07-1107-cv

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ELI LILLY AND COMPANY,

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 MOVANT-APPELLEE ELI LILLY AND COMPANY

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Corporate Disclosure Statement

Defendant Eli Lilly and Company hereby states that it does not have a parent corporation and that there are no publicly held corporations that own 10% or more of its stock.

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Statement of the Issues

1. Are the District Court's findings of fact clearly erroneous?

2. Did the District Court err in finding that Respondent-Appellant James Gottstein aided and abetted the violation of its protective order?

3. Did the District Court have personal jurisdiction over Respondent-Appellant James Gottstein?

Statement of the Case

Respondent-Appellant James Gottstein entered into a conspiracy with Dr. David Egilman, a retained plaintiff's expert, and Mr. Alex Berenson, a reporter for *The New York Times*, to violate an order of the United States District Court for the Eastern District of New York (Weinstein, *J.*). Dr. Egilman, who was in possession of confidential discovery material produced by Movant-Appellee Eli Lilly and Company ("Lilly"), wanted to leak those documents to Mr. Berenson, but was prohibited from doing so by a protective order of the district court ("CMO-3"). Rather than challenge the confidentiality of the documents via the procedure established by the district court for doing so, Dr. Egilman and Mr. Berenson enlisted the help of Mr. Gottstein, an attorney who was otherwise unrelated to the underlying litigation, to have those documents surreptitiously subpoenaed and distributed to media outlets and allied activists so that Lilly could never invoke its rights under the protective order.

Mr. Gottstein agreed to this plan. Over the course of several communications with Dr. Egilman, Mr. Gottstein agreed to gin up a case through which he would generate a subpoena. He then subpoenaed the documents, knowing they were subject to the district court's confidentiality order. Dr. Egilman, though claiming to abide by the confidentiality order, then undertook to delay Lilly's discovery of that subpoena. In the meantime, Mr. Gottstein sent a

subsequent secret subpoena, which moved up the date of production of the confidential materials, and immediately began receiving and disseminating those materials in an effort to make it impossible for Lilly to get its confidential materials back.

When Lilly learned of the breach of the protective order, it and the Plaintiff's Steering Committee ("PSC") immediately took steps to retrieve them and stop their dissemination. The Special Master for Discovery ordered Mr. Gottstein to return the documents; an order Mr. Gottstein questioned. Based on Mr. Gottstein's refusal of the Special Master's order, Lilly and the PSC jointly petitioned the court for an injunction requiring Gottstein to return the documents. On December 18, 2006, after multiple hearings in which Mr. Gottstein and his attorney participated, the district court issued a temporary injunction requiring Mr. Gottstein to immediately return all of Lilly's confidential materials. This temporary injunction was extended to permit a full evidentiary hearing on January 16, 2007, in which Mr. Gottstein and his attorney again participated. Following this hearing and subsequent briefing, the district court entered the injunction now on appeal. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385 (E.D.N.Y. 2007)

Statement of Facts

In 2004, the Judicial Panel on Multi-District Litigation ("JPMDL") assigned *In re Zyprexa Products Liability Litigation*, MDL No. 1596, to the Honorable Jack B. Weinstein of the United States District Court for the Eastern District of New York (the "MDL court").[1]

In August 2004, the MDL court, as recommended by the Manual for Complex Litigation, entered an "umbrella protective order,"[2] Case Management Order No. 3 ("CMO-3"). The purpose of CMO-3 was to "expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, adequately protect confidential material, and ensure that protection is afforded only to material so entitled."[3] CMO-3 permitted attorneys for the parties to the Zyprexa MDL litigation to share discovery designated as confidential with, *inter alia*, their retained experts; provided that such experts signed an "Endorsement of Protective Order," agreeing to be bound by CMO-3, to subject themselves to the jurisdiction

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[1] *See In re Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380 (J.P.M.L. 2004).

[2] "Umbrella orders provide that all assertedly confidential material disclosed (and appropriately identified, usually by a stamp) is presumptively protected unless challenged. Such orders typically are made without a particularized showing to support the claim for protection, but such a showing must be made whenever a claim under an order is challenged." Manual for Complex Litigation, § 11.423 (4th ed. 2004).

[3] *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2004 WL 3520247, *1 (E.D.N.Y. Aug. 9, 2004)

of the MDL court, and to be subject to sanctions by the MDL court for violation of CMO-3. [A 47-48.]

