

Motion To Compel Granted In Trademark Row Involving Health Care Fraudster

BROOKLYN, N.Y. — A New York federal magistrate judge on April 21 granted a pharmaceutical company's motion to compel in a Lanham Act trademark infringement case, seeking documents related to fee arrangement between defense counsel and his client, who pleaded guilty to conspiracy to commit health care fraud in a related case, finding in part that "the requested information is relevant" because plaintiffs in Lanham Act suits may recover a defendant's profits (Gilead Sciences, Inc., et al. v. Peter Khaim, et al., No. 24-4259, E.D. N.Y., 2025 U.S. Dist. LEXIS 75105).

(Opinion and order available. Document #20-250509-037Z.)

Magistrate Judge Joseph A. Marutollo of the U.S. District Court for the Eastern District of New York issued the opinion and order.

'Brazen Counterfeiting'

Gilead Sciences Inc., Gilead Sciences Ireland UC and Gilead Sciences LLC (collectively, Gilead) creates and sells a variety of medical products, including drugs that aim to either treat or prevent HIV. The products bear marks that establish their connection to Gilead. After a series of complaints from both patients and pharmacies, Gilead says it learned that a pharmaceutical distributor had purchased counterfeit Gilead products, with more than a 100,000 bottles of Gilead medications allegedly involved.

In June 2024, Gilead brought the instant case against Peter Khaim and a host of pharmaceutical stores, and individuals, including Irina Polvanova, bringing claims of trademark infringement in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114; false descriptions and false designations of origin in violation of Section 43 of the Lanham Act, 15 U.S.C. § 1125; false advertising in violation of Section 43 of the Lanham Act; trademark dilution in violation of Section 43 of the Lanham Act and New York General Business Law Section 360-1, N.Y. Gen. Bus. Law § 360-1; deceptive business practices in violation of New York General Business Law § 349, N.Y. Gen. Bus. Law § 349; and common-law claims of unjust enrichment and unfair competition. Gilead is also litigating a separate case in the same District Court involving the alleged scheme, Gilead Sciences, Inc. v. Safe Chain Solutions LLC, No. 21-4106, E.D. N.Y. Khaim is a defendant in that suit as well.

In the instant case, Gilead calls Khaim "among the largest and most brazen manufacturers and sellers of counterfeit Gilead medications." Gilead says Khaim continues to sell counterfeit HIV medications in multiple pharmacies. Shortly after the filing of the suit, the District Court granted Gilead's proposed seizure order, allowing Gilead to search Khaim's possessions, including electronic records.

Khaim has been convicted in two criminal proceedings. According to a June 2024 press release from the U.S. Attorney's Office for the Eastern District of New York, Khaim was sentenced to 97 months in prison for submitting fraudulent claims through a series of pharmacies to Medicare. Prosecutors said Khaim and his brother, Arkadiy Khaimov, "engaged in a complex money laundering conspiracy to launder the proceeds of a fraudulent health care scheme involving over a dozen New York-area pharmacies that they, and their co-conspirators, owned and controlled." Khaim entered a guilty plea in November 2022.

Additionally, prosecutors in the U.S. District Court for the Southern District of New York accused Khaim of taking part in a similar scheme involving medical and accident insurance claims, according to an indictment. Khaim entered guilty pleas on three counts of conspiracy to commit an offense against the United States in November 2023 and was sentenced in June 2024 to five years in prison on each count,

with the sentences to run consecutively. Twelve months of Khaim's sentence in the Eastern District of New York will be served consecutively with the Southern District sentence, while the remaining time will be served concurrently.

Asset Freeze Order

On June 18, Judge Natasha C. Merle granted Gilead's motion for an asset freeze order against certain defendants, including Khaim and Polvanova.

This order was converted to a preliminary injunction on July 16.

Polvanova is also a defendant in a criminal action in a case captioned United States of America v. Aminov, No. 23-CR-110 (MKV), a case that accused her of participating in a purported scheme to defraud private insurers and Medicare and Medicaid by trafficking black-market HIV medication.

On Oct. 1, 2024, Polvanova pleaded guilty to conspiracy to commit health care fraud in violation of Title 18 U.S. Code Sections 371 and 1347, 18 U.S.C. §§371, 1347. As part of the plea agreement, Polvanova agreed to forfeit \$94,000. The parties have since agreed that Polvanova will pay restitution totaling \$1,122,000. Polvanova is scheduled for sentencing in that case on May 14.

Motion To Stay Discovery

On Aug. 27, Polvanova moved to stay discovery in the instant case for 90 days pending the outcome of the criminal action.

In a Sept. 12 minute entry, Magistrate Judge Marutollo ordered all fact discovery to be completed by Feb. 12, 2025, and for expert discovery to be completed by June 13, 2025.

The magistrate judge on Sept. 20 granted in part and denied in part Polvanova's motion, staying discovery related to her change of plea hearing on Oct. 1, 2024, on the criminal case.

