

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

ELI LILLY AND COMPANY,

Defendant.

ELI LILLY AND COMPANY,

Appellant,

vs.

BLOOMBERG NEWS AND STATE  
OF ALASKA,

Appellees.

Case No. 3AN-06-5630 CI

Supreme Court No. S-13152

conf.  
7/18/08  
PV

**ORDER ON REMAND**

By Order dated July 8, 2008 this matter was remanded by the Alaska Supreme Court to this Court to consider whether, under principles of comity, a stay of trial court proceedings should be ordered pending decisions by the United States District Court for the Eastern District of New York and the United States Court of Appeals for the Second Circuit on the confidentiality issue. The Alaska Supreme Court has directed this Court to forward its findings on or before July 21, 2008. Following receipt of the Alaska Supreme Court's Order remanding the case, this Court, on July 8, 2008 issued an order requiring the parties to file briefs stating their position and explaining what

proceedings on the issue were being considered by the Federal Courts. Both Bloomberg LLC and Eli Lilly submitted such briefs. Lilly also filed a Notice of Correction of Misstatements and Bloomberg filed a response. A status conference to further discuss this question was also held on July 17, 2008, and additional information was provided there by counsel.

Based on the record before it, this Court now complies with the Alaska Supreme Court's Order of Remand and issues the following findings.

## **BACKGROUND**

The factual and procedural background of this case, as it relates to the release of the documents now under consideration, are set forth in this Court's June 13, 2008 Order Granting Bloomberg's Motion to Unseal Records. That discussion is incorporated herein and will not be repeated. Some additional background which may relate to the issue now before the Court is also set forth below. As indicated in the June 13, 2008 Order the documents under consideration were subject to a protective order issued in this matter which required that confidential discovery materials filed with the Court be "kept under seal until further order of the court." Many, but not all<sup>1</sup>, of the documents in question were originally produced as part of the multi-district litigation in the United States District Court for the Eastern District of New York. In Re: Zyprexa Products Liability Litigation, 04 MDL 1596 (JBW). The documents in that case remain under seal according to a protective order

issued by Judge Weinstein. See Case Management Order No. 3 ("CMO-3") (Exhibit B to defendant Eli Lilly & Co.'s briefing Re: Principles of Comity.) Under the terms of that order, any party may designate as confidential any documents produced in discovery. Documents so designated remain confidential and are subject to the provisions of CMO-3 in the course of the litigation. Depositions taken in MDL 1596 are conducted under the confidentiality provisions and protections of CMO-3. Paragraph 9 of CMO-3 provides a procedure by which a party or aggrieved entity permitted by the Court to intervene for such purpose can dispute a designation of discovery materials as confidential and obtain a ruling from the Court. The designating party has the burden of proof on such a motion to establish the propriety of its confidential designation.

Most of the cases constituting MDL 1596 have been settled. Some time prior to the trial in Alaska State Court many of the documents subject to CMO-3 were obtained by a New York Times Reporter, Alex Berenson. The documents had been obtained by a plaintiff's expert, Dr. David Egilman, who, in turn, provided the documents to an Alaska Attorney, James Gottstein, who provided them to Berenson. The history of what occurred is set forth in Judge Weinstein's Memorandum, Final Judgment, Order and Injunction of February 13, 2007 (Exhibit H to Eli Lilly's Briefing Re: Principles of Comity). In that order Judge Weinstein requires certain individuals in possession of protected

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<sup>1</sup> The depositions of Sidney Taurel, David Noesges and Robin Wojcieszek were taken in this case,

documents which Lilly sought return of to return the documents. Those individuals are also enjoined from further attempts at dissemination. Internet websites which had obtained copies of some of the documents were not enjoined from posting the documents and it is the Court's understanding that many of the documents were indeed posted on the internet. The Court is unaware of whether or not the documents at issue in this case have been posted on the website. Following receipt of the documents, the New York Times posted a series of articles concerning the documents and their contents. Bloomberg is not a party to MDL-1596 and is not affected by the injunction. Neither Berenson nor the New York Times was enjoined by Judge Weinstein from disseminating the documents or publishing any articles about them. Indeed, Judge Weinstein noted that no injunction had been sought against either the New York Times or reporter Berenson. Judge Weinstein's injunction is now on appeal to the United States Court of Appeals for the Second Circuit. Only Mr. Gottstein has appealed. The issues on appeal are set forth in Exhibit D to Lilly's Brief on Comity. At the July 17, 2008 status conference, counsel for Lilly indicated that briefing of the appeal has not yet begun.

Judge Weinstein also noted that the documents at issue in the injunction were "stolen" and that the persons enjoined were being required to return stolen documents over which they enjoyed no property rights. Judge

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not MDL 1596. Some other documents may also not be subject to the MDL order.

Weinstein also noted that to the extent that any party believed access to the protected documents was essential to their pursuit of the public interest, that those parties could petition the Court for declassification of the documents or modification of the protective order. (Exhibit H at 65, 69)

Some of the parties enjoined by Judge Weinstein's order recently have sought to utilize the declassification procedures contained in CMO-3. To date, Judge Weinstein has refused to consider this request because the appeal to the Court of Appeals for the Second Circuit is still pending. See Exhibits F & G, to Eli Lilly's Brief Re: Principles of Comity. According to counsel for Lilly, only 2 or 3 of the documents under review in this case are the subject of the request to declassify certain documents. Most of the documents at issue in this case are unaffected by the request to declassify.

This Court further observes that prior to trial in this matter Eli Lilly requested that the Court issue an order requiring that any time a document subject to the provisions of CMO-3 was discussed during trial that portion of the trial be deemed confidential and the general public excluded. This request was denied and all testimony during trial and all evidence introduced at the trial were made public. The Alaska trial received extensive coverage by both local and national press. A private service also broadcast the trial to its subscribers.

