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

In The Matter of the Necessity for the Hospitalization of William Bigley,	)
	)
Respondent	)

Case No. 3AN 08-1252PR

REPLY TO OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, MOTION TO VACATE AND MOTION TO DISMISS AND THE ADDENDUM ATTACHED TO THE MOTION TO DISMISS

API has opposed in one pleading Respondent's separate motions (1) for summary judgment and (2) to dismiss, including the addendum to the motion to dismiss (Dispositive *Parens Patriae* Motions).[1] Respondent therefore files this unitary Reply regarding the Dispositive *Parens Patriae* Motions.

I. THE MOTION TO VACATE SCHEULING ORDER HAS ALREADY BEEN DECIDED

Respondent agrees with API that Respondent's Motion to Vacate the October 29th Hearing has been ruled upon. Section I of Respondent's Memorandum in Support of Motion to Dismiss was written before Respondent had been informed the commitment petition had been granted and is no longer relevant. It is thus unclear of what API is complaining in its Section III.

However, while Respondent accepted the November 5, 2008, hearing date set by the Court, he did not waive his due process rights to meaningful notice and a meaningful

[1] API's unitary response to the Dispositive *Parens Patriae* Motion) does not apparently cover Respondent's separate Motion to Dismiss .838 Count. Thus, at this point, the Motion to Dismiss .838 Count is unopposed.

opportunity to respond, which has been set forth a number of times already and won't be rehashed here, other than to note API has cited no authority in opposition to that cited by Respondent. In addition, all pending motions should be decided before the hearing. As will be shown below, Respondent is entitled to both dismissal of the *Parens Patriae* Count and and an order granting the requested less intrusive alternative as a matter of law.[2] No hearing is needed, at least with respect to the *Parens Patriae* Count, because API has failed to meet its burden in opposing the Dispositive *Parens Patriae* Motions.

II. STANDARDS

API correctly sets forth the standards for dismissal under Civil Rule 12(b)(6),[3] but misapplies them. With respect to its recitation of the standards for Summary Judgment under Civil Rule 56, API failed to acknowledged the key provision, subsection (e), which provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

[2] This Reply does not address the pending motion to dismiss the .838 Count, which at this point has not been opposed.

[3] However, in addition to Civil Rule 12(b)(6), in his Motion to Dismiss Respondent relied on due process and that API has admitted a dispositive fact. The admission is discussed a bit further in Section IV, below, but Respondent will rely upon his Memorandum in Support of Motion to Dismiss with respect to the due process issue.

III. THE FORCED DRUGGING PETITION IS FATALLY DEFECTIVE FOR FAILURE TO ALLEGE THE *MYERS* REQUIREMENTS

In *Myers v. Alaska Psychiatric Institute*,[4] the Alaska Supreme Court held:

> [A] court may not permit a treatment facility to administer psychotropic drugs unless the court makes findings that comply with all applicable statutory requirements and, in addition, expressly finds by clear and convincing evidence that the proposed treatment is in the *patient's best interests* and that *no less intrusive alternative is available*.

(emphasis added). The Forced Drugging Petition here only alleges the statutory requirement. Thus, the Forced Drugging Petition is legally insufficient. Even with all of the allegations of the Forced Drugging Petition being assumed true, it does not state a legally sufficient claim for relief under *Myers*.

IV. API HAS ADMITTED RESPONDENT'S CAPACITY

In his Motion to Dismiss and Addendum, Respondent has made the point that by offering Respondent the drugs API impliedly admitted he currently has capacity or had capacity "at the time of previously expressed wishes" under AS 47.30.839. In its Opposition, API fails to address the fundamental point that it is illegal for it to administer psychotropic drugs to someone who lacks capacity without receiving court authorization pursuant to a petition filed under AS 47.30.839. Either AI is illegally administering drugs to Respondent when he agrees to take them, or he has the requisite capacity. What API's Opposition shows is the disingenuous, to be charitable, nature of its determinations of

[4] 138 P.3d 238, 254 (Alaska 2006).

capacity.[5] In any event, having made the decision to accept the decisions by Respondent to grant informed consent to take the medication when he makes that decision, which Respondent has done many times, including recently, it must bear the legal consequences when Respondent decides to withhold informed consent. In sum, API has made the legal admission that Respondent has capacity to withhold consent, or had capacity when he previously expressed his wishes to withhold consent.

