07-1107-cv

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

REPLY BRIEF FOR RESPONDENT-APPELLANT

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PRELIMINARY STATEMENT

In December 2006, having failed for six days to object to the Egilman subpoena, Lilly was faced with the prospect of litigating in Alaska state court the propriety of the subpoena and subsequent release of its documents and its designation of documents as confidential. Instead, Lilly sought to litigate the issues relating to the subpoena in MDL 1596, not in the Alaska state court with jurisdiction over the subpoena. The District Court, managing a complex multidistrict litigation with major settlement negotiations nearing completion, found the Alaska proceeding a pretense and conspiracy, assumed jurisdiction on an unprecedented theory that any court order could be enforced as an injunction, and enjoined Mr. Gottstein without considering whether his actions were or were not proper under Alaska law. In so doing, it subjects non-parties to an unwarranted and troubling expansion of jurisdiction based on inherent powers, contravening the Federal Rules of Civil Procedure and case law and violating principles of federalism by invading the exclusive province of state courts. Mr. Gottstein respectfully suggests that this Court should reverse the District Court's novel expansion of its authority.

ARGUMENT

I. The District Court Does Not Have And Does Not Need The Power To Enforce Its Protective Order As If It Were An Injunction

Lilly argues that "common sense" requires that all court orders be enforceable against non-parties in the same way as injunctions: it is a "common-sense rule that a court is not powerless to stop non-parties from aiding and abetting parties in violating court orders." Lilly Op. at 23. Lilly relies on "common sense" for authority because it is unable to cite a single case or provision in the Federal Rules in support of its claim. Seeking to make a virtue of this glaring deficiency, Lilly argues that "there is nothing in the Federal Rules of Civil Procedure or elsewhere that limits the application of the common-sense rule only to injunctions." *Id.*

Lilly is wrong. The Federal Rules do not support such power, and the Supreme Court has ruled that aiding and abetting liability must be express, not implied. Rule 82 provides that the Federal Rules "do not extend or limit the jurisdiction of the District Courts." The power to bind non-parties by injunction existed at common law and was not created or limited by Rule 65. No such power exists for other discovery orders such as CMO-3. The Supreme Court has made clear that liability for aiding and abetting is exceptional and not to be implied by the courts; Congress must explicitly create it. *Central Bank of Denver v. Interstate*

Bank of Denver, 511 U.S. 164, 176 (1994); Gottstein Br. at 45. Contrary to Lilly's assertion that *Central Bank* is inapposite because it is a securities case that has "nothing to do with this case" (Lilly Op. 22), the Supreme Court held that explicit Congressional authorization of aiding and abetting liability is a general requirement.

In order for its extraordinary jurisdictional reach to be constitutional, Rule 65 contains numerous provisions specifically designed to protect due process rights of unrepresented non-parties so that binding them to an injunction is fundamentally fair—provisions not present in CMO-3 and typically not present in most court orders. The District Court's reasoning would permit CMO-3 and other orders to be enforced as injunctions notwithstanding their plain failure to provide such due process to non-parties. Gottstein Br. at 44-49. Lilly fails to respond to this argument.

Most importantly here, the injunction "shall be specific in terms" and "shall describe in reasonable detail . . . the act or acts sought to be restrained." Rule 65(d). Assuming *arguendo* that Gottstein was bound by CMO-3, CMO-3 does not specify Gottstein's obligations at all, much less in the detail and specificity sufficient for due process. CMO-3 does not prohibit the Egilman subpoena; it contemplates and permits it. It does not require Gottstein to seek modification of the protective order by the District Court rather than subpoenaing confidential

documents from Egilman. It does not prohibit him from quickly identifying an appropriate client for this particular litigation as part of the ongoing, overall mission of the public interest law firm, Law Project for Psychiatric Rights (PsychRights®). It does not prohibit him from supplying formerly confidential documents to *The New York Times* and others when Lilly failed to object after a "reasonable opportunity" to do so, whether that failure was intentional or not. Nor does CMO-3 require him to contact Lilly and give it a further opportunity to object, or to obtain a court ruling confirming waiver before releasing documents which had lost their confidentiality.

The "reasonable opportunity to object" provision is so vague and nonspecific that even if CMO-3 were an injunction, it would fail to satisfy Rule 65 and due process, and it would be error for the District Court to enforce it. In many legal contexts such provisions are routine and acceptable, but they do not provide the sort of specificity required for an injunction. For example, injunctions regulating ongoing protests at abortion clinics routinely establish buffer zones with precisely specified dimensions and locations. *See, e.g., State of New York v. Operation Rescue National*, 273 F.3d 184, 203-11 (2d Cir. 2001). An injunction requiring protestors to keep a "reasonable distance" back from access routes and give staff and patients a "reasonable opportunity" to enter and leave the clinic would be unenforceable for failure to specify with particularity the actions that

were required. Gottstein Br. at 47-48. It would violate due process and Rule 65 to find an abortion protestor in violation of such an ambiguous injunction. It is equally a violation of Mr. Gottstein's due process. *See* Gottstein Br. at 44-50.

