

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE:

3
4 ZYPREXA LITIGATION,

5 MDL 04 1596

6 United States Courthouse
Brooklyn, New York

7 -----x

8 January 16, 2007
2:00 p.m.

9
10 TRANSCRIPT OF HEARING

11 Before: HON. JACK B. WEINSTEIN, District Judge

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Proceedings recorded by mechanical stenography, transcript
produced by computer.

THE COURT: Mr. McKay, are you admitted in this
district?

MR. McKAY: Your Honor, I have a pro hac vice
application. I have the certificate with me and the check
but.

THE COURT: Mr. John McKay is admitted for the
purposes of this case. We're very pleased to have such a
distinguished attorney join us here.

MR. McKAY: Thank you, your Honor.

THE COURT: Any other applications for admission.

MR. MILSTEIN: Alan Milstein.

THE COURT: You are admitted where?

MR. MILSTEIN: New Jersey, Pennsylvania, Southern
District of New York.

THE COURT: And you are applying for admission for
purposes of this case?

MR. MILSTEIN: Correct, your Honor.

THE COURT: You are admitted. We're very pleased to
have you.

MR. VON LOHMANN: Fred Von Lohmann of the Electronic

1 Frontier Foundation.

2 Your Honor was very kind enough to sign my
3 application last week.

4 THE COURT: Very pleased to have you. You are
5 admitted where?

6 MR. VON LOHMANN: Northern District of California,
7 Southern District of California, Ninth Circuit.

8 THE COURT: Has everybody who wishes a notice of
9 appearance done so?

10 THE CLERK: Civil cause for order to show cause In
11 Re Zyprexa Products Liability Litigation.

12 Do we have any counsel on telephone for
13 the 2:00 Zyprexa order to show cause?

14 MR. OAKS: I'm not counsel. This is David Oaks.
15 Our counsel is Ted Chabasinski.

16 THE COURT: Restate your name, sir.

17 MR. OAKS: My name is David Oaks, O A K S. I'm
18 director of MindFreedom International.

19 THE CLERK: Anyone else?

20 THE COURT: What is your attorney's name, sir?

21 MR. OAKS: Ted Chabasinski.

22 THE COURT: Spell it, please.

23 MR. OAKS: C-H-A-B-A-S-A-N -- I-N-S-K-I, I hope I
24 got it right.

25 Do you want to read that one back.

1 MR. CHABASINSKI: I'm on the line now. Who is
2 asking for this information?

3 THE COURT: The Court.

4 MR. CHABASINSKI: My name is spelled
5 C-H-A-B-A-S-I-N-S-K-I.

6 THE COURT: Are you admitted in this district?

7 MR. CHABASINSKI: I've been appearing in this matter
8 for several hearings now.

9 THE COURT: Where are you admitted?

10 MR. CHABASINSKI: I'm admitted to practice in all
11 courts in California including the federal courts but my
12 participation has not been questioned up to now.

13 THE COURT: You are admitted for the purposes of
14 this case. We're pleased to have you.

15 MR. CHABASINSKI: Is this Judge Weinstein speaking?

16 THE COURT: It is.

17 When any of you speak, would you please give your
18 name and the people who are present here will do the same so
19 that you'll know who is speaking and I'll try to do the same
20 because we have a reporter.

21 Whose application is this?

22 MR. FAHEY: Your Honor, it's our application for an
23 order to show cause with respect to Mr. Gottstein's deposition
24 and connected document production.

25 THE COURT: Is Mr. Gottstein present?

1 MR. GOTTSTEIN: Yes, your Honor.

2 MR. McKAY: Your Honor, I am Mr. Gottstein's
3 attorney.

4 THE COURT: Yes, I know, but he is present
5 physically?

6 MR. McKAY: Yes.

7 THE COURT: We're going to take evidence as needed
8 on this matter.

9 Now, since he has come down to New York, I suggest
10 that it might be useful to either have him give his deposition
11 today and tomorrow morning or skip the deposition and have him
12 testify and we'll take his testimony as part of the deposition
13 and direct testimony so that he is saved the inconvenience of
14 either having to come down twice or having to also give a
15 deposition in Alaska.

16 MR. McKAY: May I speak to that, your Honor?

17 THE COURT: Yes.

18 MR. McKAY: I realize that everybody has been
19 leaving you with I don't know if it's a lot of paper.

20 THE COURT: Give you name.

21 MR. McKAY: This is John McKay speaking, attorney
22 for Jim Gottstein.

23 Your Honor, may I ask if you have had a chance to
24 review the response to the order to show cause by Mr.
25 Gottstein?