V. API HAS FAILED TO SET FORTH SPECIFIC FACTS SHOWING A GENUINE ISSUE OF FACT.

As set forth above, Civil Rule 56(e) requires API to produce affidavits or other competent evidence of facts to defeat Respondent's showing of facts. Any unrebutted fact set forth in Respondent's showing has to be deemed true.[6]

(A) The Best Interests Requirement

The Supreme Court held in *Myers*:

> Evaluating whether a proposed course of psychotropic medication is in the best interests of a patient will inevitably be a fact-specific endeavor. At a minimum, we think that courts should consider the information that our statutes direct the treatment facility to give to its patients in order to ensure the patient's ability to make an informed treatment choice. As codified in AS 47.30.837(d)(2), these items include:

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[5] In his deposition in the *Myers* case, Dr. Robert Hanowell explicitly testified that if someone agrees to take the medication he considers the patient competent and if the patient doesn't, he considers the patient incompetent. *See*, http://psychrights.org/States/Alaska/CaseOne/30-Day/Hanowelldepo.htm.

[6] *Bennett v. Weimar*, 975 P.2d 691, 694 (Alaska 1999) ("assertions of fact in unverified pleadings and memoranda cannot be relied on in denying a motion for summary judgment."). Here, the Forced Drugging Petition was verified, but that doesn't save it because it doesn't include the *Myers* requirements.

> (A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;
>
> (B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of dosages, possible side effects and benefits, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;
>
> (C) a review of the patient's history, including medication history and previous side effects from medication;
>
> (D) an explanation of interactions with other drugs, including over-the-counter drugs, street drugs, and alcohol; and
>
> (E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment[.][7]

The Alaska Supreme Court then cited with approval the Supreme Court of Minnesota's requirement of consideration of the following factors:

> (1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment;
> (2) the risks of adverse side effects;
> (3) the experimental nature of the treatment;
> (4) its acceptance by the medical community of the state; and
> (5) the extent of intrusion into the patient's body and the pain connected with the treatment.[8]

Respondent has submitted a tremendous amount of admissible evidence with respect to these best interests requirements. Respondent has also submitted a tremendous amount of admissible evidence with respect to the less intrusive alternative requirement.

The following is the admissible evidence submitted by Respondent:

(1) Affidavit of Loren Mosher, dated March 5, 2003, originally filed in 3AN 03-277 CI.

(2) Affidavit of Robert Whitaker, dated September 4, 2007, originally filed in 3AN 07-1064PR.

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[7] 138 P.3d 252.
[8] *Id.*

(3) Affidavit of Grace E. Jackson, MD, dated May 16, 2008, originally filed in 3AN 08-493PR.

(4) Affidavit of Grace E. Jackson, MD, dated May 20, 2008, originally filed in Alaska Supreme Court case No. S-13116.

(5) Transcript of the March 5, 2003, testimony of Loren Mosher, in 3AN 03-277 CI;

(6) Transcript of the May 14, 2008, testimony of Grace E. Jackson, MD, in 3AN 08-493PR.

(7) Affidavit of Ronald Bassman, PhD, dated September 4, 2007, originally filed in 3AN 07-1064PR.

(8) Affidavit of Paul Cornils, dated September 12, 2007, originally filed in 3AN 07-1064PR.

(9) Transcript of the September 5, 2007, testimony of Sarah Porter in 3AN 07-1064 PR.

This is an overwhelming case and Respondent won't try to describe it all here, other than to say it addresses the *Myers* Requirements and the following are particularly germane elements:

(A) The drugs have caused dysmentia or dementia in Respondent.

(B) The drugs otherwise cause a tremendous amount of brain damage.

(C) The drugs are particularly harmful to Respondent at this point in his life, with every dose causing serious harm.[9]

(D) If the drugs are continued to be administered it is likely they will kill Respondent within 5 years.

(E) Respondent's most likely proper diagnosis is Chemical Brain Injury from the drugs and this should preclude the attachment of any and all psychiatric labels at this time.