The District Court invokes its "inherent" or "equitable" powers or words to the same effect more than a dozen times in the course of its opinion. *See, e.g.,* SPA-18, 49, 57, 58, 60, 64, 66, and 72. It repeatedly justifies its actions as necessary to vindicate its authority, prevent "flouting" of its orders, and other similar phrases. *See, e.g.,* SPA-15, 18, 71, 77, 78. Lilly's arguments follow along the same lines.

Courts have been properly cautious as to the nature and scope of such "inherent" powers, and while their contours are not completely settled there is general agreement inherent powers do not warrant violation of existing legal principles. Thus, this Court has stated that "inherent authority does not free the court from the procedural requirements regarding injunctions." *Rosen v. Siegel,* 106 F.3d 28, 33 n.3 (2d Cir. 1997). The District Court's claimed exercise of inherent authority here has resulted in a denial of due process and numerous serious legal and factual errors and inconsistencies. The District Court's opinion fails to respect existing precedents governing either protective orders or injunctions, ignores clear limitations in Rules 26 and 65, and in the end does not contain a coherent rule for courts to use to vindicate their authority properly in the

future. That is in itself more than enough reason to reject the District Court's invocation of "inherent power."

The District Court's attempt to exercise extraordinary "inherent" powers was particularly unwarranted here because it was quite unnecessary. As the old-fashioned "flouting" terminology indicates, the problem is hardly new, and the courts already had ample powers to prevent "flouting" of their orders in the nineteenth century. Those traditional powers have endured with only modest changes to the present day and would have proved entirely adequate here had Lilly and the District Court elected to follow them.

Ordinarily, courts have power to enforce their orders against parties, not against the world at large. The District Court has unquestioned power to enforce CMO-3 against parties to MDL 1596 and signatories such as Dr. Egilman. The Alaska state court has unquestioned power to determine under Alaska law whether the subpoena served by Mr. Gottstein was proper or abusive and what production was required in response. Non-parties may be bound by an injunction issued in compliance with Rule 65(d). Court orders may be enforced against non-parties under the contempt power, where Congress has specifically authorized aiding and abetting liability in accordance with the Supreme Court's ruling in *Central Bank of Denver, supra*. *See* 18 U.S.C. §§ 2, 401.

Instead of employing these established procedures, the District Court disregarded them, assumed jurisdiction over the Alaska state court subpoena proceedings and enforced its protective order against a non-party as if it were an injunction but without providing the due process and procedural protections required under Rule 65(d) or 18 U.S.C. § 401.[1] However, as *Rosen* held, inherent powers may not be used to avoid compliance with existing law and procedure.

Lilly preferred to litigate these issues in MDL 1596 and avoid rulings by an Alaska state court applying Alaska law on the validity of the Egilman subpoena, the propriety of Mr. Gottstein's conduct, and the claims of confidentiality for Lilly documents. But Lilly's preference to litigate these issues in MDL1596 hardly justifies the District Court's dramatic departures from settled jurisdictional and procedural principles. The MDL statute does not permit expansion of the powers of a district court in the "interest of justice" or "convenience." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998).

The District Court fails to offer any explanation of its claim of necessity to vindicate its orders. Nor could it do so given the existence of well-established powers which other courts have found sufficient since the nineteenth century. The District Court may not invoke inherent powers to avoid established due process

[1] The District Court did not proceed under the contempt power and did not allow the procedural and evidentiary protections required to establish aiding and abetting a violation of a court order under the contempt power. SPA-16. Given the evidence that *In re William Bigley* and the Egilman subpoena were legally and factually sound, the showing required cannot possibly be made.

limitations on its powers over non-parties. Accordingly, the District Court had no power to proceed against Mr. Gottstein, and its judgment should be reversed.

II. Mr. Gottstein At All Times Acted Properly As A Lawyer On Behalf Of His Client And Is Not Subject To "Aiding And Abetting" Liability

Even assuming that aiding and abetting analysis were applicable to discovery and case management orders, the District Court erred in holding that Mr. Gottstein aided and abetted a violation of CMO-3 without considering whether his actions were proper as actions *of a lawyer*. SPA-18. Mr. Gottstein argued in his opening brief that his legal and independent actions as a lawyer serving a subpoena on behalf of an Alaska client were well grounded in law and fact. Gottstein Br. at 31-44. In opposition, Lilly contends that it is irrelevant whether Mr. Gottstein was acting properly as a lawyer, citing *N.Y. State Nat'l Org. for Women v. Terry,* 961 F.2d 390 (2d Cir. 1992), *vacated on other grounds,* 41 F.3d 794 (2d Cir. 1994). Lilly Op. at 18. *Terry* is inapposite.