Among other restrictions, CMO-3 requires any recipient of Confidential Discovery Materials, if subpoenaed by another court, to promptly notify the party that produced the Confidential Discovery Materials:

> in writing of all of the following: (1) the discovery materials that are requested for production in the subpoena; (2) the date on which compliance with the subpoena is requested; (3) the location at which compliance with the subpoena is requested; (4) the identity of the party serving the subpoena; and (5) the case name, jurisdiction and index, docket, complaint, charge, civil action or other identification number or other designation identifying the litigation . . . or other proceeding in which the subpoena or other process has been issued. 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. Furthermore, the person receiving the subpoena or other process shall cooperate with the producing party in any proceeding related thereto. [A 43-44]

CMO-3 also established procedures for parties and intervenors to challenge the confidentiality of material produced under its protection. [A 44.]

Sometime in 2006, Dr. David Egilman, who refused to testify in this matter, citing his Fifth Amendment right against self-incrimination [A 541], was retained by The Lanier Law Firm to serve as a consulting expert for cases pending

in the Zyprexa MDL proceedings, signed the Endorsement of CMO-3, and was given access to confidential Lilly discovery material.[4] [A 526-27.]

Dr. Egilman devised a plot with *New York Times* reporter Alex Berenson to leak Lilly's confidential discovery materials to *The New York Times* and Mr. Berenson.[5] [A 323.] Mr. Berenson told Dr. Egilman to contact Appellant-Respondent James Gottstein, an attorney practicing in the State of Alaska who also serves as the President and CEO of the Law Project for Psychiatric Rights ("PsychRights") with whom Mr. Berenson had prior dealings, and use him as the conduit for getting the protected documents to *The New York Times*. [A 63-64, 238, 322-25.]

On November 28, 2006, in furtherance of their scheme, Dr. Egilman contacted Mr. Gottstein, informed him that he (Dr. Egilman) "had access to secret Eli Lilly documents pertaining to Zyprexa," and arranged to have those documents subpoenaed by Mr. Gottstein. [A 67, 251, 323.] Mr. Gottstein understood that Dr. Egilman wanted to make the CMO-3 protected Zyprexa documents public, and needed his help:

[4] Copies of these Endorsements are retained only by the counsel who provide access to confidential discovery materials. [A 38.] Therefore, Lilly does not ordinarily know who has been given access to its confidential discovery materials by plaintiffs' counsel.

[5] Although CMO-3 provides a procedure for seeking the modification of the protective order, and for the de-designation of documents as confidential, neither Dr. Egilman, Mr. Berenson, Mr. Gottstein, nor the individuals identified in the Temporary Mandatory Injunction took any steps to modify CMO-3 prior to its breach.

Q: So help me understand the phone call. He calls you out of the blue and is looking for some documents that you have posted on your website. How does he tell you that he has access to secret documents?

A: He says that he is a plaintiffs' expert in this litigation.

Q: And why was he telling you that in your view?

A: Well, I mean I can kind of give my sense of that. Maybe I have a pretty good sense of that. But anyway, basically he -- he wanted -- he was interested in getting these documents out as well. That was my sense of it.

* * *

Q: Mr. Gottstein, your understanding based on the conversation with Dr. Eagleman [sic], your state of mind at the time was that you understood that the -- that Dr. Eagleman [sic] was calling you so that you would assist him in disseminating documents that were subject to a protective order, right?

A: I think that is probably correct. I was pretty focused on my objectives not his objectives but it's hard for me to say that is not accurate.

Q: And your sense was -- we know that you wanted to get the documents made public, you've already said that, right?

A: Correct.

Q: And your sense was that Dr. Eagleman [sic] shared your desire to make them public, correct?

A: Well, what I said is that -- it's my understanding that he also had that objective, and so did he share mine? I don't know but I think that was his objective. [A 251-52.]

Mr. Gottstein knew that the "secret documents" that Dr. Egilman was trying to get his help to leak were covered by a protective order. [A 253-54.] But Dr. Egilman did not send Mr. Gottstein a copy of CMO-3, which contains provisions that must be followed in connection with any subpoena directed to protected documents: "He [Dr. Egilman] said I didn't want it and I didn't push it." [A 254.] Mr. Gottstein believes this was done so that he would not be later "charged with knowledge" of these provisions. [A 254-55.]

Although Mr. Gottstein was a willing participant in the scheme to disseminate the Zyprexa documents, he had his own problem. He did not have a pending case that could be used as a vehicle to issue the subpoena for Zyprexa documents. [A 67, 258-59.] As a result, Mr. Gottstein and Dr. Egilman agreed that Mr. Gottstein would find "a [forced drugging] case" that would "occur very quickly" and then issue a subpoena for the CMO-3 protected documents. [A 67.]