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[9] In fact, the Alaska Supreme Court noted in granting the Stay Pending Appeal in S-13116 noted that "even the administration of a single dose, or an additional dose, intravenously may contribute to irreparable harm."

(F) There are alternative treatments that are far less harmful with far better outcomes.

(G) Respondent's prospects will be dramatically improved if he is not forced by this Court to take the drugs.

API has failed to submit any admissible evidence against Respondent's showing[10] and therefore Respondent is entitled to summary judgment on the best interests issue. Respondent respectfully suggests there is no legitimate argument to the contrary.

(B)Less Intrusive Alternative

Respondent has also requested an order requiring API, as the agency exercising the State of Alaska's *parens patriae* power, to provide the following less restrictive alternative:

1. Respondent be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.

2. If involuntarily in a treatment facility in the future, Respondent be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.

3. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Respondent should he choose it.[11] API shall first attempt to negotiate an acceptable abode, and failing, that procure it and make it available to Respondent.

4. At API's expense, make sufficient staff <u>available</u> to be with Respondent to enable him to be successful in the community.

5. The foregoing may be contracted for from an outpatient provider.

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[10] Even if the testimony at the involuntary commitment hearing can be used in the context of this summary judgment motion, most of it is completely irrelevant to the facts involved in deciding the *Parens Patriae* Count because it doesn't address most of the *Myers* requirements.

[11] API may seek to obtain a housing subsidy from another source, but such source may not be Respondent's Social Security Disability income.

Respondent has also clearly set forth unrebutted facts on this, and the issue before this Court is whether these facts entitle him to relief as a matter of law. They do.

Respondent also cited authority establishing that once having invoked its awesome power to lock Respondent up and then file a petition to drug him against his will, API, as the agency exercising the State of Alaska's *parens patriae* power, is obligated to provide this less intrusive alternative.[12]

API addressed none of this authority, instead just asserting the requested less intrusive alternative is not related to the Forced Drugging Petition and "he will have to file a separate legal action." That Respondent has raised the issue multiple times in the past without it having been ruled upon only suggests it should be ruled upon now.[13]

The question is whether this Court will continue to allow the State to discharge Respondent to the revolving door criminal justice interactions that has been occurring since API discharged him "Against Medical Advice" on September 18, 2007,[14] after obtaining a commitment order based on API's sworn testimony that Respondent was so

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[12] *Wyatt v. Stickney*, 344 F.Supp. 387 (M.D.Ala.1972) ("no default can be justified by a want of operating funds."), affirmed, *Wyatt v. Anderholt, 503 F.2d 1305, 1315 (5th Cir. 1974),* (state legislature is not free to provide social service in a way that denies constitutional right); *Hootch v. Alaska State-Operated School System*, 536 P.2d 793, 808–09 (Alaska 1975)(Supreme Court won't hesitate to order State to provide constitutionally required services).

[13] It is also a question which the Alaska Supreme Court may decide in S-13116, but it also may not.

[14] Exc. 1 in Alaska Supreme Court Case No S-13116, a copy of which has been filed contemporaneously herewith.

gravely disabled he could not survive safely in the community,[15] in order to avoid being ordered to provide the requested less intrusive alternative then.[16] Respondent has demonstrated his legal right to the less restrictive alternative. The facts are unrebutted, The law is in his favor. It is appropriate for determination by summary judgment. It should be done.

VI. CONCLUSION

There being no genuine issue as to any material fact and Respondent being entitled to judgment as a matter of law, Respondent's Motion for Summary Judgment should be granted, denying the petition and ordering API to provide the following less intrusive alternative:

1. Respondent be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.

2. If involuntarily in a treatment facility in the future, Respondent be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.

3. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Respondent should he choose it.[17] API shall first attempt to negotiate an acceptable abode, and failing that, procure it and make it available to Respondent.

4. At API's expense, make sufficient staff <u>available</u> to be with Respondent to enable him to be successful in the community.

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[15] Page 82 of Judicial Notice Appendix filed in Alaska Supreme Court Case No. S-13116, a copy of which has been filed contemporaneously herewith (S-13116 Judicial Notice Appendix).
[16] Pages 149-158 of S-13116 Judicial Notice Appendix.
[17] API may seek to obtain a housing subsidy from another source, but such source may not be Respondent's Social Security Disability income.