1 THE COURT: I have read everything that has come
2 into the courthouse.

3 MR. MCKAY: Thank you. Then I appreciate
4 your Honor's suggestion concerning the deposition and perhaps
5 no need to do that and I guess what I was going to suggest is
6 that I believe our position is that by the end of the hearing
7 today on the injunction, which was the principal purpose for
8 this, that it may appear that there is no reason to go further
9 and that we can take up at that point whether there is any
10 need to go any further with the proceedings.

11 THE COURT: As I understood your papers, you are
12 proposing to put Mr. Gottstein on the witness stand.

13 MR. MCKAY: If need be, your Honor. I think their
14 burden is to establish that there was a violation that there
15 was an injunction that is appropriate. If we need to, we
16 will.

17 THE COURT: He is here, they can call him.

18 Since the burden is on Lilly, is there anything
19 you'd like to say before you proceed with your case?

20 MR. FAHEY: Your Honor, our request for the order to
21 show cause was for his deposition but it was also for
22 documents and the reason why we wanted the documents was
23 because up to this point the Court and the parties involved
24 are only in possession of documents that Mr. Gottstein has
25 chosen to provide the Court and the parties.

1 We believe that there are a number of communications
2 which he has disclosed in his writings which he has not
3 produced which would shed additional light on the issues
4 relating to his aiding and abetting Dr. Eagleman's breach of
5 case management order number 3.

6 While we believe the documentary evidence we
7 submitted prior to this hearing and which we could elicit
8 today would clearly demonstrate that Mr. Gottstein aided and
9 abetted Dr. Eagleman, we do not want to or we'd like to
10 reserve the right to have additional documents to further show
11 the full nature of Mr. Gottstein's contempt.

12 THE COURT: You do have a considerable number of
13 documents already. I suggest that you may want to just call
14 him as a witness and ask him about the other documents and if
15 there is a critical document, I suppose we can have it faxed
16 down or provide for it, but I'd rather proceed quickly with
17 this matter.

18 MR. McKAY: John McKay.

19 I understand there is speculation that there
20 possibly is something that might help their case but I can
21 tell you I know of nothing and so I think we can proceed as
22 you suggested and if there appears there is something that is
23 necessary, we can deal with that.

24 THE COURT: Then we'll proceed with the hearing.
25 This is an evidentiary hearing. Lilly will proceed. It has

1 the burden of proof.

2 MR. LEHNER: Thank you, your Honor.

3 This is George Lehner for Pepper Hamilton on behalf
4 of the defendant Eli Lilly and we are proceed to proceed.

5 The issue that is before the Court and that I will
6 address and which Mr. McKay suggested should be the first
7 issue we need to consider is whether or not the temporary
8 mandatory injunction that was entered first on December 29 by
9 Judge Cogan then extended and modified by this Court on
10 January 4th should be made permanent.

11 I believe the factual record for the continued basis
12 for the temporary injunction has been developed already
13 through a series of hearings before first Special Master
14 Woodin, Magistrate Mann and ultimately Judge Cogan. We have
15 for these proceedings submitted a proposed finding of fact
16 which outlines in detail the necessary factual predicate for
17 making this injunction permanent. Much of the material
18 findings of fact are documents and letters that have been
19 previously submitted to the Court. In addition, there is an
20 affidavit from the law firm, from the Lineer law firm which
21 initially retained Dr. Eagleman. And it is important to note
22 I think in the outset that the application for the injunction
23 that has been made and that is before you today is made on
24 behalf of both Lilly and the plaintiffs' steering committee
25 both of whom are party to the protective order that has been

1 violated in this case and both of them recognize the
2 fundamental interests at stake when what happened here,
3 private parties affirmatively choose to subvert and order of
4 this Court and to decide to take the law into their own hands
5 to advance their own private agenda.

6 Let me review briefly the facts that have been
7 developed to date. Then we would call Mr. Gottstein to
8 testify.

9 As the Court knows, and as I just noted, Dr.
10 Eagleman was retained by the Lineer law firm --

11 THE COURT: I have read all the papers. You now
12 have the burden of proof. If you are going to introduce
13 documents, you'll have to do it in the regular course. If you
14 are going to call witnesses, you are going to have to do it.