In *Terry*, abortion protesters had violated an injunction against obstructing access to an abortion clinic. Some protesters argued that they were acting independently on their own moral principles, not in concert with the others also obstructing access at the time. The Court noted that aiding and abetting liability turned on "the actuality of concert or participation" and found that such differences

in motive were irrelevant. 961 F.3d at 397. Persons part of a crowd obstructing access to an abortion clinic in violation of an injunction which had just been read to them could not avoid aiding and abetting responsibility on grounds that their individual purposes were different from those of others in the crowd.

Lilly misstates Gottstein's argument that he was acting properly as a lawyer as a claim that his "supposed 'independent' purpose" (subpoenaing documents for litigation) justified violation of CMO-3, akin to a claim that protection of public health justified violation of CMO-3.[2] Relying on *Terry,* Lilly argues that "Mr. Gottstein's intent" is "legally irrelevant." Lilly Op. at 18.

Gottstein agrees that his subjective intent is legally irrelevant here and that aiding and abetting liability is to be addressed under an objective standard. *See* Point III. Gottstein's argument on aiding and abetting was not based on his subjective purposes but on the longstanding and well-settled limitation on the imposition of aiding and abetting liability: an injunction cannot bind a non-party "who act[s] independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB,* 324 U.S. 9, 14 (1945); *see* Gottstein Br. at 41-44. The reference is not to independent motives, as Lilly asserts, but to

[2] Given the extreme facts of the present case, with FDA label changes and Lilly's plea of guilty to a crime and record penalties following the release of the documents at issue, such defenses are significant and were raised below. While the District Court recognized their potential relevance, it deferred consideration of these defenses to prospective contempt proceedings and did not decide them. SPA-16, 18. Thus, those issues are not before the Court in the present appeal. Mr. Gottstein reserves his rights to pursue such defenses on a full record should there be such further proceedings.

independent legal status and interests. To ensure protection of due process rights, non-parties cannot constitutionally be bound by an injunction—regardless of its terms—unless their interests were in effect represented by parties with similar interests present at the injunction hearing. *See Brock v. Casey Truck Sales, Inc.,* 839 F.2d 872, 874 n.1 (2d Cir. 1988), *citing* 11A C. Wright & A. Miller, *Federal Practice & Procedure* § 2956 (2d. ed.); *Heyman v. Kline*, 444 F.2d 65 (2d Cir. 1971); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930).

No party to CMO-3 could be considered aligned with Mr. Gottstein's and his client's interests so that he could be bound by CMO-3 without a hearing. Lilly and the other parties to MDL 1596 who drafted and negotiated CMO-3, both plaintiffs and defendants, had financial interests that were advanced by keeping discovery materials under seal indefinitely to facilitate settlement. Experts who signed CMO-3 as a condition of employment did not represent Gottstein's interests. There is no finding that Egilman controlled Gottstein's actions such that he could be considered Egilman's agent.

On the contrary, Gottstein's interests were legally identified with his client, not with anyone in MDL 1596. If Gottstein's actions as a lawyer were proper, the District Court was effectively denying PsychRights' client legally proper discovery under Alaska law without any legal justification. No one in MDL 1596 in any sense represented the interests of persons such as PsychRights and its clients, who

sought full disclosure of Zyprexa's risks and benefits, both to protect their individual rights to prevent being ordered to take Zyprexa against their wishes, and to increase public awareness of its extreme health risks.

Waffenschmidt v. MacKay, 763 F.2d 711 (5th Cir. 1985), on which the District Court strongly relies, provides a telling example of independent status precluding aiding and abetting liability. Two confederates had received and concealed assets from MacKay, who was enjoined to preserve them, and were found aiders and abettors. However, a bank with knowledge of the injunction which acted negligently in transactions with MacKay was found not to be an aider and abettor. *Id.* at 715. The Fifth Circuit cited this Court's opinion in *Heyman* recognizing that a party's independent interest in property precluded liability as an aider and abettor, *id.* at 717-18, and in effect respected the bank's independent legal role. The District Court should similarly have respected Gottstein's actions as an attorney.

Lilly does not distinguish these cases and principles or contend that any party had interests sufficiently aligned with Mr. Gottstein's to justify holding him bound by CMO-3. Lilly relies on the *Terry* statement that members of a crowd of abortion protestors could be found aiders and abettors based on "the actuality of concert or participation, without regard to motives." Lilly Op. at 18-20. According to Lilly, it is simple: it is enough that Gottstein received documents from Dr.

Egilman and distributed them; it is irrelevant that he acted properly as a lawyer. The District Court found it irrelevant that Gottstein acted as a lawyer for similar reasons. SPA-18.