5. The foregoing may be contracted for from an outpatient provider.

DATED: November 3, 2008.

Law Project for Psychiatric Rights

By: _____
James B. Gottstein
ABA # 7811100

Subject: Follow-up
From: Jim Gottstein <jim.gottstein@psychrights.org>
Date: Tue, 21 Oct 2008 18:29:49 -0800
To: Laura Derry <laura.derry@alaska.gov>

Hi Laura,

It was nice to meet you. I wanted to follow up a bit.

The first thing I want to emphasize is I would really like for us all to get together to try and work something out that has a chance for things to work for Mr. B and that maybe having a formal settlement conference or mediator would facilitate things.

The second thing, is I need a copy of everything in Mr. B's API chart for 2007 and so far in 2008 in order to be in a position to prepare if we get to the forced drugging petition.

--

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President/CEO

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Subject: Records Deposition
From: Jim Gottstein <jim.gottstein@psychrights.org>
Date: Thu, 23 Oct 2008 09:58:39 -0800
To: Laura Derry <laura.derry@alaska.gov>

Hi Laura,

Receiving no response to my demand for a complete copy of Mr. B's chart from the beginning of 2007, I will just go ahead and subpoena the records. If you want input into who and when, you should let me know immediately.

--

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Subject: Khari Deposition Subpoena
From: Jim Gottstein <jim.gottstein@psychrights.org>
Date: Thu, 23 Oct 2008 20:03:52 -0800
To: Laura Derry <laura.derry@alaska.gov>, Jim Gottstein <jim.gottstein@psychrights.org>
CC: Lisa Smith <Lisa@psychrights.org>

Hi Laura,

Not having heard from you, I am going to try and arrange a court reporter for Wednesday morning to take the deposition of Dr. Khari and then subpoena her. I will try and be accommodating as I can to your schedule, but without knowing what time frame I might be dealing with, I feel I need to get this done as soon as possible. Will you accept service of Dr. Khari's subpoena?

--

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Subject: RE: Dismissal of Med Petition
From: "Derry, Laura J (LAW)" <laura.derry@alaska.gov>
Date: Fri, 24 Oct 2008 09:45:16 -0800
To: Jim Gottstein <jim.gottstein@psychrights.org>

Jim,

Thank you. I am writing the motion right now, and will have it filed in superior court before noon.

Thank you for your patience, and speaking with me this morning. I enjoy our discussions.

Laura

From: Jim Gottstein [mailto:jim.gottstein@psychrights.org]
Sent: Friday, October 24, 2008 9:29 AM
To: Derry, Laura J (LAW)
Cc: Jim Gottstein
Subject: Dismissal of Med Petition

Hi Laura,

This is to confirm our discussion that API is going to dismiss the forced medication petition in 3AN 08-1252 PR and in reliance on this, I am canceling the deposition of Dr. Khari.

--

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Subject: This 'n That
From: Jim Gottstein <jim.gottstein@psychrights.org>
Date: Tue, 28 Oct 2008 11:00:55 -0800
To: Laura Derry <laura.derry@alaska.gov>
CC: Jim Gottstein <jim.gottstein@psychrights.org>

Hi Laura,

A few things:

- I need to schedule depositions, but I will need to have the chart for at least a day or so before that.
- I don't see any reason why I shouldn't get all his 2007 & 2008 chart by the end of tomorrow.
- Since it seems like a focus is going to be on the emergency justification, please provide *ex post hasto* (a Latin phrase I made up) all documentation pertaining to AS 47.30.838 medication against Bill for 2007 and 2008. I don't see why this shouldn't be available by the end of today because special record keeping is required.
- I need a copy of API's policy on emergency medication. Will you provide it or do I need to subpoena it.
- Who is in charge of/does training with respect to emergency medication?
- What witnesses other than Dr. Khari do you intend to call? I will need to take their depositions.
- Could you please give me your direct phone number?

