

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In re: ZYPREXA PRODUCTS LIABILITY : MDL No. 1596
LITIGATION :
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THIS DOCUMENT RELATES TO: :
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ALL ACTIONS :
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**ELI LILLY'S MEMORANDUM IN SUPPORT OF THE COURT'S ORDER
TO SHOW CAUSE ISSUED TO JAMES B. GOTTSTEIN, ESQUIRE**

Evidence discovered since Lilly submitted its brief on January 8, 2007 – when combined with facts already of record – supports continued enforcement of the terms of the Court's Order to Show Cause Issued to James B. Gottstein, Esquire.

**EVIDENCE THAT MR. GOTTSTEIN AIDED AND ABETTED THE
DELIBERATE VIOLATION OF CMO-3 CONTINUES TO MOUNT**

As Magistrate Judge Mann and District Judge Cogan have already found, the scheme hatched by Dr. David Egilman and Mr. Gottstein to violate CMO-3 “smacks of bad faith,” and resulted from Mr. Gottstein “deliberately and knowingly aid[ing] and abet[ing] Dr. David Egilman[]”¹

When Judge Cogan issued an Order for Mandatory Injunction on December 18, he relied on Mr. Gottstein's admissions:

[Mr. Gottstein] was aware that these documents were restricted, and that he undertook procedures to help the expert, Dr. Egilman, try to circumvent the restrictions that were on him. He deliberately

¹ Tr. of Tele. Conf. before the Honorable Roanne L. Mann (Dec. 18, 2006) at 10, attached as Ex. A; *see* Rulings of the Honorable Roanne L. Mann, attached as Ex. B; Tr. of Phone Conf. before the Honorable Brian M. Cogan (Dec. 18, 2006) at 19-20, attached as Ex. C; Order for Mandatory Injunction of Dec. 18, 2006, attached Ex. D; *see also* Eli Lilly's Memorandum Of Points And Authorities On Motion For Re-Argument Of The Court's Order Extending The December 29, 2006, Temporary Mandatory Injunction, at 1-12; Eli Lilly and Company's Proposed Findings of Fact Concerning its Request to Extend the Temporary Mandatory Injunction.

~~aided and abetted Dr. Egilman in getting these documents released from the restriction that they were under, under the protective order. He knew what he was doing, and he did it deliberately.²~~

The parties have acquired additional information corroborating Mr. Gottstein's wrongdoing. The Court now has evidence that, immediately upon receiving Lilly's documents from Dr. Egilman on December 12, Mr. Gottstein frantically began making copies. By December 13, Mr. Gottstein already had made and distributed DVDs to fifteen people with whom he was affiliated. These people were to use these hastily made copies to assist him in improperly disseminating Lilly's confidential documents.³

JURISDICTION AND AUTHORITY TO ENFORCE COURT'S ORDERS

A. This Court Has Power To Enforce Violations of CMO-3.

This Court possesses the inherent authority to protect ongoing judicial proceedings, to remedy violations of its orders and to enter orders designed to effectuate its decrees. *See, e.g., Wards Co. v. Jonnet Dev. Corp. (In re Lafayette Radio Elecs.)*, 761 F.2d 84, 92 (2d Cir. 1985). In addition, "the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the [ordering] court." *In re Debbs*, 158 U.S. 564, 594-95 (1895); *see also Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452 (1932); *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985).

B. This Court Has Personal Jurisdiction over Mr. Gottstein.

Mr. Gottstein is subject to the jurisdiction of this Court. The mandate of a protective order issued by a federal court, like the mandate of an injunction, runs nationwide and

² Ex. C at 19-20, 22; *see also* Order of Dec. 15, 2006, attached as Ex. E.

³ *See* Email from John McKay to Special Master Woodin (Dec, 22, 2006), attached as Ex. F.