Although Mr. Gottstein "proceeded to try to acquire a suitable case in earnest," he was unable to find a forced drugging case, with its quick deadlines. Instead, on the evening of December 5, he learned that the Alaska Office of Public Advocacy had been granted guardianship rights over a patient (then identified as "B.B."), which allowed the State to make treatment decisions on behalf of B.B. [A 67.] The next morning, on December 6, Mr. Gottstein filed papers to terminate the

guardianship of B.B., and asked an Alaska state court to issue four subpoenas, including one to Dr. Egilman. [*Id.*]

At the time that Mr. Gottstein had the subpoena issued to Dr. Egilman to obtain the confidential Lilly material relating to Zyprexa, Mr. Gottstein had no idea whether B.B. had ever taken Zyprexa:

> Q: I understand what you are saying but I just want to make it clear that you have no evidence to present to the Court today that at any point from December 5th through today, you have no evidence to provide to the Court that [B.B.] was taking Zyprexa at any time during that period, correct?
>
> A: Correct.
>
> Q: And so you issued a subpoena, you found a case with someone who has no evidence of taking Zyprexa and you issued a subpoena to Dr. Eagleman [sic] on December 6.
>
> Dr. Eagleman [sic] told you he had Zyprexa documents, right?
>
> A: Yes.
>
> Q: He didn't tell you he was an expert in any other cases and had any other documents correct?
>
> A: Yes. [A 260-61.]

To further mask the subpoena's true purpose, Mr. Gottstein buried the request for Zyprexa documents "in the middle" of fifteen other prescription medicines, even though he and Dr. Egilman knew that Dr. Egilman only had — and would only be producing — Zyprexa documents. [A 261-62, 548.] Mr. Gottstein emailed (and faxed) the Alaska state court subpoena to Dr. Egilman, as Dr. Egilman had already

provided all of his contact information and "agreed to accept service" in either manner. [A 543, 542.]

The subpoena of December 6 called for the production of documents on December 20, 2006. [A 547] On December 6, 2006, Dr. Egilman sent a fax to Lilly's General Counsel purporting to notify Lilly of the subpoena in the Alaska Action, and its December 20 return date. [A 550.] Dr. Egilman never contacted Lilly's litigation counsel; The Lanier Law Firm, who had retained him; or any attorneys representing either Lilly or the plaintiffs in this litigation regarding the December 6 subpoena. Despite efforts to delay Lilly's litigation counsel's involvement in this issue, counsel spoke with The Lanier Law Firm on December 13 — a full week before the announced December 20 production date — and received assurances that plaintiff's counsel had spoken with Dr. Egilman and that no documents would be produced until Lilly's motion to quash the Alaska subpoena was ruled upon. [A 527, 537.] This same day, December 13, Dr. Egilman was told by The Lanier Law Firm not to produce any documents. [A 426-27, 527, 537.]

On December 15, 2006, counsel for Lilly learned that, despite the instruction from The Lanier Law Firm, Dr. Egilman had violated CMO-3 by sending to Mr. Gottstein documents that he had received pursuant to the confidentiality provisions of CMO-3. That same day (which was a Friday), upon

the joint application of members of the *In re Zyprexa Products Liability Litigation* Plaintiffs' Steering Committee ("PSC") and Lilly, and after giving Mr. Gottstein notice and an opportunity to be heard on the matter, Special Master for Discovery Peter H. Woodin entered an order requiring Mr. Gottstein and Dr. Egilman to immediately send to the Special Master's office in New York any and all documents produced by Lilly pursuant to CMO-3. [A 552-53.]

Rather than comply with the Order, Mr. Gottstein sent a letter to Special Master Woodin on Sunday evening, December 17, 2006, questioning Special Master Woodin's authority and providing his version of the events that led to his possession of confidential documents. [A 63-69.] Mr. Gottstein's letter described, for the first time, how he and Dr. Egilman had worked in concert to issue a secret "amended" subpoena on December 11, 2006, which called for the immediate production of the confidential materials. [A 67-68.] On December 12 — which was only four business days after the original subpoena was issued, and only one day after the secret amended subpoena was issued — Dr. Egilman began electronically transferring documents to Mr. Gottstein without the knowledge of — or notice to — anyone else:

> Q: And earlier you said you had told Dr. Eagleman [sic] repeatedly that he should send the second subpoena to Lilly, correct?
>
> A: Yes.