Polvanova renewed her motion to stay until the conclusion of sentencing in the criminal case.

After the magistrate judge denied her motion to stay on Oct. 10, Polvanova appealed.

Judge Merle denied the appeal on Dec. 17.

Ankle Monitor

Meanwhile, Polvanova's co-defendant, Khaim, as part of his conditional release on the criminal case in the Eastern District, wore an ankle monitor continuously from Dec. 21, 2020, to Sept. 11, 2024. In July 2024, Gilead subpoenaed BI Inc., the company that manufactured the ankle monitor and collected its data.

Gilead sought data to assist in the discovery process in the instant case. It sought all information related to Khaim's movements from June 1, 2023, to the time of the filing of the subpoena. Gilead then moved for an order compelling BI to comply with the subpoena.

According to Gilead, it needed the data to show that Khaim visited some of the pharmacies listed as co-defendants in the case. Gilead further said that BI indicated that it did not oppose complying with the subpoena.

In August, Khaim moved to quash the subpoena, arguing that compelling BI to comply with the subpoena would be tantamount to violating his rights to privacy and against self-incrimination.

Standing

On Nov. 5, the magistrate judge issued an order denying Gilead's motion and granting Khaim's motion to quash the subpoena.

The magistrate judge said Khaim's interest in the data is enough to establish that he has standing to object to the subpoena.

However, the magistrate judge said that even if Khaim did not have standing, the court could still exercise its own authority in choosing to order compliance with the subpoena.

Discovery Request

The magistrate judge then discussed whether the subpoena complies with federal rules. He said that "the Court is doubtful that *all* of the GPS data sought from Mr. Khaim's ankle monitor — thousands of hours of data — is relevant to [the] underlying claims." Magistrate Judge Marutollo said that while the data would undoubtedly show at least some valuable information regarding Khaim's interactions with the pharmacies, it would also produce totally irrelevant information.

Even if the data were all relevant, though, the scope of the requested data is not proportionate to Gilead's needs in the case, the magistrate judge said.

But, the judge said, "even if Gilead's discovery request conformed with the scope and limitations of [Federal Rule of Civil Procedure 26, Fed. R. Civ. P. 26], and even if Gilead's discovery request was not premature, the Court has serious concerns about whether the subpoenaed data intrudes on Mr. Khaim's privacy interests." The judge said Khaim consented to only the government, not Gilead, tracking his movements.

Motions To Compel

On Nov. 18, Gilead filed its first motion to compel against Polvanova, seeking compliance with a subpoena it served on her to disclose information related to her fee arrangement and payments to Moses & Singer.

Magistrate Judge Marutollo on Dec. 22 denied the motion as to requested information from Moses & Singer without prejudice.

Polvanova renewed the motion the following month and the magistrate judge on Feb. 6 again denied the motion to compel.

After the parties advised the court multiple times that they were attempting a compromise on the dispute regarding the motion to compel, Gilead filed its renewed motion to compel on March 12.

Motion To Compel Granted

Granting the motion to compel, the magistrate judge ordered Polvanova to "comply with the subpoena and produce all non-privileged documents and information sufficient to show" the source of payments

and dates and amounts of payments to Moses & Singer since they started representing her in the criminal action.

As an initial matter, the magistrate judge determined that the information requested is not privileged.

Further, the magistrate judge said that Polvanova “has not demonstrated that the requested information falls under any ‘special circumstances’ that warrants denial of Gilead’s request,” quoting Vingelli v. United States, 992 F.2d 449 (2d Cir. 1993).

Magistrate Judge Marutollo also found that the information requested was both relevant and proportional.

“Here, Gilead’s discovery request is within the scope of Rule 26 and permitted under Rule 45 [Federal Rule of Civil Procedure 45, Fed. R. Civ. P. 45].”

The magistrate judge explained that the information is relevant because plaintiffs alleging trademark infringement and suing under the Lanham Act may recover a defendant’s profits and is proportional to the needs of the case because “the period of information requested has been narrowed to when Moses & Singer began representing Defendant in the Criminal Action” and “will be subject to the confidentiality order governing this matter.”

Counsel

Gilead is represented by Geoffrey Potter, Timothy A. Waters and Thomas P. Kurland of Patterson Belknap Webb & Tyler LLP in New York.

Khaim is represented by Oleg A. Mestechkin and Wing K. Chiu of the Mestechkin Law Group PC in New York.

Polvanova is represented by Robert S. Wolf, Christopher Kim and Mark N. Parry of Moses & Singer LLP in New York.

(Additional documents available: **Gilead’s renewed motion compel with attachments.** Document #20-250509-038M. **Polvanova’s response in opposition.** Document #20-250509-039B. **Nov. 5 order.** Document #16-241118-402R. **Gilead’s complaint.** Document #16-241118-409C.)