cited the Hoffmann Declaration as evidence that disclosure of the Egilman Documents could cause Lilly irreparable harm. SPA-70.

The Hoffmann Declaration only asserts that the TPP documents contained "information of the type that Lilly treats and protects as confidential," RA-388, not that they were confidential for purposes of Rule 26(c)(7), which is never mentioned. Nor does it provide specific information on any individual documents to allow Gottstein to challenge confidentiality or this Court to review it on appeal.

Notwithstanding the Hoffmann Declaration's assertion that all two thousand TPP documents would cause Lilly competitive harm, when Lilly was asked by the

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16 *See* http://www.furiousseasons.com/zyprexadocs.html.

Special Master to identify specific TPP documents whose disclosure would cause it current competitive harm, Lilly only claimed eleven such documents out of the hundreds or thousands of TPP documents undergoing declassification review. RA–361-67.

Given Lilly's acknowledgement that the Egilman Documents were similar and overlapped with these TPP documents and its acknowledgement that disclosure of the information in the Egilman Documents in the *Times* articles did not cause Lilly significant competitive harm, Lilly's continued assertion that the Egilman Documents are confidential has virtually no record support. Without evidence that the Egilman Documents were confidential, all Lilly's claims fail.

D. Lilly's Unclean Hands Require Reversing or Vacating the Injunction

Lilly has pleaded guilty to "promoting Zyprexa in elderly populations as treatment for dementia, including Alzheimer's dementia," a treatment not approved by the FDA. RA–450. The second of the Times articles based on the Egilman Documents reported that Lilly conducted a marketing campaign called Viva Zyprexa to persuade doctors to "prescribe Zyprexa to older patients with symptoms of dementia." RA–137. The inference that one of Lilly's motivations for over-designation of documents as confidential under CMO-3 was to avoid civil and criminal liability must now be recognized as significant and plausible. The District Court's reasoning, which justified CMO-3 as necessary to allow Lilly to designate

documents confidential to protect itself from unfair competitive harm due to misleading documents released out of context, no longer applies when Lilly has pled guilty to a crime relating to information it unilaterally designated confidential and kept under seal. A confidentiality order which protects "those who engage in misconduct, conceal the cause of injury from the victims, or render potential victims vulnerable . . . defeats a function of the judicial system – to reveal important legal factual issues to the public." Weinstein, Secrecy in Civil Trials: Some Tentative Views, 9 J.L.&Policy 53, 61 (2000).

Confidentiality orders are obviously not granted to allow concealment of misconduct, particularly criminal misconduct, and should be reconsidered when they have been so abused. Lilly's guilty plea relating to information in the Egilman Documents should strongly caution the Court against affirming the district court's ruling. The appearance that Lilly improperly designated evidence of criminal activity confidential and vigorously sought to suppress any disclosures of such supposedly "confidential" evidence of crime must be addressed before the Court awards Lilly equitable relief. The District Court's ruling was based on the erroneous supposition that Lilly's confidential documents did not contain evidence of criminal activity, and should be reversed or remanded for further proceedings if the injunction is not vacated outright on the other grounds set forth herein.

III. The District Court Lacked Jurisdiction To Bind Mr. Gottstein to CMO-3

A. The District Court Erred in Ruling that Mr. Gottstein Waived His Objection to Personal Jurisdiction

Mr. Gottstein, a resident of Alaska, asserted his objection to the district court's personal jurisdiction when he first began receiving orders, correspondence and telephone calls from or on behalf of the district court and counsel for parties in MDL 1596 pending in the Eastern District of New York. A-61, 69, 88. The District Court ruled that Gottstein waived his objection to personal jurisdiction by appearing at an evidentiary hearing in New York and decided against him on the merits in the same ruling. SPA–76, A–479. The District Court did not address Gottstein's statements in the record reserving his objection to jurisdiction or rule on the merits of personal jurisdiction over Gottstein. A-6 (Dkt. 28, Response at 9).

Certainly there was no actual waiver, no intentional relinquishment of a known right. Nor did his brief, limited participation in proceedings waive his objection to personal jurisdiction. While extensive, prolonged participation in litigation may eventually amount to de facto waiver despite continuing objection, Gottstein's participation was brief and did not continue after the District Court ruled on personal jurisdiction. *See Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 307 (2d Cir. 2002) (no waiver where objection to personal jurisdiction was stated at pretrial hearing and motion deferred pursuant to court's scheduling preference) *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58 (2d Cir. 1999) (waiver after

participating for four years in extensive pretrial proceedings and foregoing opportunities to move to dismiss).