> Q: And you knew he planned not to send it to Lilly, correct?
>
> A: Yeah, I think -- he told me he didn't see that it made any difference.
>
> Q: And you decided that it was not important for you to send the subpoena to Lilly either, correct?
>
> A: My -- my position is that it was his responsibility under the CMO and not mine.
>
> Q: As an officer of the Court, I'm just asking you, you made the decision not to send the amended subpoena which called for production of documents prior to December 20th to Eli Lilly, correct?
>
> A: Correct. [A 270-71.]

Mr. Gottstein and Dr. Egilman intended that after Mr. Gottstein took possession of the documents, he would disseminate them as quickly as possible. [A 251-53, 262-65, 275-76.] In fact, before Dr. Egilman turned over any documents, he directed Mr. Gottstein to send them to Mr. Berenson and also directed their disclosure to other individuals. [A 233-35.]

In furtherance of their scheme, on December 12 and 13, Mr. Gottstein created copies of the confidential materials — using two laptops and an office computer — and then sent the DVDs to those people directed by Dr. Egilman and to other individuals with whom Mr. Gottstein was affiliated. [A 263-67, 274-75.] In fact, Mr. Gottstein was so busy making copies to disseminate that he never actually reviewed them – though the need to review was the purported reason for

moving up the production date. [A 269-70, 274-75.] Mr. Gottstein and Dr. Egilman understood that those people Mr. Gottstein disseminated the unlawfully obtained documents would assist in further disseminating them [A 63-68] and that time was of the essence for the plan to work:

> Q: And you were anxious to get them out as quickly as you could, right?
>
> A: Anxious, yes, I thought it would be good to get them out.
>
> Q: Before the Court could enter an order telling you you shouldn't?
>
> A: Well, I don't know. I mean I guess -- I don't know that -- you know, I knew that Eli Lilly would want to try to stop it.
>
> Q: Right, and you wanted to get them out as quickly as you could to make that harder?
>
> A: Well, I would say yeah, I wanted to get them out of the way that would make it impossible to get them back.[6] [A 275-76.]

Dr. Egilman continued to transfer documents — even after speaking with The Lanier Law Firm on December 13 – until Mr. Gottstein received communication from Lilly's lawyers on December 15. [A 67-68, 270.] Based on the admissions in Mr. Gottstein's December 17 letter and his continued refusal to

[6] Indeed, as Mr. Gottstein admitted privately after he was caught, he was disappointed that his efforts were not more successful: "I am surprised, but it is not inconceivable Evil Lilly is going to get the cat back into the bag. I would have sent more copies out if I thought they could get back all the ones they seem to be." [A 732.]

comply with Special Master Woodin's order, further court involvement was necessary.

The next day, December 18, the Honorable Roanne L. Mann (*M.J.*) held a telephonic hearing, in which Mr. Gottstein participated, relating to Mr. Gottstein's failure to comply with Special Master Woodin's December 15 Order. [A 240, 555-56.] Because Magistrate Judge Mann did not have the power to enter an injunction,[7] Lilly and the PSC jointly petitioned the district court for an injunction. The Honorable Brian M. Cogan (*J.*), sitting as miscellaneous duty judge, issued a temporary Order for Mandatory Injunction after hearing argument from Mr. Gottstein (through his counsel).[8] [A 113240, 558-60.]

The MDL court extended the temporary injunction until it could hold a full evidentiary hearing.[9] [*See* SPA 38.] On January 16 and 17, 2007, the MDL court conducted an evidentiary hearing at which it received evidence and heard testimony, most notably from Mr. Gottstein, who had traveled from Alaska to New York to testify. [A 228, 232-33, 293.] The MDL court extended the temporary

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[7] *But see* A 111-13, 555-56 (condemning Mr. Gottstein's actions in violation of the MDL court's protective order).

[8] As did Magistrate Judge Mann, Judge Cogan found that Mr. Gottstein had "deliberately and knowingly aided and abetted Dr. David Egilman's breach of CMO-3." [A 135-36, 138, 558.]

[9] The temporary injunction was also expanded to include additional individuals, a matter that has not been appealed. [*See* SPA 36-39, 84.]

injunction pending its decision following the evidentiary hearing and permitted post-hearing briefing. [*See* SPA 39.]

On February 13, 2007, the MDL court entered the injunction at issue. [SPA 3-80.] The basis of the MDL court's decision was its power to protect its own orders and the processes established by those orders from violation. [SPA 65-66.] Judgment was entered March 1, 2007. [SPA 82.] Notice of appeal was filed on March 13, 2007. [SPA 84.]