Lilly's simplistic misreading of the terse result in *Terry*—if you were there, then you violated the injunction—is plainly wrong. What if the crowd had included an undercover policeman investigating possible criminal activity? A reporter covering the story? By virtue of their professional activities they would have different legal rights and independent interests from others in the crowd. Under *Alemite* and its progeny, a court determining whether such persons were aiding and abetting the violation of the injunction would have to address whether legal status as an undercover policeman or reporter provided independent grounds for their actions and whether they acted properly within its scope. The *Terry* court was not presented with claims of such independent interests and did not hold them irrelevant as Lilly asserts. Lilly Op. at 18, 20.

CMO-3 does not purport to have any applicability to non-signatories such as Mr. Gottstein. Had CMO-3 included provisions purporting to impose any obligations on Mr. Gottstein in connection with the subpoena, those provisions would have been facially invalid. In order to find a violation, the District Court had first to hold him bound to CMO-3 and then imply provisions in CMO-3 after the fact that Gottstein was found to have violated. For example, nothing in CMO-3

suggests that Gottstein was required to come to New York and seek relief in MDL 1596 to obtain documents relevant to PsychRights' Alaska litigation rather than through a subpoena as he did. And nothing in CMO-3 requires lawyers serving subpoenas for confidential materials from others to personally notify Lilly to protect Lilly from negligently waiving its rights.

Gottstein was acting independently from Egilman and Berenson by virtue of his independent status as a lawyer proceeding properly to subpoena evidence and litigate in Alaska state court. *Alemite* and its progeny require consideration of whether Gottstein was acting properly as a lawyer before his actions can be ruled aiding and abetting a violation of CMO-3. The District Court's explicit refusal to consider whether Mr. Gottstein's actions in subpoenaing Dr. Egilman were legitimate and proper under Alaska law and procedure, in and of itself, constitutes legal error requiring reversal of the injunction. *See Sussman v. Bank of Israel*, 56 F.3d 450, 454 (2d Cir. 1995) (district court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law"), *quoting Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 402 (1990).

III. The District Court Abused Its Discretion As A Matter Of Law By Finding The Egilman Subpoena A "Pretense" With Improper Purposes

The District Court found the Egilman subpoena requesting Zyprexa and other documents to be a "pretense" based on perceived improper purposes and treated it as a legal nullity. Mr. Gottstein's opening brief presented extensive evidence in the record below, court rulings in the Alaska state courts, and records in public court dockets demonstrating Zyprexa was relevant to *In re William Bigley*, that Mr. Gottstein had reasonable grounds at the time of the subpoena to believe that it was relevant, and that his subpoena to Dr. Egilman was therefore proper under Alaska law. Gottstein Br. at 8-17, 31-35. Lilly now takes the position that it is "irrelevant" whether the Egilman subpoena was proper in the Alaska case, and that "Mr. Gottstein's subpoena" remains a "pretense" whether Zyprexa was relevant or not. Lilly Op. at 20.

The District Court erred as a matter of law by disregarding the Alaska litigation and the Egilman subpoena as mere pretense based on findings of improper purpose.[3]

Under the law of this Circuit and of Alaska, the District Court should have initially determined whether the subpoena to Dr. Egilman in *In re William Bigley* was permissible under Alaska law and procedure—regardless of whether any of

[3] Lilly's related contention that the finding of a pretense is a purely factual determination and not clearly erroneous is addressed in Point IV below.

Gottstein's intentions were improper. *Sussman, supra* (filing of nonfrivolous pleadings could not be penalized or deterred on ground of improper purpose); *DeNardo v. Maassen*, 200 P.3d 305, 312 (Alaska 2009) ("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") (internal quotations omitted); *Young v. Embley*, 143 P.3d 936, 949 (Alaska 2006).

Instead, the District Court relied on its characterization of Gottstein as a conspirator stealing Lilly confidential documents to find that the subpoena was a "pretense" and entered an injunction against Gottstein sometimes justified as punitive, SPA-18, 57, though the opinion below also disclaims such intentions. SPA-73. The District Court's repeated harsh characterizations of Mr. Gottstein's actions, based on Lilly's misleading characterizations, underscore that its consideration of all of Mr. Gottstein's actions was tainted by its unfounded determination of a pretense for improper purposes. For example, Mr. Gottstein's efforts to identify an appropriate client and bring suit quickly to subpoena documents of value for many of PsychRights' clients were unquestionably legal and standard practice for public interest law firms, Gottstein Brief at 39-40, yet were characterized by the District Court as damning evidence of conspiracy. The legal error inherent in the District Court's consideration of improper purpose and

pretense was fundamental and renders all of the District Court conclusions based on pretense erroneous as a matter of law.

Lilly rejects all of the above federal and Alaska precedents on Rule 11 and abuse of process as irrelevant, but offers no alternate source of authority for the District Court's having taken the drastic action of disregarding another court's valid process and ignoring that Mr. Gottstein at all times was acting properly in his capacity as a lawyer representing a client and pursuing the mission of PsychRights. Lilly Op. at 21. The District Court frequently invoked its "inherent" powers to justify its actions, but such inherent authority cannot justify the District Court's disregard of the Egilman subpoena as a pretense without consideration of its legal legitimacy under Alaska law. *See* SPA-49, 57, 58, 66.