The District Court may have viewed the evidentiary hearing at which Mr. Gottstein testified as addressing the merits of the litigation, which was the case for others, overlooking that in Gottstein's case it addressed both personal jurisdiction and the merits, which were inextricably intertwined. Both issues focused on whether Gottstein, a nonparty, aided and abetted a violation of CMO-3.

Since Gottstein participated only until his jurisdictional objection was decided, the district court erred in finding a waiver.

B. The District Court Lacked Personal Jurisdiction

While the District Court does not specifically address the merits of personal jurisdiction over Gottstein, it cites only cases enforcing injunctions such as *Waffenschmidt v. MacKay,* 763 F.2d 711, 714 (5th Cir. 1975). SPA–58. However, *Waffenschmidt* and similar injunction cases do not support personal jurisdiction over Gottstein for essentially the same reasons that they did not support an injunction against Gottstein on the merits.

The District Court refers to its "inherent authority to enforce [its] orders," SPA-57, a grand phrase which does not withstand analysis if taken literally. The opinion below includes several brief quotes from well-known cases that speak in shorthand of enforcing a court's "order," but upon examination these cases involve

enforcement of injunctions. And even with respect to injunctions, a court does not have "inherent authority" to enforce its orders against "against the world at large" any more than a court can "enjoin the world at large." *See Alemite.*

The District Court distinguished *Alemite* on grounds that it involved contempt proceedings but relied on *Waffenschmidt v. MacKay*, 763 F.2d 711, 714 (5th Cir. 1985), overlooking that it also involved contempt proceedings. *Waffenschmidt* does not support inherent power beyond Rule 65(d). It found that Rule 65(d) "codified" the inherent power of the courts. *Waffenschmidt* is consistent with *Regal Knitwear, Alemite,* and *Heyman*, allowing aiding and abetting liability only where a nonparty's interests and rights were effectively represented and adjudicated in the initial injunction proceedings, and not when the nonparty has an independent interest.

Under *Waffenschmidt* as well as under the Second Circuit and Supreme Court precedents, Gottstein had an independent interest and was acting as a lawyer. He could not be bound by CMO-3 or subject to the District Court's jurisdiction consistent with due process. Because Zyprexa was relevant and the Egilman subpoena was not frivolous, Gottstein's actions as a lawyer on behalf of Bigley were proper. Gottstein was not subject to CMO-3 and did not violate it, much less violate it intentionally as would be required for personal jurisdiction.

Thus, the District Court erred in finding personal jurisdiction over Gottstein. All claims against him should be dismissed, and the opinion of the District Court vacated insofar as it contains findings of fact or conclusions of law as to Mr. Gottstein.

CONCLUSION

Accordingly, the Court should dismiss Lilly's application for an injunction against Gottstein and reverse, or in the alternative vacate, the District Court's opinion insofar as it contains findings of fact or conclusions of law as to Mr. Gottstein.

Dated: Garden City, New York
July 23, 2009

Respectfully submitted,

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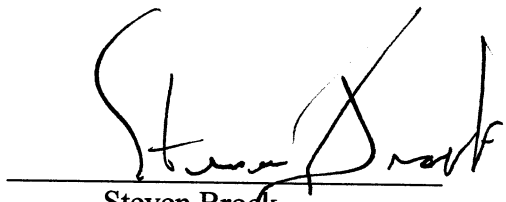
Steven Brock certifies that the PDF version of the attached document that has been submitted via email to the Court of Appeals at ***civilcases@ca2.uscourts.gov*** has been scanned for viruses and no virus has been detected.

Dated: July 23, 2009



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(s) _____

Attorney for James B. Gottstein

Dated : July 23, 2009

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I hereby certify that:

(1) two true and correct copies of the Respondent-Appellant's Brief, the Joint Appendix, Special Appendix and Respondent-Appellant's Appendix were served this 23rd day of July, 2009 upon Sean P. Fahey, Esq., Pepper Hamilton, LLP, 3000 Two Logan Square, Philadelphia, PA 19103, via Federal Express, and

(2) an additional copy of the foregoing brief was emailed to Mr. Fahey on this 23rd day of July, 2009, at the following email address provided by him: *Faheys@pepperlaw.com.*

Dated: July 23, 2009

Steven Brock