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★ OCT 21 2008 ★

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BROOKLYN OFFICE

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**ORDER ON
DISCOVERY APPEAL AND
SPECIAL SETTLEMENT
MASTER**

In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

04-MD-1596

-----X

JIM HOOD, ATTORNEY GENERAL OF THE
STATE OF MISSISSIPPI, ex rel. THE STATE OF
MISSISSIPPI,

07-CV-645

Plaintiff,

vs.

ELI LILLY & COMPANY,
Defendant.

-----X

STATE OF LOUISIANA, ex rel. CHARLES
C. FOTI, JR., ATTORNEY GENERAL,
Plaintiff,

05-CV-01549

vs.

ELI LILLY & COMPANY,
Defendant.

-----X

CHARLES FOTI, ATTORNEY GENERAL,
ex rel. STATE OF LOUISIANA,
Plaintiff,

05-CV-1455

vs.

ELI LILLY & COMPANY, INC., et al.,
Defendants.

-----X

STATE OF WEST VIRGINIA ex rel. DARRELL
V. MCGRAW, JR., ATTORNEY GENERAL,
Plaintiff,

06-CV-5826

vs.

ELI LILLY & COMPANY,
Defendant.

-----X
STATE OF NEW MEXICO, ex rel.
PATRICIA MADRID, ATTORNEY GENERAL
OF THE STATE OF NEW MEXICO,
Plaintiff,

07-CV-1749

vs.

ELI LILLY & COMPANY,
Defendant.

-----X
THE STATE OF MONTANA, ex rel.
MIKE MCGRATH, Attorney General,
Plaintiff,

07-CV-1933

vs.

ELI LILLY & COMPANY,
Defendant.

-----X
STATE OF CONNECTICUT,
Plaintiff,

08-CV-955

vs.

ELI LILLY & COMPANY,
Defendant.

-----X

JACK B. WEINSTEIN, Senior United States District Judge:

I. Introduction

These cases brought by Attorneys General are part of a wide-ranging series of lawsuits based upon allegations of fraud by Eli Lilly & Company ("Lilly") in advertising and distributing its drug Zyprexa for a variety of mental health problems. *See, e.g., In re Zyprexa Products Liability Litigation*, 2008 U.S. Dist. LEXIS 71037, *13-24 (E.D.N.Y. 2008) (discussion of other Zyprexa cases). Most of the suits brought by Attorneys General have been settled. *See Alex*

Berenson, *33 States to Get \$62 Million in Zyprexa Case Settlement*, N.Y. Times, October 7, 2008, at B7.

After settlement by more than thirty states, there are still pending cases against Lilly brought by Attorneys General from eleven states. In this court are cases by Connecticut, Louisiana, Mississippi, Montana, New Mexico, and West Virginia. The Idaho Attorney General's case against Lilly is in the process of being transferred to this court by the Multi-District Litigation Panel. Cases brought by Arkansas, Pennsylvania, South Carolina, and Utah are before state courts.

While most states have settled their cases against Lilly for a few million dollars each, the states with cases now pending in this court – Connecticut, Louisiana, Mississippi, Montana, New Mexico, and West Virginia – are seeking, on essentially the same theories and evidence, many billions of dollars in damages and fines.

In the discussion which follows, two issues are addressed: first, plaintiffs' appeal from the magistrate judge's order on discovery is discussed. *See* 9/24/08 Memorandum and Order, Docket No. 04-MD-1596, Docket Entry ("D.E.") No. 1900 ("order"). The order is affirmed. Second, steps to encourage settlement are outlined and a Special Settlement Master is appointed.

II. Appeal from Discovery Order

A. Deference to Magistrate Judge Ruling

Federal Rule of Civil Procedure 72(a) provides for deferential review of a magistrate judge's determinations. The reviewing court may modify or set aside the magistrate judge's order on a nondispositive pretrial matter such as discovery only if it is found to be "clearly erroneous" or "contrary to law." Fed. R. Civ. P. 72(a). The magistrate judge's order may be

reversed only if there is clear error. *See Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990) (finding that matters involving pretrial discovery are generally considered “nondispositive of the litigation” and thus are subject to the “clearly erroneous or contrary to law standard” on review by a district court).