--

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Subject: Re: Motion to quash depositions 3 am 08-1252 PR
From: Jim Gottstein <jim.gottstein@psychrights.org>
Date: Thu, 30 Oct 2008 17:56:12 -0800
To: "Derry, Laura J (LAW)" <laura.derry@alaska.gov>
CC: Jim Gottstein <jim.gottstein@psychrights.org>, Lisa Smith <Lisa@psychrights.org>
BCC: John McKay <mckay@alaska.net>

Hi Laura,

First, if Ron's subpoena said 9:00 pm, that was a mistake. Lisa was out sick yesterday and I sent her home today before I got your last e-mail because she is still sick and I hadn't located a copy of what we sent out in between your last e-mail and this one. So, that's why I hadn't responded yet.

In any event, yes, your assumption that I don't intend to withdraw the subpoenas is correct. I am, of course, as I've repeatedly said, willing to work with you with respect to the details.

You may also represent that I would be willing to submit my opposition to your motion to quash orally, in argument if we can do it tomorrow afternoon. Otherwise, I should be able to get my opposition in by noon on Monday. With respect to your offer to meet and confer, I have been saying we should do that for days and had to issue the subpoenas (as I said I would) because I ran out of time.

Derry, Laura J (LAW) wrote:

> Jim –
>
> In my most recent email, I don't think I was as clear as I needed to be regarding our disagreement over discovery. We do not believe you are entitled to discovery under a variety of theories. I assume you disagree with that position and are not willing to withdraw your subpoenas. Assuming I am correct, I will be filing motions to quash tomorrow, under an expedited basis. As required by the Civil Rule 77, I am informing you of our intent to move on an expedited basis to quash your subpoenas and assume we can inform the court that we have discussed this matter and have agreed to disagree.
>
> If you are willing to withdraw your subpoenas please advise; if we don't hear from you by noon tomorrow, we will file the above mentioned motions.
>
> Laura Derry

--

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Subject: RE: Subpoenas
From: "Derry, Laura J (LAW)" <laura.derry@alaska.gov>
Date: Fri, 31 Oct 2008 08:05:39 -0800
To: Jim Gottstein <jim.gottstein@psychrights.org>

Jim,

I will call you mid-morning. Thanks, Laura

From: Jim Gottstein [mailto:jim.gottstein@psychrights.org]
Sent: Friday, October 31, 2008 6:06 AM
To: Derry, Laura J (LAW)
Cc: Kraly, Stacie L (LAW); Jim Gottstein
Subject: Re: Subpoenas

Hi Laura,

I have realized that when I responded to this as part of my response to your later e-mail, I didn't include a response about the confidentiality of the transcripts. You can move for a protective order and I will agree to keep it confidential (to the extent not used at trial) for a reasonable amount of time after the relevant deposition(s)--say a week--for you to file for such a protective order. If you want to draft up a stipulation to that effect for me to review, go ahead.

Derry, Laura J (LAW) wrote:
Jim,

I'm sorry if I have inconvenienced you. It is not the practice of the Human Services section to accept service on behalf of our clients. Mr. Adler will be available tomorrow morning for you to serve him with your subpoena—at a reasonable time—around 9am.

As a second and equally important matter, API does not believe that discovery is proper for this type of proceeding, and this specific case. Should discovery occur, we wish to meet and confer with you regarding the depositions. Given the late notice, and the fact that you wish to depose psychiatrists on Monday, and they are responsible for the care of multiple patients, it will be difficult if not impossible to produce these witness at the times requested. Also, the 9pm deposition of Ron Adler is a time that should only be allowed, at the convenience of the witness. We would like to confer with you regarding alternate days and times as mutually agreeable between the witnesses and parties, furthermore the state requests that the transcripts from these requests be maintained as confidential.

Thank you,
Laura Derry

From: Jim Gottstein [mailto:jim.gottstein@psychrights.org]
Sent: Thursday, October 30, 2008 2:55 PM
To: Derry, Laura J (LAW)
Cc: Kraly, Stacie L (LAW); Jim Gottstein
Subject: Subpoenas
Importance: High

Hi Laura,

I will ask you again if you will accept service of subpoenas for API employees? We have served the deposition subpoena on Dr. Khari, but Mr. Adler was not there. His assistant said he was at a conference today and tomorrow and would be out of town on Monday. As I wrote you and left voice mail earlier, I will work with you on the schedule as I can. So, maybe we should do it Saturday or Sunday. I think you are obligated to work with me on this. I will object to your calling any witness(es) whose deposition I was

unable to take, especially due to your refusal to accept service.

--

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