Sussman made clear that district courts are not permitted to sanction nonfrivolous pleadings under Rule 11 *or otherwise,* expressly rejecting the claim that a district court had "inherent power" to do so even if it was lacking under the Federal Rules. 56 F.3d at 459-60. The District Court's reliance on subjective intent and perceived pretense rather than the objective standard under Rule 11 and the precedents on abuse of process cannot be justified by the inherent powers of the courts. Neither Lilly nor the District Court point to any other source of such power.

The policies underlying the analysis of the *Sussman* court apply with particular force in the present circumstances. The Court analyzed at length whether an objectively proper complaint could be sanctioned on grounds that it was filed for improper purposes and concluded that "inquiries into subjective bad faith . . . would invite a number of potentially harmful consequences, such as generating satellite litigation, inhibiting speech and chilling advocacy." *Sussman,* 56 F.3d at 458. It thus held that the propriety of legal pleadings was determined under an "objective standard." *Id.* at 456. Lilly asserts Gottstein's subjective good intentions were irrelevant, but then relies on claims of bad faith and improper purposes. *Sussman* made clear that the same considerations applied to attorney claims of subjective good intentions and allegations of subjective bad faith. An attorney could not escape responsibility for a frivolous pleading by claiming subjective benign intentions, nor be sanctioned for a nonfrivolous pleading based on allegations of subjective ulterior motives. *Id.* at 456-57.

The record evidence regarding Zyprexa's relevancy in *In re William Bigley* plainly demonstrates the objective propriety of the Egilman subpoena under applicable Rule 11 and abuse of process precedents. *See, e.g.,* Point V. The District Court explicitly stated that it did not consider the propriety of Gottstein's actions as a lawyer. SPA-18. Nor did it address the applicable Alaska rules or apply the appropriate legal and evidentiary standards. The District Court's discussion of

Gottstein's actions in the context of pretense and subjective intent failed to address the objective reasonableness of the subpoena under Alaska law as required and was error as a matter of law.

Subjective intent is irrelevant and may not be considered in determining whether a legal pleading is objectively frivolous. Since it is clear that the Egilman subpoena was proper under applicable Alaska law, a remand for further proceedings is not necessary. The Court should reverse the District Court's ruling based on its failure to consider the propriety of the subpoena under Alaska law.

IV. The Egilman Subpoena Was Well Grounded In Law And Fact

The District Court's statement that the subpoena was a pretense functioned effectively as a legal conclusion that the subpoena was a nullity. It was not a factual conclusion such as whether the traffic light was red or green. As such, it is subject to review for legal error, not under the more lenient standard of clear error applicable to factual determinations. Lilly's assertion that it constitutes a finding of fact reviewable only for clear error is incorrect. Lilly Op. at 20.

In Point III, Gottstein argued that the District Court's conclusion of pretense was erroneous as a matter of law because it was based on the legally impermissible consideration of subjective improper purpose. The critical findings of the District Court discussed below followed from the determination of pretense and were thus

affected by the same erroneous view of the law. These findings should be reversed because they are based on an erroneous view of the law and, in the alternative, are clearly erroneous. With respect to the latter, where free speech is involved, such as the dissemination of documents of extreme importance to public health here, the United States Supreme Court has "repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 499 (1984).

The evidence cited by Lilly, Lilly Op. at 20-21, fails to support the District Court's conclusion that the subpoena was a pretense. The record before the Court, when evaluated free of such erroneous legal conclusions, establishes that the Egilman subpoena was legally and factually sound and that Mr. Gottstein acted properly as a lawyer in *In re William Bigley.*

The Egilman subpoena was served in a proceeding to remove PsychRights' client's guardian or end the guardian's existing authority to consent to forced medication over his client's objection. Alaska's standards, modeled on the Federal Rules of Evidence and Civil Procedure, allow discovery of "relevant" evidence having "any tendency" to make facts at issue more or less probable, and the attorney signing the subpoena certifies "reasonable belief" that it is "well

grounded" in law and fact. *See* Alaska Rules of Civil Procedure, Rules 11 and 26; Alaska Rules of Evidence, Rule 401.

Lilly cites Gottstein's hearing testimony at A-260-61 that he did not have evidence of his client's Zyprexa history one way or another at that time and asserts that he "admitted" he had taken the *In re William Bigley* case as a "pretense." Lilly Op. at 20. Mr. Gottstein admitted no such thing, and Lilly's citation to the record (A-67, 258-59) contains no such admission. Such hyperbole infects Lilly's discussions of the record throughout. When not viewed through the distorting lens of pretense, the record evidence clearly establishes that the subpoena was proper because Zyprexa was relevant even if Mr. Bigley had not been given Zyprexa. Gottstein did not have Mr. Bigley's Zyprexa history at the time of the District Court hearing because he was still being denied access to medical records by Mr. Bigley's guardian, whom Mr. Gottstein had petitioned to remove. Zyprexa was one of the handful of drugs most commonly prescribed for persons with his client's diagnosis. Gottstein knew even without the medical records in hand that it was very likely Mr. Bigley had been given Zyprexa in light of Mr. Bigley's then known diagnosis and history and that even if he had not been given Zyprexa contemporaneously with the subpoena, as he in fact was, it would likely be a principal alternative for consideration in subsequent decisions on forced medication. *See* Gottstein Br. at 14-15.