B. Privilege

The magistrate judge has demonstrated why privilege under federal or state law does not prevent operation of her discovery order. *See Order at 3-7.*

The doctrine of waiver also applies. State and federal law provides for the waiver of a privilege by a plaintiff who attempts to use the privilege to block the defendant from obtaining evidence needed to mount a defense against plaintiff’s claims. As Judge Learned Hand wrote:

[T]he privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition...for disputes ought to be settled so far as they can be by resort to the whole truth; and when the only excuse for darkness ceases, it is shocking to shut out the light.

United States v. St. Pierre, 132 F.2d 837, 840 (2d Cir. 1942) (5th Amendment privilege), *cert. dismissed as moot*, 319 U.S. 41 (1943); *see also* 3 Margaret A. Berger et al., *Federal Evidence* § 511.05 (Gen. ed. Joseph M. McLaughlin) (Rev. ed. 2008) (“Initiating and maintaining a lawsuit may waive any privilege that applies to matters at issue in the case.”).

“Fairness considerations may also come into play where the party asserting the privilege makes factual assertions, the truthfulness of which may be assessed only by an examination of the privileged communications or documents.” *Falise v. American Tobacco Co.*, 193 F.R.D. 73, 84 (E.D.N.Y. 2000) (attorney-client and work-product); *see also In re Steinhardt Partners, L.P.*,

9 F.3d 230, 235 (2d Cir. 1993) (“selective assertion of privilege should not be merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage”). Cf. *In re County of Erie*, No. 07-5702, slip op. at 12-13 (2d Cir. Oct. 14, 2008) (describing unfairness where a party asserts a fact but denies its adversary access to material that could possibly rebut that fact).

A party cannot use the “shield” of privilege to disable a defendant. Utilization of privilege by a plaintiff to cripple a fair defense would violate due process. See, e.g., *McMillan v. City of New York*, No. 08-2887, 2008 WL 4555550 (E.D.N.Y. October 14, 2008).

C. Application of Law

The discovery order of the magistrate judge is confirmed. It is based upon a fair and cogent analysis of the reasonable needs of all parties.

It has been established that the records at issue are relevant to this case. See Case Management Order 1, Docket No. 04-MD-1596, D.E. No. 1821. The magistrate judge has provided an extensive and reasoned discussion of the issues of individual patient privacy and the mechanism for production. She has reduced discovery so far as it is practicable to do so. Much of the load has been placed on Lilly, including major financial costs.

Despite effective efforts by the magistrate judge to minimize discovery, the procedures that have been ordered will be expensive and burdensome. Moreover, there may be a burden imposed on health care providers, who already face significant stresses. Nevertheless, the damages being sought are substantial, and plaintiffs must recognize their responsibility for discovery if they wish to prosecute their suits.

Plaintiffs may not assert the physician-patient or other privileges in order to deprive the defendant of material reasonably needed for its defense. If a plaintiff wishes to withhold critical records based on state privileges, or because of a desire to protect privacy, it is free to do so by withdrawing its claims. By initiating and maintaining this lawsuit, a plaintiff waives privileges blocking essential discovery.

The redaction of medical records ordered by the magistrate judge adequately addresses concerns about privilege and patient privacy. *See Order at 12; In re Rezulin Products Liability Litigation*, 178 F.Supp.2d 412, 416 (S.D.N.Y. 2001). She fully considered and came to appropriate conclusions regarding the application of federal and state privileges and the protection of individual patients' privacy. Her order provides for an efficient means of production, sensitive to the needs of all parties, including providers and patients.

The magistrate judge's discovery order is not clearly erroneous or contrary to law. The appeal from the order is denied.

D. Stay

The order is stayed for thirty days. This delay will permit the parties and any other persons to consult on settlement and other matters. It may avoid or reduce the need for discovery. Any party may request a further extension of the stay.

III. Settlement

A. Desirability of Settlement Now

Every effort should be made to settle all pending cases brought by Attorneys General which are before this court, and any other like cases in federal or state court. It would be useful

to settle all pending Attorney General claims at the same time since the issues in each are much the same. Further delays will unnecessarily increase transactional costs.