Summary of Argument

The reasons for the MDL court's injunction are fully set forth in its memorandum of February 13, 2007. The factual findings on which the MDL court based its decision are amply supported by the record, including Mr. Gottstein's own statements. There is no question that Dr. Egilman was subject to the MDL court's jurisdiction and protective order. Mr. Gottstein's aiding and abetting of Dr. Egilman's violation of the MDL court's protective order, and his active participation in the injunction proceedings below, subjected Mr. Gottstein to the jurisdiction of the MDL court and the injunction against him was a justified exercise of the MDL court's power to enforce its own orders.

Mr. Gottstein largely ignores the findings of fact set forth by the MDL court. Instead his brief relies on materials outside of the record which this Court has already excluded. [*See* Order of August 17, 2009.] Lilly is separately moving

to strike those unsupported portions of his brief. Regardless, Mr. Gottstein's arguments are all flawed because they do not address the situation in this case; none of Mr. Gottstein's case law involves injunctions to stop a conspiracy to violate court orders as is at issue here.

To the extent that Mr. Gottstein argues that the confidential materials were not confidential at the time that he assisted in stealing them, the district court's contrary determination is well supported. To the extent that Mr. Gottstein argues that subsequent developments calls for the recession or modification of the injunction or of the protective order generally, the MDL court is the proper venue for such an argument in the first instance. Moreover, because the injunction restricts dissemination of documents only if those documents were first obtained in violation of the court's orders, [SPA 67-68] subsequent developments which resulted in the judicial unsealing of certain documents are immaterial to the continued validity of the injunction.

Argument

Mr. Gottstein's arguments on appeal can be organized into four themes: his actions were not improper, the documents were not confidential in the first place, new facts demand this Court dissolve the injunction and/or CMO-3, and he was not subject to the personal jurisdiction of the MDL court. None of these arguments are availing. The MDL court's factual findings, that Mr. Gottstein

aided and abetted in the violation of its orders, and the reasonable steps the MDL court took to protects its orders and processes are amply supported. This Court should hold that the MDL court did not abuse its discretion.

I. The MDL Court's Finding That Mr. Gottstein Aided And Abetted Dr. Egilman's Violation Of The Protective Order Is Not Clearly Erroneous.

This Court reviews the entry of an 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). Under the "clearly erroneous" standard, "factual findings by the district court will not be upset unless [this Court is] left with the definite and firm conviction that a mistake has been committed. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Complaint of Messina*, 574 F.3d 119, 128 (2d Cir. 2009).

Mr. Gottstein's brief does not address the MDL court's findings against him based on the record before the MDL court. Instead, his brief relies almost entirely on materials outside of the record on appeal which this Court has already excluded [*see* Order of August 17, 2009], and Lilly is moving to strike those unsupported portions of his brief.

A. Mr. Gottstein's Supposed "Independent" Purpose For Subpoenaing The Confidential Material From Dr. Egilman Is Irrelevant.

Mr. Gottstein's first argument is that he did not participate in a scheme to violate the MDL court's orders as a matter of law because his motivations were "independent" of Dr. Egilman's scheme, and therefore no conspiracy existed. [*See* Gottstein Br. at 31-44.] Mr. Gottstein also argues that because his subpoena had a legitimate purpose – obtaining documents for his litigation – no other motive (such as helping Dr. Egilman violate the protective order) matters. In support of his arguments Mr. Gottstein relies on cases that relate to sanctions for abuse of process in both Alaska and in the federal courts. *See, e.g., Sussman v. Bank of Israel*, 56 F.3d 450 (2d Cir. 1995).

Mr. Gottstein's intent, however, is legally irrelevant. The MDL court's order of injunction was premised on the need to protect its own orders from Dr. Egilman, who was subject to the MDL court's protective order and was violating it, and Mr. Gottstein, who was actually aiding and abetting that violation. The inquiry into aiding or abetting the violation of a court order is properly "directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation." *N.Y. State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 397 (2d Cir. 1992), *vacated on other grounds,* 41 F.3d 794 (2d Cir. 1994).

In *Terry*, respondents-appellants were adjudged in contempt of an injunction prohibiting certain demonstrations at abortion facilities. *Id.* at 394. Respondents-appellants recognized that, even though they had not been named in the injunction, they could be liable for violating the injunction if they were "in active concert or participation with anyone" who was bound by the injunction. *See id.* at 394 (citing Fed. R. Civ. P. 65(d)). Respondents-appellants challenged the imposition of sanctions by arguing that they could not be "in active concert or participation" with those parties named in the injunction because their actions "were independently motivated" by their "political, social and moral positions on the subject of . . . abortion." *Id.* at 397 (internal quotation marks omitted, alteration in original). This Court made short work of that argument, noting that: "We have no reason to doubt this representation, but it is unavailing as an escape hatch from Rule 65(d). The rule is directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation." *Id.* at 397.

