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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

Case No. 3AN-06-05630 CI

ELI LILLY AND COMPANY,

Defendant.

**DEFENDANT ELI LILLY AND
COMPANY'S OPPOSITION TO JAMES
GOTTSTEIN'S ADMINISTRATIVE
RULE 37.7(b) REQUEST FOR ACCESS
TO CERTAIN SEALED DOCUMENTS**

Pursuant to this Court's August 22, 2008 Order, Defendant Eli Lilly and Company ("Lilly") submits this opposition to the request by Mr. James Gottstein for access to certain documents filed under seal, and which remain sealed following entry of the Court's June 13, 2008 Order on Bloomberg's LLC's motion to unseal records in *State of Alaska v. Eli Lilly and Company*.

Many of the documents contained within the four pleadings at issue in this application were ultimately used at the trial of this matter, and Lilly offers no objection to their unsealing (those documents will be cataloged below).¹ But a small subset of the documents in those four pleadings properly remain under seal pursuant to the July 30, 2007, protective Order in this case. Bloomberg never challenged their confidential status, and accordingly this Court maintained them under seal in its June 13, 2008 Order.

The documents that remain at issue were previously obtained illegally by Mr. Gottstein and (before he was enjoined by Judge Weinstein) disseminated by him, and others receiving documents through him, via the Internet and otherwise. Mr. Gottstein's actions, along with his abuse of the Alaska subpoena power and his willful violation of MDL

¹ Of course, those documents are now available in the public record, and their status will be unaffected by the disposition of this application.

Orders, are the subject of an appeal pending before the Second Circuit, and may be the subject of further sanctions proceedings before Judge Weinstein. Granting this application would have the unintended—but nevertheless real—effect of nullifying, in part, Judge Weinstein’s efforts to enforce his orders, and would allow Mr. Gottstein to effectively modify an injunction entered as a result of his willful violation of another court’s order. Such an action by this Court would raise thorny issues of comity and federal-state court relations. But those issues can be avoided if this application is denied or, in the alternative, stayed pending disposition of the federal proceedings.

I. BACKGROUND

As this Court is aware from its previous review of Judge Jack Weinstein’s February 13, 2007 Memorandum of Final Judgment, Order and Injunction (“Order and Injunction”), confidential documents produced in discovery in MDL 1596, *In Re: Zyprexa Products Liability Litigation*, were submitted under seal pursuant to Case Management Order 3 entered in those proceedings.

As is detailed in Judge Weinstein’s Order and Injunction, Mr. Gottstein, conspiring with Dr. David Egilman and Alex Berenson, developed a scheme to improperly obtain and disseminate documents protected by CMO 3: they “conspired to obtain and publish documents in knowing violation of a court order not to do so” Order and Injunction at 16. Judge Weinstein described the behavior of Gottstein and his co-conspirators (which included use of a sham Alaska state court subpoena) as a “brazen flaunting of this court’s protective order” and, noting that “there remains the substantial probability of further abuse of CMO 3 by the conspirators,” ordered Mr. Gottstein to return the illegally obtained documents, and permanently enjoined him from further disseminating them. Order and Injunction at 23-24, 75-76, 78.

Mr. Gottstein appealed Judge Weinstein’s Order and Injunction to the Second Circuit. His appeal brief is now due on September 15.

II. THE DOCUMENTS AT ISSUE IN THIS APPLICATION

A. R. 8349: "Plaintiff's Reply to Eli Lilly's Response to Plaintiff's Motion Concerning Claims and Proofs"

This memorandum, submitted by the State in 2007, includes three attachments: a letter from the Food and Drug Administration to Eli Lilly and Company; Eli Lilly and Company's Responses and Objections to Plaintiff's First Interrogatories; and Eli Lilly and Company's Objections and Responses to Plaintiff's First Request for Production. As the FDA document in question was used at the trial in this matter, and the two sets of discovery responses do not contain information subject to a protective order, Lilly offers no objection to their unsealing.

B. R. 8352: "Plaintiff's Zyprexa Backgrounder"

This submission presented to the Court an early outline of the State's anticipated claims and proofs and, as is set forth in its opening paragraph, was "based upon confidential documents produced in *In Re: Zyprexa Products Liability Litigation*, MDL 1596." Attached to the State's submission are 37 exhibits. All but the following numbered attachments were either used at the trial of this matter, or have otherwise (lawfully) become publicly available: Exhibits 2, 8, 20, 29 and 33. For the reasons discussed below, Lilly objects to unsealing Exhibits 2, 8, 20, 29 and 33 (or any references to them in the "Backgrounder").

C. R. 8346: "Eli Lilly and Company's Supplemental Brief Seeking Dismissal of the State's Claims Pursuant to the UTP CPA Exemption and Federal Preemption" (and Exhibits Thereto).

Attached to that brief as Exhibit A is a declaration by Nina M. Gussack, Esq., along with 20 exhibits thereto. Information contained in the declaration and exhibits, and in some instances the exhibits themselves, were used at trial or have otherwise lawfully become publicly available, and Lilly offers no objection to their unsealing.

D. **R. 8348: “Defendant’s Notice of Filing Objections to Plaintiff’s Trial Deposition Designations Under Seal”**

As this pleading contains only deposition page/line listings (not the depositions themselves), and evidentiary objections, Lilly does not object to its unsealing.