15 I don't really need at this point, having read all
16 of the submissions, an opening statement.

17 MR. LEHNER: Then I think we would be prepared to
18 call Mr. Gottstein to the stand and have them testify as to
19 his involvement with Mr. Eagleman and his own involvement in
20 disseminating the documents that were subject to the
21 protective order.

22 So at this time we would call Mr. Gottstein to the
23 stand, please.

24 And if I might, I would turn the microphone over to
25 my colleague, Mr. Fahey, who will conduct the examination.

1 THE COURT: Would you take the stand.

2 THE WITNESS: May I can take notes, your Honor?

3 THE COURT: You may, however any notes you take will
4 be subject to inspection by the attorneys.

5 THE WITNESS: Thank you, your Honor.

6 THE COURT: Would you swear the witness.

7 THE CLERK: Would state your name for the record.

8 THE WITNESS: James V -- Jim Gottstein,
9 G-O-T-T-S-T-E-I-N.

10 JAMES V. GOTTSTEIN, having been called as a
11 witness, first being duly sworn, was examined and
12 testified as follows:

13 DIRECT EXAMINATION

14 BY MR. FAHEY:

15 Q Good afternoon, Mr. Gottstein.

16 My name is Sean Fahey.

17 You're an attorney, correct?

18 A That's correct.

19 Q And you graduated from Harvard Law School?

20 A Yes.

21 Q You are licensed from the State of Alaska?

22 A Yes.

23 Q You've been practicing as an attorney in Alaska for over
24 20 years, correct?

25 A Correct.

1 Q As an attorney you are also an officer of the Court,
2 correct?

3 A Absolutely.

4 Q And as an attorney and officer of the Court, you have an
5 obligation to be truthful to the Court, correct?

6 A Absolutely.

7 Q That is true when you use the Court's subpoena power,
8 right?

9 A Absolutely.

10 Q You would agree that the privilege to use the Court's
11 subpoena power sets attorneys apart from most other
12 professions?

13 A The subpoena power is very powerful and I understand it.

14 Q And as an attorney, you have an obligation when using the
15 subpoena power in terms of those privileges that our
16 profession provides, correct.

17 A Yes.

18 Q With that privilege comes responsibility, correct?

19 A Yes.

20 Q It would be wrong as an attorney or officer of the Court
21 to misuse the Court's subpoena power?

22 A Yes.

23 Q It would be wrong as an attorney and officer of the Court
24 to abuse the Court's subpoena power, correct?

25 A Yes.

1 Q As an attorney and officer of the Court, you also have an
2 obligation to be truthful when you speak to the Court during
3 hearings like this, correct?

4 A Yes.

5 Q And during the hearing that you testified with Magistrate
6 Judge Mann, correct?

7 A Well, I was truthful, your Honor. I don't think I was
8 actually testifying.

9 Q You spoke to Magistrate Judge Mann and you put out your
10 position?

11 A Yes.

12 Q You had an obligation to be truthful when you spoke to
13 the Court, correct?

14 A Yes, and I was.

15 Q You were present on the hearing with Judge Cogan on
16 December 18 as well, correct?

17 A Yes.

18 Q And you heard the words that your attorneys said,
19 correct?

20 A Well, I think it was very hard to hear him at times so I
21 heard what I did hear.

22 Q Understood, but you -- at the end of the conference you
23 actually spoke up and spoke to the Court, correct?

24 A I don't recall that, actually.

25 Q Do you remember when Judge Cogan asked you whether or not

1 you submitted the December 17 letter to Special Master Woodin?

2 A I remember it was in either one or both of those
3 hearings, yes.

4 Q When you spoke up in that hearing, you had an obligation
5 to tell the Court the truth there as well?

6 A Yes.

7 Q Going back to the conference with Magistrate Judge Mann,
8 you were on that call on December 18, correct?

9 A Yes.

10 Q And you spoke to Magistrate Judge Mann, you answered her
11 questions?

12 A Yes.

13 Q And you answered them truthfully, yes?

14 A Yes.

15 Q And you posted the transcript for that telephone
16 conference on your website, didn't you?

17 A Yes.

18 Q Then you participated as we just talked about in another
19 conference with Judge Cogan, correct?

20 A Yes.

21 Q And your attorney was on that?

22 A Yes.

23 Q And there was a transcript prepared from that conference,
24 correct?

25 A Yes.

1 Q And you posted that to your website as well, didn't you?

2 A Yes.

3 Q Now, you heard the things that your attorney was saying
4 during the call subject to your ability to be able to hear
5 them, right?