Evidence of Zyprexa's risks and benefits was relevant to test the guardian's fitness to make such decisions in the future. The subpoena was proper based on the likelihood of Zyprexa use notwithstanding the lack of proof *at that time* that it had been used contemporaneously with the subpoena. *See* Gottstein Br. at 8-11, 14-17. This is supported by undisputed record evidence. Subsequent Alaska court rulings in other cases involving Mr. Bigley considering evidence of the risks and benefits of Zyprexa and involving other drugs of the same class reinforce that conclusion; additional materials offered for judicial notice showing Mr. Bigley was given Zyprexa against his wishes pursuant to court order during the time period of the subpoena are "icing on the cake."[4]

Lilly cites Gottstein's letter to Special Master Woodin and hearing testimony at A-67, 258-59 which describe his efforts to find an appropriate case to subpoena Zyprexa documents during the week after he learned of them in a phone call from Dr. Egilman. However, it is entirely proper for a public interest law firm to look

[4] On appeal, in addition to the published Alaska Supreme Court Opinion in *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 176 (Alaska 2009), Mr. Gottstein, has cited various unpublished rulings in the Alaska state courts accepting the relevance of Zyprexa documents in similar circumstances. Courtesy copies of these rulings are included in Gottstein's motion for judicial notice. Lilly has objected to this Court taking judicial notice of these court decisions, but a motion to take judicial notice is not necessary for such courtesy copies. In addition, Gottstein has moved the Court to take judicial notice of records from public dockets of Alaska state court proceedings showing that Mr. Bigley, his client, was in fact being administered Zyprexa against his will under court order at the time of the subpoena and thereafter, and documenting Gottstein's successful representation of his client over the past three years in *In re William Bigley*, the guardianship proceeding mischaracterized as a pretense, and other related litigation. Many of these documents were previously received by the Alaska Supreme Court on Gottstein's motion for judicial notice, and the others are of the same nature. They provide confirmation of important aspects of Gottstein's hearing testimony which were ignored by the District Court.

for an appropriate plaintiff for litigation to advance its mission. Gottstein Br. at 39-40.

Lilly cites Gottstein's testimony at A-269-70, 274-75 that during the first two days after he received the documents produced under the subpoena he reviewed some of them but spent most of his time distributing them to press, government, and individuals he believed would be interested in them. Distributing the documents quickly does not show that the documents were stolen. All it shows is that Gottstein capitalized on Lilly's error in failing to object after being given a reasonable opportunity to do so. Gottstein appreciated that Lilly's failure may not have been intentional and correctly anticipated that Lilly would try to get the documents back and tie their release up in extended litigation. But Lilly does not claim that CMO-3 required intentional voluntary waiver. It is commonplace for parties missing deadlines to be held to have waived rights they had no actual intention of waiving. Lilly's actions—intentional or not—waived any confidentiality claims it might have had under CMO-3.

The District Court's statement that Lilly did not have a "reasonable opportunity" to object to production is erroneous. As negotiated by Lilly, ¶14 of CMO-3 simply directed Egilman not to produce documents until Lilly had received notice and had a reasonable opportunity to object. A-44. The issue under ¶14 is whether the actual time period from notice to production provided Lilly a

"reasonable opportunity" to object. It was irrelevant whether some longer period might also have provided a reasonable opportunity.

In contrast to ¶14, ¶6 required that upon receiving notice of a proposed disclosure of confidential documents to one of its competitors, disclosure was permissible unless Lilly filed a motion challenging such disclosure within three business days. A-39.

Given Lilly's participation in the drafting of CMO-3 and its agreement to its terms, Lilly cannot properly dispute that three days provided a reasonable opportunity to file a formal motion opposing disclosure to competitors. Here, Lilly had only to give Dr. Egilman brief notice by phone, letter, e-mail or fax, not prepare and submit a motion.

Since three days notice provided a reasonable opportunity for Lilly to prepare and file a motion to avoid disclosure to a competitor, the six days Lilly had to merely instruct Dr Egilman to resist the production was a reasonable opportunity to object. In contrast to Lilly's laxity here, Richard Meadow, counsel for plaintiffs in MDL 1596 who had retained Dr. Egilman, responded to each development during this period immediately. A-60, 80-81. Dr. Egilman's decision to begin producing documents after six days was entirely proper and authorized by CMO-3. And even if that were not the case, it would have been Dr. Egilman's responsibility, not Mr. Gottstein's.