III. ARGUMENT

Lilly opposes this application to the extent it seeks to unseal the following documents: Exhibits 2, 8, 20, 29 and 33 to the State’s Zyprexa Backgrounder (and any references to those exhibits in the Backgrounder). Those documents were among the ones illegally obtained and unlawfully disseminated by Mr. Gottstein, leading to their placement on the Internet.² Pursuant to Judge Weinstein’s Order and Injunction, he was required to return those documents to the Court, and is permanently enjoined from further disseminating them.

Because those documents fall squarely within the terms of Judge Weinstein’s Order and Injunction, and are implicated in the Second Circuit’s review of that Order, this Court should deny the current application or, in the alternative, stay it pending final resolution of Mr. Gottstein’s appeal (and any subsequent or collateral sanctions proceedings).

In July, this Court determined that concepts of comity did not apply to Bloomberg’s application to unseal certain documents (not including those described above) filed in this case. The Court was persuaded that “the concept of comity has no application in cases involving different parties, different causes of action, and different issues.” July 18, 2008 Order at 6 (citation omitted). Noting that Bloomberg “is not a party to either the Second Circuit Appeal or the MDL case,” that Bloomberg “is not enjoined by Judge Weinstein’s

² The fact that the documents were placed on the Internet as a result of Mr. Gottstein’s unlawful conduct should be of no moment here; Mr. Gottstein should not be permitted to benefit from his own wrongdoing by somehow claiming that the documents are no longer entitled to confidentiality because he took illegal steps to make them public.

Order,” and that Bloomberg had already obtained the documents at issue in that application in a lawful manner, this Court concluded that principles of comity did not warrant a stay of proceedings, “[b]ecause the parties, causes of action and issues before the respective courts are different” July 18, 2008 Opinion at 9-10.

The current application stands on a completely different footing. Unlike Bloomberg, Mr. Gottstein is a party to the proceedings before the Second Circuit and Judge Weinstein. Indeed, as the only party who appealed from Judge Weinstein’s Order and Injunction, he is at the center of those proceedings.

Unlike Bloomberg, Mr. Gottstein is permanently enjoined from disseminating the very documents he seeks to have this Court provide him.

Unlike Bloomberg, Mr. Gottstein previously obtained these documents in an unlawful manner, and was directed by Judge Weinstein to return them. Granting this application now will inject this Court into the Zyprexa MDL proceedings and will (although not purposefully) interfere with Judge Weinstein’s legitimate desire to enforce his orders. Mr. Gottstein “deliberately thwarted a federal court’s power to effectively conduct civil litigation under the rule of law.” Order and Injunction at 12. As Judge Weinstein noted in the Order and Injunction, a court’s power to enforce its orders, and to prevent them from being ignored or avoided with impunity “is a necessary prerequisite to the administration of justice; without it, courts would ill-equipped to insure the rule of law in a democratic society.” *Id.* at 55. Yet, if this application is granted, this Court will have given Mr. Gottstein access to documents Judge Weinstein ordered him to return, as well as a concomitant ability to argue that he can ignore Judge Weinstein’s injunction preventing further dissemination of those documents. A grant of this application will result in a second flaunting of Judge Weinstein’s orders—this time with judicial imprimatur. Such a result seems untoward and inequitable at best, and at worst is counterproductive and, while inadvertent, needlessly disrespectful of another court’s ability to enforce its orders.

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In addition, there can be little doubt that if this Court were to grant Mr. Gottstein access to the documents in question, he would use that ruling to attack Judge Weinstein's Order and Injunction, claiming that it should be vacated, at least in part, because he would now have "lawful" possession of some of the documents in question.

This Court should not accept Mr. Gottstein's thinly veiled invitation to enter the MDL proceedings, and provide him with a convenient bootstrap argument or free pass to evade the injunction against him. Mr. Gottstein's actions in obtaining and disseminating confidential documents—including those described above—in willful violation of Judge Weinstein's protective Order are under review by the courts directly responsible for that Order. This Court should defer to the Eastern District of New York and the Second Circuit as they complete their review of Mr. Gottstein's conduct, and it should let those proceedings run their course without the disruption that a grant of this application would create.

CONCLUSION

Because the grant of this application would, however inadvertently, aid Mr. Gottstein in evading a permanent injunction, and unnecessarily complicate and interfere with pending proceedings in a federal trial and appellate court as they deal with a willful violation of a federal court Order, this Court should either deny this application with respect to this subset of documents that remain at issue, or, in the alternative, stay its disposition pending resolution of the federal matter.


DATED this 2nd day of September, 2008.

I certify that on September 2, 2008, a copy of the foregoing was served by mail on:

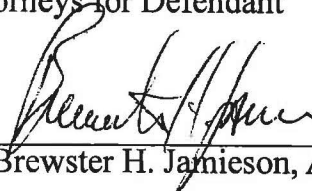
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**Defendant Eli Lilly and Company's Opposition to James Gottstein's
Administrative Rule 37.7(b) Request for Access to Certain Sealed Documents
State of Alaska v. Eli Lilly and Company (Case No. 3AN-06-05630)**