Here, the record amply supports the MDL court's factual finding that Mr. Gottstein conspired with Dr. Egilman to violate the MDL court's protective order. Mr. Gottstein knew that Dr. Egilman was trying to leak confidential materials to, *inter alia*, Mr. Berenson and *The New York Times* [A 67, 251-52, 323], knew that Dr. Egilman was not going to notify Lilly of the true date of the illegal production of confidential materials and did not do so himself [A 270-71],

and endeavored to assist Dr. Egilman in disseminating the documents widely, knowing that Lilly would challenge their disclosure [A 63-68, 275-76, 732]. Whatever Mr. Gottstein's motivation for assisting in the violation of the MDL court's order, it is the fact of his assistance that justified the MDL court's injunction, and the fact of his assistance is amply supported by the record.

B. The Finding That Mr. Gottstein's Subpoena Was A "Pretense" Is Supported By The Record.

Mr. Gottstein's brief argues at length why the confidential material in Dr. Egilman's possession was pertinent to the B.B. case in Alaska. Because this argument goes to motive and does not address the actuality of his participation in the violation of a court order, this argument is irrelevant.

Regardless, the MDL court's finding is supported by the record. At the time of the subpoena, indeed, at the time of the evidentiary hearing months later, Mr. Gottstein had no evidence that his client had ever taken Zyprexa.[10] [A 260-61.] Mr. Gottstein admitted that he had taken the B.B. case as soon as possible after the initial phone call from Dr. Egilman merely as a pretense to generate a subpoena for those materials. [A 67, 258-59.] Moreover, Mr. Gottstein admitted that, although he had claimed that the reason for moving the date of

[10] Mr. Gottstein's brief notes that he later determined that B.B. was taking Zyprexa [Gottstein Br. at 32] – but this "fact" is not supported on the record on appeal. Instead it is taken from material this Court has refused to add to the record. [*See* Order of August 17, 2009.]

production in the second, secret, subpoena was his need to review those documents, he was so busy trying to copy and disseminate them that he never got around to reviewing them.[11] [A 269-70, 274-75.] These facts support the MDL court's finding that the subpoena was a pretense used to violate its orders. The cases cited by Mr. Gottstein regard frivolous filings under Rule 11 or civil actions for abuse of process, issues not at play in this case.

C. The Protective Order Can Be Enforced Against All Individuals Who Consented To Its Terms And To Those Who Conspire To Violate It.

Mr. Gottstein also argues that the protective order cannot be applied to him because it is not an injunction itself and because it "does not provide the protections required to enforce injunctions." [Gottstein Br. at 44-50.] Again, neither argument is availing.

First, Mr. Gottstein argues that Congress has not established "aiding and abetting liability" for violations of Rule 26(c), citing cases regarding a private right of action on aiding and abetting liability under the Securities Exchange Act. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511

[11] Mr. Gottstein also argues that he had no duty to subpoena Lilly directly for the documents and that Lilly had no right to notice of or participation in quashing the subpoena. *See, e.g., Langford v. Chrysler Motors Corp.*, 513 F.2d 1121 (2d Cir. 1975). But here the documents in Dr. Egilman's possession subject to the subpoena were not his own – he had them only because he agreed to be bound the terms of the protective order – and he was obligated to notify Lilly of the subpoena for Lilly's documents and cooperate with Lilly. The protective order makes clear that Lilly did have the right to notice of and participation in quashing the subpoena, [A 43-44] and the record on appeal makes clear that Mr. Gottstein conspired with Dr. Egilman to deprive Lilly of that right [A 270-71].

U.S. 164 (1994). But private rights of action on aiding and abetting liability under the Securities Exchange Act have nothing to do with this case.

It is unquestioned that a court can enforce its orders against parties or non-parties who agree to be bound by the court's orders, such as Dr. Egilman agreed to be here. [A 526-27.] 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. *See* Fed. R. Civ. P. 65(d) (injunctions apply to " persons who are in active concert or participation with anyone" subject to the injunction). Put most plainly, parties "may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945); *accord United States v. Schine*, 260 F.2d 552, 556 (2d Cir. 1959) ("Respondents contend that, while the consent decree enjoined them from directly buying and booking pictures for theatres in which they had no financial interest, it did not prevent them from using [others] to accomplish the same result. The bald statement of this contention is its own refutation."), *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.").