In view of the applicable statute of limitations, it is unlikely that any new cases can be brought successfully. A global settlement of all cases, including those pending in state courts, is desirable. *See* Hearing Tr. of October 17, 2008 at 61-64.

B. Settlement Discussions Aided by Special Settlement Master

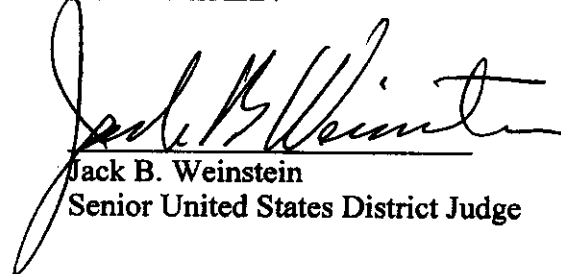
The parties in the captioned cases are directed to engage in settlement discussions. Michael K. Rozen is appointed Special Settlement Master. *See* Attached Vitae. Fees for the Special Settlement Master shall be arranged among the parties.

In connection with settlement, or for any other purposes, this court and the Special Settlement Master will fully cooperate with any federal or state judge conducting a related Attorney General case.

C. Modification of Order

Any party or person may move within ten days for a modification of this settlement order.

SO ORDERED.



Jack B. Weinstein
Senior United States District Judge

Date: October 21, 2008
Brooklyn, N.Y.

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Mr. Rozen is a partner in The Feinberg Group, LLP specializing in the negotiation, mediation and settlement of complex, multi-party disputes. Mr. Rozen has successfully negotiated or mediated thousands of disputes in such areas as products liability – including asbestos, lead paint, fen-phen, zyprexa, medical devices, and others – toxic tort and environmental insurance coverage, shareholder class actions, employment discrimination, intellectual property and numerous other business and commercial matters.

In addition to his work as a privately retained settlement counsel, mediator and arbitrator, Mr. Rozen served as the court-appointed Special Settlement Master/Referee for asbestos litigation, in a joint federal and state appointment, in the Southern and Eastern Districts of New York and New York State Supreme Court from January 1994 through July 1999, as well as the Special Discovery Master/Referee for asbestos litigation in the City of New York from September 1996 through July 1999. Mr. Rozen has also served as Special Settlement/Discovery Master, In re Informix Corporation Securities Litigation (securities fraud class action); Court-appointed Mediator, Rapid American v. Allstate Insurance Co. et al. (insurance coverage action involving numerous carriers); Special Settlement/Discovery Master, Herman v. Westinghouse Electric Company (employment discrimination class action); Special Settlement Master, Cook v. Georgia Pacific Corp., et al. (consolidation of asbestos cases); Court-appointed Mediator, Maxicare Health Plans, Inc. v. Pennsylvania Dept. of Public Welfare, et al. (health care bankruptcy); Special Settlement Master, In re Eastern District Asbestos Litigation (consolidation of asbestos cases remanded from MDL court); Special Master, In re Certain Lead Paint Cases (appointed by court to allocate settlement funds among numerous individuals); Special Settlement Master, In re Zyprexa Products Liability Litigation. Mr. Rozen has assisted many corporations with so-called prepackaged or prenegotiated asbestos bankruptcies, and advises numerous companies on their litigation and settlement strategy. In addition, Mr. Rozen was a Deputy Special Master of the United States government's September 11th Victim Compensation Fund of 2001.

Mr. Rozen is an active member of various bar associations and has served as chair or co-chair of ADR and tort committees. He has appeared as a panelist on numerous ABA, PLI and private programs, and has lectured extensively throughout the U.S. and abroad to corporations, investors, attorneys and the judiciary on ADR, mass torts, complex litigation, ethics and other matters. Mr. Rozen is also a member of the Board of Directors of Human Rights First.

Mr. Rozen received a B.A. from Tufts University in 1986 and a J.D. from Georgetown University Law Center in 1989, where he was a member of the American Criminal Law Review. Mr. Rozen practiced as a litigator at Kaye, Scholer, Fierman, Hays & Handler from 1989 to 1993 and joined The Feinberg Group at its inception in March 1993.