6 A Yes.

7 Q And you didn't hear your attorney say anything that you
8 knew to be untruthful, did you?

9 A No, I don't recall anything. I was called onto the phone
10 right then and I said well, I better try and get an attorney
11 and we put him on hold and I called Mr. McKay right then and
12 it was demanded that we get right back on the phone and we
13 did. So that was how that came about.

14 Q Now as an attorney and officer of the Court, you also
15 have an obligation to be truthful when you submit things in
16 writing to the Court, don't you?

17 A Yes. And I seem to be hesitating.

18 Q Yes, you did.

19 A And the reason for that is you know I styled my response
20 to the special master a draft for a number of reasons. I'm
21 not really quibbling over that but it was prepared very
22 hurriedly I notice one footnote just ends.

23 Q I didn't hear you.

24 A One footnote wasn't finished when I went back and read
25 it. I'm not saying anything in there was not truthful but

1 that is a draft.

2 Q It's a draft, it's final, it's truthful, right?

3 A Yes.

4 Q And you wrote that letter to the special master on
5 December 17, correct?

6 A I believe that is true.

7 Q Then you posted that letter to your website?

8 A Yes, as it's been my practice in most of these cases that
9 I've been doing in this overall effort.

10 Q You do have a history of seeking documents in other
11 cases, don't you, seeking to put them on your website?

12 A Well, we put a lot of documents on our website so they
13 are not necessarily from proceedings. It's laid out, a
14 certain amount of that is laid out in the draft response.

15 Q In your draft response you talk about the history of your
16 desire to go out and find documents from litigation from other
17 sources and then make them widely available on your website,
18 correct?

19 A Correct.

20 Q And when you sent your letter to Special Master Woodin on
21 December 17, you attached a number of documents, correct?

22 A Correct.

23 Q 1 of them was a subpoena that you had issued in the case?

24 A Yes.

25 Q And the second was an amended subpoena that you had

1 issued in the case?

2 A Yes.

3 Q And the case that we're talking about is a case in
4 Alaska, correct?

5 A Correct.

6 Excuse me, may I have some water, please?

7 THE COURT: Of course. We'll get you some
8 immediately.

9 Now before we go any further, while everybody is
10 taking refreshments, is Dr. Eagleman in the courtroom?

11 MR. REINERT: I'm his counselor. My name is
12 Alexander Reinert. Mr. Hayes is also present.

13 THE COURT: His counsel is present?

14 MR. REINERT: Yes, although we both did not expect
15 to be required at this hearing and both have to leave at
16 approximately 3:30.

17 THE COURT: I would suggest that counsel for Dr.
18 Eagleman come forward and sit at the table since your client
19 may be affected by what is going on and you may want to
20 object. You do have the power to object and you may want to
21 cross-examine. And if you wish the proceedings terminated
22 because you can't be here or for some other reason, please
23 speak up.

24 MR. REINERT: We will say that we haven't received
25 any notice to this point of any initiation of any contempt

1 proceedings by Eli Lilly.

2 THE COURT: This is not a contempt proceeding. This
3 is a proceeding with respect to a mandatory injunction.

4 Do you understand that?

5 MR. REINERT: Yes, we do.

6 THE COURT: Would you gave your name.

7 MR. HAYES: Edward Hayes, 515 Madison Avenue.

8 THE COURT: I know you are admitted to this Court.

9 MR. HAYES: This is the first time I've been down
10 here in a while.

11 MR. McKAY: Let the record show my client is not
12 recalcitrant in case there are any consequences.

13 MR. HAYES: It's a joke.

14 THE COURT: Let's get back to the examination.

15 MR. FAHEY: I'm going to hand back -- actually,
16 your Honor, if I can hand the witness a document.

17 THE COURT: Of course.

18 Marked what?

19 We'll call you petitioner.

20 MR. FAHEY: This is Petitioner 1.

21 (So marked.)

22 Q Have you seen this document before, sir?

23 A Yes.

24 Q Could you tell the Court what it is?

25 A This is what I referred to earlier as the draft response.

1 Q This is a letter -- I'm sorry.

2 A That I sent to Special Master Woodin on December 17 that
3 you referred to earlier. It appears to be it.

4 MR. FAHEY: I would move Petitioner 1 in evidence,
5 your Honor.

6 THE COURT: Admitted.

7 (So marked.)