Although Rule 65 applies specifically to injunctions, there is nothing in the Federal Rules of Civil Procedure or elsewhere that limits the application of the common-sense rule only to injunctions. Dr. Egilman and Mr. Gottstein's "actions in this case are a paradigm of how a [party] can enlist the aid of out-of-state individuals in an attempt to frustrate the orders of the district court." *Waffenschmidt v. MacKay*, 763 F.2d 711, 717(5th Cir. 1985) (holding that "[t]he nationwide scope of an injunction carries with it the concomitant power of the court to reach out to nonparties who knowingly violate its orders."). To leave a district court powerless to stop non-parties from aiding and abetting parties in violating any court order other than an injunction is to invite the frustration of those orders.

Second, Mr. Gottstein argues that the terms of CMO-3 cannot be applied to him because it "does not provide the protections required to enforce injunctions." Most of this argument is premised on his first argument: that Mr. Gottstein cannot be held liable for violation of CMO-3 under any situation. To the extent that he argues he and Dr. Egilman did abide by the terms of CMO-3, the MDL court's findings to the contrary are well supported: Dr. Egilman and Mr. Gottstein deliberately misled Lilly and violated the terms of the protective order by not informing Lilly about the second subpoena which dramatically moved up the date of production; Mr. Gottstein was aware that Dr. Egilman refused to provide

such notice to anyone and Mr. Gottstein refused to do so himself; and Mr. Gottstein, an attorney, was willing to be kept in the dark about the terms of the protective order and accept Dr. Egilman's interpretations of it at face value to keep plausible deniability about the violation of its terms. [A 254-55, 270-71.]

D. The Documents At Issue Were Confidential At The Time Mr. Gottstein Assisted In Their Wrongful Dissemination.

Mr. Gottstein also argues that, for a variety of reasons, the documents at issue were not actually confidential at the time that he and Dr. Egilman conspired to disseminate them. To the extent that these arguments were raised below, the MDL court rightly rejected them. To the extent that Mr. Gottstein argues that subsequent developments indicate (to him) that the documents should not be confidential, those arguments are not appropriate for this appeal and should be raised in the district court in the first instance.

Mr. Gottstein's first argument appears to be that the umbrella protective order at issue in this case was improper, rendering none of the documents confidential. [Gottstein Br. at 51-54.] As the MDL court noted, however, umbrella protective orders are entirely proper (and preferable) in large cases. [SPA 54-55.] Manual for Complex Litigation, § 11.423 (4th ed. 2004). Such protective orders permit parties, and in this case, non-parties, to challenge the confidentiality of documents at any time. [*See* SPA 21-22; A 44.] But a challenge to the confidentiality of documents must come in the form of a challenge to the

confidentiality of documents, not in the form of a violation of the protective order with non-confidentiality asserted as an *ex post* justification. *Cf. Walker v. City of Birmingham*, 388 U.S. 307, 314-15 (1967) (cannot normally defend against a criminal contempt action by challenging the validity of the underlying injunction). Neither Mr. Gottstein, Dr. Egilman, nor Mr. Berenson, took any steps to modify the protective order prior to its breach, and Mr. Gottstein cannot now challenge the validity of the order he violated.

Mr. Gottstein also argues that subsequent developments have demonstrated that the documents were not or should not be considered confidential. These developments include the unsealing of certain documents through the procedures established by the protective order; the MDL court's ruling in a securities litigation that there were "storm warnings" in the market in the form of adverse information about Zyprexa; and a plea of guilty to a single violation of 21 U.S.C. §331(a), a strict liability offense. [Gottstein Br. at 54-58.] These matters, like so many Mr. Gottstein argues, are outside of the record on appeal, [*See* Order of August 17, 2009], and the appellate court is not the proper venue for the initial consideration of such issues. Where subsequent developments call for the recession or modification of an injunction, the district court is the proper venue for such an argument. *See Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972) ("where circumstances have changed between the ruling below and the

decision on appeal, the preferred procedure is to remand to give the district court an opportunity to pass on the changed circumstances," unless the new situation "demands one result only").

Moreover, none of these matters affect the injunction entered by the MDL court. To the extent that certain documents have been unsealed by the district court, the injunction does not apply to them. [*See* SPA 68 ("it restricts dissemination of documents only if those documents were obtained in the first instance by use of the court's processes").] To the extent that documents remain confidential, Mr. Gottstein, like all parties and non-parties, is free to challenge the confidentiality of those documents by invoking the procedure established by the MDL court.