~~binds those persons subject to that order wherever they may be found in the United States. See~~
Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 451 (1932); *Stiller v. Hardman*, 324
F.2d 626, 628 (2d Cir. 1963); *Waffenschmidt v. MacKay*, 763 F.2d 711, 717 (5th Cir. 1985). A
person subject to an injunction or a protective order may not use others to violate that order:
Such an order “binds not only the parties subject thereto, but also nonparties who act with the
enjoined party.” *Waffenschmidt*, 763 F.2d at 717; accord *United States v. Schine*, 260 F.2d 552,
556 (2d Cir. 1958).

When nonparties work in concert with parties to violate the order of a court, those
nonparties subject themselves to the jurisdiction of the issuing court. *Waffenschmidt* 763 F.2d at
717; see also *Estate of Greene v. Glucksman*, No. 86 Civ. 9184, 1987 WL 17994 at *1 (S.D.N.Y.
Apr. 1, 1987) (“[A] court may enforce a restraining order against a non-party who otherwise
would not be subject to that court's jurisdiction, if, with actual notice of the court’s order, the
non-party actively aids and abets a party in violating that order.”).

Here, Dr. Egilman subjected himself to this Court’s jurisdiction when he signed
the Endorsement of CMO-3. As this Court has already concluded, Dr. Egilman and Mr.
Gottstein then entered into an arrangement whereby “Mr. Gottstein . . . deliberately and
knowingly aided and abetted Dr. David Egilman’s breach of CMO-3”⁴

C. The Court Has Authority To Enforce the Terms of Its Order To Show Cause.

This Court’s authority to enforce the terms of its Order to Show Cause and to
compel non-parties to participate in contempt proceedings is deeply rooted in Second Circuit
case law. As Judge Learned Hand wrote in 1930, “a person who knowingly assists a defendant

⁴ Ex. D.

~~in violating an injunction subjects himself to civil as well as criminal proceedings for contempt.~~

This is well settled law.” *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832, 832 (2d Cir. 1930). Judge Hand’s reasoning has not faded over time. *See, e.g., Canterbury Belts v. Lane Walker Rudkin*, 1986 U.S. Dist. LEXIS 16929, at *3-4 (S.D.N.Y. Dec. 9. 1986) (quoting *Computer Searching Services Corp. v. Ryan*, 439 F.2d 6, 9 (2d Cir. 1971)). Indeed, the Second Circuit recently reaffirmed that non-parties can become parties to contempt proceedings if they “either abet the [party to the order], or [are] legally identified with him.” *New York v. Operation Rescue National*, 80 F.3d 64, 66, 70 (2d Cir. 1996) (quoting *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832, 832 (2d Cir. 1930)).

Mr. Gottstein cannot avoid the terms of the Order to Show Cause: This Court has already found that he “deliberately and knowingly aided and abetted Dr. David Egilman’s breach of CMO-3”⁵ This finding is conclusive with respect to the Court’s jurisdiction over Mr. Gottstein, as well as his status as a party to this contempt proceeding. *Operation Rescue National*, 80 F.3d at 66, 70 (2d Cir. 1996); *Waffenschmidt*, 763 F.2d at 717; *see also Estate of Greene v. Glucksman*, No. 86 Civ. 9184, 1987 WL 17994 at *1 (S.D.N.Y. Apr. 1, 1987). Therefore, the Court can and should enforce the terms of its Order to Show Cause.

The balancing of equities further bolsters the terms of the Order to Show Cause. Indeed, any inconvenience to Mr. Gottstein in complying with the Order will be the result of his own actions to aid and abet Dr. Egilman in violating CMO-3. In this situation, “[t]he balance of burden clearly preponderates in favor of jurisdiction in the court whose injunction is knowingly contempered.” *Waffenschmidt*, 763 F.2d at 721.

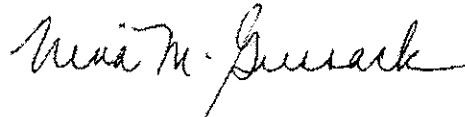
⁵ Ex. D.

CONCLUSION

For the foregoing reasons, the Court should enforce its Order to Show Cause

Issued to James B. Gottstein, Esquire.

Respectfully submitted,



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