The District Court's intense criticism of Mr. Gottstein's otherwise *routine request* to receive subpoenaed documents for review in advance of a deposition, like the other findings discussed above, flowed from its initial conclusion that the subpoena was a pretense. There is no general legal obligation for lawyers to notify third parties or adversaries in such circumstances, and the District Court does not provide any legal analysis in support of such a duty. It discussed Mr. Gottstein's actions simply as evidence of improper purpose.

In sum, the District Court's critical factual findings must be rejected because they were based on an erroneous view of the law, or, in the alternative, were clearly erroneous.

V. The Documents Were Not Confidential

There is extensive evidence that Lilly systematically violated CMO-3 by designating all its production as confidential, that Lilly waived confidentiality under CMO-3, that the information in the documents at issue here was not in fact properly designated as confidential, that Lilly and the District Court have both made seriously inconsistent statements regarding the confidentiality of the documents at issue, that documents at issue were not adequately reviewed by the District Court to provide this Court with a proper record of the determinations of confidentiality below, and that the confidentiality designations of the documents at

issue were used to conceal evidence of criminal conduct. Gottstein Br. at 50-58. In such circumstances, the injunction against Mr. Gottstein should not have been entered and should not be allowed to stand.

As justification for designating all the discovery it produced as confidential, including press releases, news articles, and evidence of criminal wrongdoing, Lilly argues that CMO-3 was an "umbrella protective order," and that umbrella protective orders are permissible. Lilly Op. at 24, *citing Manual for Complex Litigation* §11.423 (4th ed. 2004) [*sic,* should read §11.432]. However, §11 of the *Manual for Complex Litigation*, at footnote 134, specifically admonishes, "counsel should not mark documents as protected under the order without a good-faith belief that they are entitled to protection." Lilly's circular argument fails to address Mr. Gottstein's argument that discovery practice in MDL 1596 was not proper under CMO-3 or the Manual for Complex Litigation. *Id.*; Gottstein Br. at 52-54.

CMO-3 explicitly requires Lilly to designate confidentiality based on good faith belief: "'Confidential Discovery Materials' shall mean any information that the producing party in good faith believes is properly protected under Federal Rule of Civil Procedure 26(c)(7)." A-35. This definition supports Gottstein's position that material does not become confidential without such actual good faith belief and reinforces Gottstein's argument that the documents at issue were not in fact

confidential and were never properly reviewed to determine their confidentiality. Lilly essentially admits it flouted CMO-3's requirement of good faith designation by characterizing CMO-3 as allowing all produced documents to be designated confidential.

Lilly argues that Mr. Gottstein may not question Lilly's designations of confidentiality before the District Court or in the present appeal because documents remain confidential under CMO-3 until properly challenged and declassified by the District Court. Lilly Op. at 24-25. Lilly's authority is a claimed analogy to *Walker v. City of Birmingham*, 388 U.S. 307, 314 (1967), which involved explicit defiance of an allegedly unconstitutional injunction. Mr. Gottstein's reasonable claims of compliance with CMO-3 are quite unlike the claim of justification for an acknowledged violation in *Walker.*

Both Lilly and the District Court criticize Mr. Gottstein for not going through the declassification provision of CMO-3 ¶9. A-40-41. Even though this procedure was simply an option, the District Court considered it a mandate, essentially treating ¶14 pertaining to subpoenas from other courts as if it did not exist. Mr. Gottstein was entitled to rely on the procedures contained in ¶14 for any number of practical reasons, not the least of which was the delay and expense of the declassification process as it was conducted in MDL 1596. The Third Party Payors pursued three and one-half years of litigation with Lilly to obtain release of

a few hundred documents cited in and attached to their complaint after Lilly also missed the deadline for objecting to their dedesignation under CMO-3, ¶9.

As a non-party, Mr. Gottstein would have had to seek leave to intervene, which might well have been denied. Even if leave were granted, ¶9 required Gottstein to challenge disputed documents on an item-by-item basis, "specifying by exact Bates number(s) the discovery materials in dispute." A-41. This was impossible for Mr. Gottstein or anyone else to do without already having copies of the documents under the protective order. The District Court's suggestion that ¶9 was the sole proper mechanism for Mr. Gottstein to obtain documents subject to CMO-3 was erroneous.

Lilly asks the Court not to consider the record evidence of improper designations, inadequate reviews, and inconsistent findings on confidentiality in the District Court or additional such evidence subject to a pending motion to take judicial notice. Lilly Op. at 25-26. These matters include concealment of evidence of criminal activity and hazards of Zyprexa through confidentiality designations, as confirmed by the *New York Times* articles, Gottstein Br. at 21-22, and a similar summary of the contents of the documents at issue at the hearing before the District Court:

> Eli Lilly knew that . . . Zyprexa causes diabetes. They knew it from a group of doctors that they hired who told them you have to come clean. That was in 2000. And instead of warning doctors who are widely prescribing the drug, Eli Lilly set about in an aggressive

> marketing campaign to primary doctors. Little children are being given this drug. Little children are being exposed to horrific diseases that end their lives shorter.