8 Q Could you turn to page 4 of the letter, please.

9 This was the letter that you wrote to Special Master
10 Woodin after you had been ordered to return the documents that
11 you had received from Dr. Eagleman, correct?

12 A Correct.

13 Q This is the letter where you attempt to describe how you
14 came into possession of the document, correct?

15 A Yes.

16 Q Could you please read into the record starting with out
17 of the blue on the bottom of page 4.

18 A For how long?

19 Q Why don't you read the whole section about how you came
20 into the possession of the documents all the way down to
21 "analysis" on page 6.

22 A "Out of the blue on or about November 29, 2006, Dr.
23 Eagleman called me to ask if I had FOIA documents pertaining
24 to Zyprexa. He identified himself as one of the plaintiffs'
25 retained experts in Zyprexa damages litigation. I directed

1 him to the location of the FOIA information available on Psych
2 Rights website and also mentioned to him the adverse events
3 database. During the course of the conversation I learned
4 that he had access to secret Eli Lilly documents pertaining to
5 Zyprexa. I told him that I wanted to access those documents
6 and would undertake a case from which to subpoena them. Dr.
7 Eagleman told me he was subject to a protective order to
8 provide notification of such a subpoena. I informed him that
9 I understood and indicated that typically forced drugging
10 hearings occur very quickly and they are often scheduled for
11 hearing the same day they are filed but that I always ask for
12 a short continuance to prepare.

13 Should I read the footnote there?

14 Footnote 14 see AS47.30.839E.

15 Q For the court reporter's benefit, I don't think you have
16 to read the footnotes for the rest of the paragraphs.

17 A I would prefer to.

18 "Since I knew at the time that I would be away from
19 Alaska from December 22, 2006 until January 15, 2007, I
20 preceded to try to acquire a suitable case in earnest and in
21 footnote 15, these efforts are chronicled at and then an URL
22 to that, a URL, which stands for uniform resource locator.

23 In spite of the impediments to doing so interposed
24 by the Alaska Psychiatric Institute I was able to acquire a
25 suitable case in the evening of December 5, 2006. This case

1 however was not within an AS4730839 Court ordered forced
2 drugging proceeding but involved the guardianship wherein the
3 public guardian, the Alaska Office of Public Advocacy, OPA or
4 OPA was granted full guardianship powers under AS 13.26.090
5 through .155, including the power to quote approve
6 administration of psychotropic medications, meaning the right
7 to agree to the forced drugging of its ward who is now Psych
8 Rights' client. The next morning I filed papers to, among
9 other things, terminate the guardianship and remove the
10 guardian's rights to consent to forced drugging. The Court
11 issued four deposition subpoenas at my request.

12 If I may, it's the clerk's office that does that,
13 the clerk's office -- including one to Dr. Eagleman setting
14 his telephonic deposition for December 20, 2006, a copy of
15 which is attached. It is my belief that Dr. Eagleman promptly
16 notified Eli Lilly of the subpoena, a belief which is
17 supported by a December 14, 2006 letter from Eli Lilly's
18 Alaska counsel, Brewster Jamison, a copy of which is enclosed,
19 footnote 16. It is noted that this letter recites a copy of
20 Dr. Eagleman's letter transmitting the subpoena which was not
21 included in either the fax or a hard copy of the letter
22 received by Psych Rights. Over the weekend, in reviewing of
23 paperwork, I realized that the subpoena's requirement for Dr.
24 Eagleman to "bring with" him the subpoenaed materials didn't
25 make any sense for a telephonic deposition. So on Monday