As Bloomberg points out, the question of the confidentiality of documents in the files of this Court has been raised several times by Eli Lilly. At no time in the Trial Court did Lilly ever previously raise the issue of comity or suggest that it was inappropriate to rule on the issue of confidentiality. The Alaska Supreme Court's Order of Remand is the first opportunity that this Court has had to rule on that issue.

## **DISCUSSION**

The doctrine of comity is one of "deference and respect" among of tribunals of overlapping jurisdiction. The question of comity arises when there is "tension . . . between courts and/or agencies having concurrent jurisdiction over the same matter. In such cases the doctrine of comity teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of litigation, has had an opportunity to pass upon the matter." Matanuska Electric Assoc., Inc. v. Chugach Electric Assoc., Inc., 99 P.3d 553, 560 (Alaska 2004). But technically, the concept of comity has no application in cases involving different parties, different causes of action, and different issues. Robertson v. Department of Defense, 402 F.Supp. 1342, 1346 (DDC 1975).

Recognizing these principles, this Court concludes that principles of comity do not require that a stay of trial court proceedings be ordered pending the decisions by the United States District Court for the Eastern District of

New York and the United States Court of Appeals for the Second Circuit on the confidentiality issue. The Court reaches this conclusion for a number of reasons.

First, Bloomberg is not a party to either the Second Circuit appeal or the MDL case. Bloomberg is not enjoined by Judge Weinstein's Order that is under appeal to the Second Circuit. While Bloomberg arguably could seek to intervene in the MDL case to seek declassification of the documents designated as confidential in that case there is no evidence in the record that anyone in the MDL case has sought declassification of the vast majority of the records at issue in this case. Stated otherwise, while the Order of Remand from the Alaska Supreme Court asks this Court to consider whether, under principles of comity, a stay of trial court proceedings should be ordered pending the *decisions* by the United States District Court for the Eastern District of New York and the United States Court of Appeals for the Second Circuit, there is no evidence that any proceedings before those courts would result in decisions regarding most of the documents at issue in this case.

More importantly, even if motions now being considered by those federal courts were pending, the legal standards that would apply are likely to be far different than the legal standards that were applied by this Court in granting Bloomberg's Motion to Unseal Records. The records at issue in this Court were filed under seal pursuant to a protective order as part of motion practice before this Court. They are not filed as part of the discovery practice.

As this Court has noted blanket protective orders are essential to court facilitation of discovery in complex litigation. What is at issue in this Court, however, is not how the discovery process should proceed, but whether the public is entitled access to *court records* designated as confidential pursuant to a protective order. Applying standards from decisions on this issue by the Ninth Circuit, and recognizing a distinction between sealed discovery documents attached to a non-dispositive motion and dispositive motions, this Court reviewed each document at issue and determined that Lilly had not met its burden under those standards to maintain the confidentiality of the documents.

This is far different than the issues arguably, if at all, being considered by either the Second Circuit Court of Appeals or Judge Weinstein. The Second Circuit Court of Appeals is considering the propriety of an injunction issued by Judge Weinstein as to "stolen" documents, rather than court records. Briefing has not even started in that appeal. Likewise, if Judge Weinstein eventually does review motions seeking to declassify the documents designated as confidential by Lilly pursuant to CMO-3 he will be applying the standards for considering the confidentiality of documents at the discovery stage, rather than those filed with the Court. It is this Court's belief that the public has a far greater right to access documents filed with the Court than it does to access documents designated during discovery and the standards governing disclosure generally reflect this although there is some



overlap. Further, as Bloomberg has already obtained the documents in question in this case, this case presents issues regarding prior restraint of First Amendment rights that do not appear to exist in the federal cases. At issue before the Second Circuit Court of Appeals is the question of the dissemination of documents that were obtained *unlawfully*. At issue before this Court is the dissemination of documents that were obtained lawfully.

In its June 13, 2008 decision now on appeal to the Alaska Supreme Court, this Court applied the standards set forth in that decision and conducted a document by document review of each of the documents that Bloomberg asked be unsealed. Judge Weinstein has not been asked to conduct such a review although he eventually would have to do so under the provisions of CMO-3 if he were asked to do so. Even if the issues and parties in the respective courts were identical, the comity doctrine requires that when two identical actions are filed in courts of concurrent jurisdiction, the one which first acquired jurisdiction should be the one to decide the matter. Great Northern Railway Co. v. National Railroad Adjustment Board, 422 F.2d 1187, 1193 (7<sup>th</sup> Cir. 1970); Robertson v. Dept. of Defense, *supra*, 402 F Supp. at 1346. Even were Judge Weinstein to disagree with this Court's analysis, principles of comity should not require this Court to wait for him to do so.<sup>2</sup>

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<sup>2</sup> Judge Weinstein has deferred ruling on the motion to declassify pending the Second Circuit's decision and briefing has not even begun on the appeal. The court is cognizant of Bloomberg's argument that if release of records is delayed then the staleness of the news makes it less likely a story will be published. The principles of respect inherent in the doctrines of comity suggest that this practical consideration of timeliness of ruling should be given some weight.

Because the parties, causes of action and issues before the respective courts are different, this Court concludes that principles of comity do not require a stay of these proceedings pending decisions by the respective federal courts.

DATED at Anchorage, Alaska, this 18<sup>th</sup> day of July 2008.

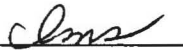


MARK RINDNER  
Superior Court Judge

*I certify that on July 18, 2008 a copy  
was mailed to:*

E. Sanders  
J. Dawson

B. Jamieson



Administrative Assistant