A-397.

> Eli Lilly knew that Zyprexa causes hypoglycemia, diabetes, cardiovascular damage and they set about both to market it unlawfully for off label uses to primary care physicians and they even set about to teach these physicians who were not used to prescribing these kind of drugs to, they taught them to interpret adverse effects from their drug Prozac and the other antidepressants which induce mania and that is on the drug's labels. They taught them that if a patient presented with mania after having been on antidepressants, that that was an indication for prescribing Zyprexa for bipolar which is manic depression. That is absolutely outrageous and that is one of the reasons that I felt that this should involve the Attorney General. . . . They marketed it, as I said, for off label uses which is against the law.

A-415.

Such evidence, culminating in Lilly's criminal conviction for conduct disclosed in the documents at issue, Gottstein Br. at 57-58, puts a troubling perspective on proceedings related to CMO-3 in the District Court, especially the District Court's statement in *In re Zyprexa Products Liability Litigation*, 2008 WL 2783155 at *4 (E.D.N.Y.), that "In the enormous cache of discovery documents it has reviewed, no sign of potential criminal liability has been observed by this court." Such evidence—both in the record and subject to judicial notice—is highly relevant to this Court's consideration of the propriety of the District Court's injunction, particularly as to whether it should be continued. *See* Gottstein Br. at 17-30, 50-58; Motion for Judicial Notice at 12-14; *Operation Rescue National,*

273 F.3d at 200 ("Courts may not use past conduct to place a permanent burden on the exercise of First Amendment rights.").

Accordingly, the injunction against Gottstein was not properly entered and should not be maintained.

VI. The District Court Lacked Personal Jurisdiction Over Mr. Gottstein

The District Court made a conclusory finding that Mr. Gottstein waived objections to personal jurisdiction by participation in merits proceedings. SPA-76. Lilly relies on a 1960 Maryland district court case for its statement of the "general rule" governing waiver of personal jurisdiction by participation in proceedings on the merits. Lilly Op. 27. Modern authority is more flexible, and, in particular, will hesitate to find waiver where a party complies with a district court's scheduling preferences in multi-party litigation. Here, the District Court declined to decide the jurisdiction issue prior to the merits, electing to decide all issues as to all parties in a single ruling after less than two months of proceedings. Mr. Gottstein properly asserted and preserved his objection to personal jurisdiction throughout and should not be found to have waived it. *See* Gottstein Br. at 59-60.

Absent a waiver, the District Court did not have personal jurisdiction over Mr. Gottstein. *See* Gottstein Br. 60-62. Resolution of merits issues in Gottstein's favor may also require dismissal for lack of personal jurisdiction. For example, if

the Court holds that non-parties may not be bound under CMO-3, as Gottstein contends, then the District Court had no personal jurisdiction over Mr. Gottstein. In such circumstances, the Court should not remand but instead vacate the District Court's ruling and dismiss for lack of personal jurisdiction.

CONCLUSION

For the foregoing reasons, the decision by the District Court should be reversed and the injunction issued thereunder vacated.

Dated: December 15, 2009

Respectfully submitted,

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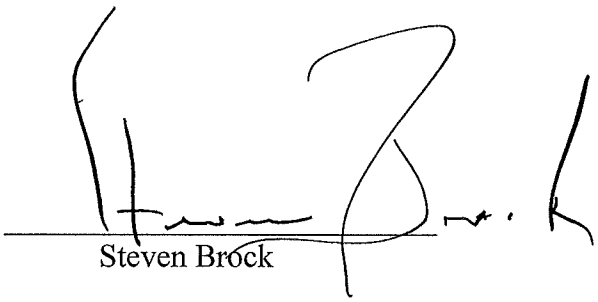
VIRUS PROTECTION CERTIFICATE

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: December 15, 2009



Steven Brock

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(s) _____

Attorney for James B. Gottstein

Dated: December 15, 2009

CERTIFICATE OF SERVICE

I hereby certify that:

(1) two true and correct copies of the Respondent-Appellant's Reply Brief were served this 15th day of December, 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 15th day of December, 2009, at the following email address provided by him: *Faheys@pepperlaw.com.*

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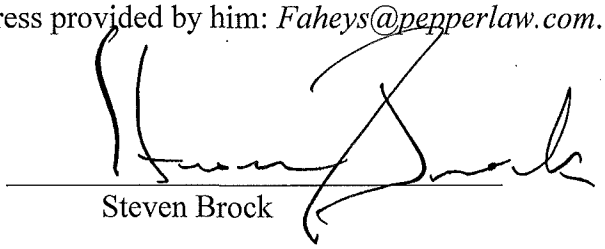

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