1 December 11th, 2006, the Court issued an amended subpoena, a
2 copy of which is enclosed, that required Dr. Eagleman to
3 deliver the subpoenaed materials to me prior to the
4 deposition. This amended subpoena, a copy of which is
5 enclosed, was served on Dr. Eagleman by E-mail which states in
6 its entirety: Dear Dr. Eagleman, I have (hopefully) attached
7 an amended subpoena. I assume that you will also accept
8 service of this amended subpoena in this manner. If not,
9 please notify me immediately. In reviewing the original
10 subpoena, I realized it did not take into account that this
11 was a telephonic deposition, therefore the amended order --
12 then it actually doesn't say you but I put it in here -- you
13 to deliver the material to me prior to the date and time set
14 for the deposition rather than bring it with you. In order
15 for the deposition to go smoothly and as efficiently as
16 possible by allowing me to review them ahead of time -- then
17 italicized, please deliver the subpoenaed materials to me as
18 soon as you can, emphasis added. I registered the internet
19 domain name or domain zyprexadocuments.net that same day
20 December 11, 2006 in order to set up a secure method via "file
21 transfer protocol" for Dr. Eagleman to deliver the subpoenaed
22 documents to me. I then so informed Dr. Eagleman. Subpoenaed
23 materials began being uploaded on December 12, 2006 but ceased
24 after I E-mailed Dr. Eagleman a copy of the afterhours Jamison
25 letter of December 14, 2006 which I received on December 15,

1 2006 and which is enclosed. Footnote 17, I E-mailed this
2 letter to Dr. Eagleman because the fax cover sheet did not
3 indicate it had been faxed to him.

4 Q Okay.

5 And I just want to review some of the things -- and
6 those are the words that you wrote to Special Master Woodin to
7 describe how you came into possession of the Zyprexa
8 documents, correct?

9 A Correct.

10 Q On page 4 of your letter you told Special Master Woodin
11 that Dr. Eagleman called you in your words out of the blue on
12 November 29, correct?

13 A I think I said on or about or something like that. Going
14 back to my records, it looks like it was November 28th.

15 Q And those are records that you have in your possession?

16 A Yes.

17 Q That you haven't submitted at this point?

18 A No.

19 Q What type of evidence are you suggesting confirms that
20 there was a communication on November 28?

21 A I have an E-mail from him.

22 Q What does the E-mail say?

23 A That E-mail at my recollection is simply his contact
24 information, nothing else.

25 Q He just sent you an E-mail with his contact information?

1 A Yes, after he had called me on the telephone.

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

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

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

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

13 Q So your sense was that Dr. Eagleman called you so that
14 you could help or he could help -- you could help him make the
15 documents public. That's what you just said, right?

16 A I'm trying to think exactly. One of the things is that I
17 had my interests and he had his interests. So I don't know
18 that I was really trying to help him at that point.

19 Q You both had an interest in publicizing the documents,
20 correct?

21 A Yes, I have my interest. I really hesitate to speak for
22 Dr. Eagleman.

23 Q But your understanding based on your conversation with
24 Dr. Eagleman was that he called you so that you could assist
25 him in disseminating the documents that were subject to a

1 protective order, right?

2 MR. HAYES: I object. It calls for a state of mind
3 of Dr. Eagleman.

4 MR. McKAY: I also object because it -- it states
5 facts that aren't in the record. That's not what he said.
6 It's predicated on a --

7 THE COURT: Excuse me. I'll deal first with the
8 Eagleman objection.

9 What is your objection?

10 MR. HAYES: My objection is that it calls for his
11 analysis of Eagleman's state of mind.

12 THE COURT: That is overruled. The state of mind of
13 the witness is what is in issue at the moment and his belief
14 as to what Eagleman wanted to do is admissible.

15 MR. HAYES: Yes, your Honor. Thank you.

16 THE COURT: Your objection, sir?

17 MR. McKAY: My objection is framing the question, he
18 misstated what Mr. Gottstein's testimony was --

19 THE COURT: Sustained.

20 Reframe your question.

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

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

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

6 A Correct.

7 Q And your sense was that Dr. Eagleman shared your desire
8 to make them public, correct?

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

12 Q And you are familiar with protective orders generally,
13 sir, aren't you?

14 A Somewhat. Actually, I haven't litigated that much in my
15 career.

16 Q But you understand what a protective order means in
17 litigation, right?

18 A Yes.

19 Q And you understand that a protective order is designed to
20 allow parties to share information to facilitate information,
21 correct?

22 A Yes. Well, I'm not sure that I think that is the reason
23 for a protective order. I think the reason is to protect
24 information that is produced.

25 Q Fine.

1 In litigation though, right?

2 A Yes.

3 Q And you are aware that -- and Dr. Eagleman as you

4 testified told you that there were certain restrictions that

5 he was operating under with respect to the Zyprexa documents,

6 correct?

7 A Yes, and I told him he had to comply with those.

8 Q And you never asked for a copy of the protective order,

9 did you?

10 A Actually I did ask for it.

11 Q When?

12 A Probably the first telephone call. It was pretty early

13 on in the telephone conversations.