II. Mr. Gottstein Was Subject To The Jurisdiction Of The MDL Court.

A. Mr. Gottstein Waived Any Objection To Personal Jurisdiction.

Mr. Gottstein argues that he did not waive his objections to personal jurisdiction. [*See* Gottstein Br. at 59-60.] As an initial matter, however, the MDL court did not base its finding of personal jurisdiction on waiver, but rather on its power to enforce its own orders against "[n]onparties who reside outside the territorial jurisdiction . . . [who] actively aid and abet a party in violating" its orders. [See SPA 57-58; *see also* A 558.] Nevertheless, Mr. Gottstein did waive his objections to personal jurisdiction by appearing at the several proceedings in

the Eastern District of New York and not just to contest personal jurisdiction but also to engage in substantive arguments as to his conduct. [*See* SPA 76; A 240, 555-56, 558-60.]

An individual challenging personal jurisdiction has one of two choices, he can "appear[] and challenge[] jurisdiction, . . . agree[ing] to be bound by the court's determination on the jurisdictional issue" or he can "ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir. 1998) (internal quotation marks and citations omitted). Objections to personal jurisdiction may be waived. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). A decision regarding waiver or forfeiture of personal jurisdiction is based on the totality of the circumstances and is reviewed for abuse of discretion. *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 60-61 (2d Cir. 1999) The "general rule" is "that an objection to the jurisdiction over the person is waived by proceeding on the merits before the objection has been ruled on, but is not waived by proceeding on the merits thereafter." *Speir v. Robert C. Herd & Co.*, 189 F. Supp. 436, 439 (D. Md. 1960); *accord Hamilton*, 197 F.3d at 61 (significant participation in proceedings regarding issues other than personal jurisdiction forfeits personal jurisdiction objections).

Here, Mr. Gottstein did not limit his participation below to challenging personal jurisdiction. Rather, at every opportunity, at hearings and in briefings, he pursued the merits of his position regardless of any ruling as to personal jurisdiction. Actual physical presence in the Eastern District of New York to give substantive testimony, while an obvious waiver of personal jurisdiction, *see Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc.*, 376 F.2d 543, 547 (3d Cir. 1967) ("a party who participates in [a hearing on an application for an injunction pendente lite] must be deemed to have waived the defense of lack of personal jurisdiction"), was just a part of his larger participation in this matter.

Regardless of any other basis for personal jurisdiction, Mr. Gottstein's substantive participation in the proceedings below forfeited any objection as to the MDL court's jurisdiction over his person.

B. Mr. Gottstein Was Subject To The Jurisdiction Of The MDL Court Because He Aided And Abetted Dr. Egilman's Violation Of The MDL Court's Order.

Regardless of Mr. Gottstein's waiver of personal jurisdiction, the MDL court was correct to find it had personal jurisdiction. It is undisputed that Dr. Egilman subjected himself to the MDL court's jurisdiction when he signed the endorsement of the protective order. [A 526-27.] As the MDL court's findings of fact demonstrate, Mr. Gottstein willingly aided and abetted Dr. Egilman's violation

of the protective order. Thus, Mr. Gottstein subjected himself to the MDL court's jurisdiction.

The mandate of a protective order issued by a federal court, like the mandate of an injunction, runs nationwide and 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); *Waffenschmidt v. MacKay*, 763 F.2d 711, 717 (5th Cir. 1985); *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963). 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 Schine*, 260 F.2d at 556.

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."); *Cf. Alemite Mfg. Corporation v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) ("We agree that a person

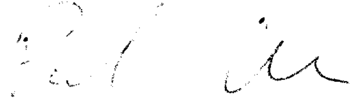
who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt. This is well settled law.").

Mr. Gottstein argues that he acted independently from Dr. Egilman, because he had somewhat different interests and motivations, and therefore did not subject himself to the MDL court's jurisdiction. [*See* Gottstein Br. at 41-44.] But, as noted above, the inquiry into aiding or abetting the violation of a court order is properly "directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation." *Terry*, 961 F.2d at 397. Here the record is replete with evidence, including his own statements, that Mr. Gottstein knew that Dr. Egilman was subject to the MDL court's protective order, knew that Dr. Egilman was violating that order, and willingly assisted Dr. Egilman in his scheme to bring about that violation. [A 63-68, 233-35, 251-53, 258-60, 262-67, 270-71, 274-76, 732.] By helping bring about the violation of the MDL Court's order by Dr. Egilman, Mr. Gottstein subjected himself to the jurisdiction of the MDL Court. *See Alemite,* 42 F.2d 832.

Conclusion

For the foregoing reasons, this Court should determine that the MDL court did not abuse its discretion in entering the injunction against Mr. Gottstein. The judgment should be affirmed.

Respectfully submitted,



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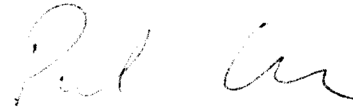

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