14 Q On November 28th?

15 A I don't remember the exact day.

16 Q Was there a conversation before the 28th?

17 A No, but it might have been in subsequent phone calls.

18 Q But subsequent to Dr. Eagleman sharing the documents with

19 you, you asked for the protective order, correct?

20 A Yes.

21 Q And you didn't get it, right?

22 A He said I didn't want it and I didn't push it.

23 Q Why did he say you didn't want it?

24 A Again, we're calling for his state of mind. My kind of

25 sense of it was that if I didn't have it, then I wouldn't be

1 charged with the knowledge of it but.

2 Q And you wouldn't be here in a proceeding like this?

3 A No, I don't think that is correct because he did read the
4 relevant portions to me and I felt -- first off, I felt and do
5 feel that we followed the procedure set out in the protective
6 order; and second of all, I feel that it was Dr. Eagleman's
7 obligation to comply.

8 Now, subsequent to all of this coming out, I realize
9 that I probably should have been more insistent on getting the
10 protective order but I felt pretty confident that all I needed
11 to do was comply with my part of the process.

12 Q So essentially what you didn't know couldn't hurt you,
13 right?

14 A I really hesitate to answer that. I guess maybe that was
15 his sense of it. Mine was I wasn't really concerned about
16 that because I felt I had -- he read part of it to me.

17 Q What parts did he read to you?

18 A He read -- is it paragraph 14?

19 Q The part relating to dissemination of information?

20 A The one relating to when someone subpoenaed and he read
21 or told me about one about that notice was defined as three
22 days for one purpose and a longer period for another purpose.
23 But what I was -- anyway, I'm sorry.

24 Q So he read to you paragraph 14 of the protective order
25 which is actually in your letter, isn't it?

1 A Yes.

2 Q You recite paragraph 14 in your letter?

3 A Yes.

4 Q One of the things that paragraph 14 requires is to
5 provide the producing party, in this case Eli Lilly, and
6 Section 3 under paragraph 14 is the location -- I'm sorry,
7 number 2 is the date on which compliance with the subpoena is
8 requested?

9 A Yes, and actually I don't know if I misheard or what and
10 I recall thinking of it as required rather than requested but
11 from my perspective, that doesn't really make any difference.

12 Q And you've said before that the protective order didn't
13 make much difference to you at all, it was not a concern of
14 yours?

15 MR. McKAY: Objection. That misstates the
16 testimony.

17 A That's not what I said.

18 THE COURT: Reframe it.

19 Q Sure.

20 You understood there was a protective order
21 governing the production or dissemination of the documents
22 issued by this Court, correct?

23 A I'm sorry, could you repeat.

24 Q Sure.

25 You understood when you spoke to Dr. Eagleman that

1 this Court had issued an order, a protective order relating to
2 the dissemination of the documents produced in this
3 litigation, correct?

4 A Yes.

5 Q And you further understood that the procedures in place
6 under that protective order required the producing party, in
7 this case it would be Dr. Eagleman who wanted to share the
8 documents with you, that he had to give notice to Lilly if
9 they were Lilly's documents prior to production, correct?

10 A Yes.

11 Q And one of the things that was important for Dr. Eagleman
12 to share with Lilly was the date on which the production would
13 be made, correct?

14 A Well, I think it says requested.

15 Q Requested by you, correct?

16 A Yes.

17 Q Right.

18 And then the production date that Dr. Eagleman
19 shared with Lilly was December 20, correct?

20 A I believe that's correct.

21 Q And he never shared and you know he never shared the
22 amended subpoena that you and he concocted to prepare an
23 earlier production?

24 MR. McKAY: Objection to the question.

25 Argumentative.

1 THE COURT: Yes, reframe.

2 Q Let me back up. I'll rephrase.

3 On December 6 you sent a subpoena to Dr. Eagleman?

4 A Yes.

5 Q It was an Alaska State Court subpoena?

6 A Yes.

7 Q You didn't serve it on Dr. Eagleman properly, you sent an

8 E-mail to him?

9 A I actually did have it served.

10 Q By who?

11 A A process server. We arranged to have a Massachusetts

12 process server serve it.

13 Q That is the December 6 subpoena, the first one?

14 A Yes.

15 Q Why don't you turn to the page on -- the attachment to

16 your letter where the original subpoena is attached.

17 A Yes.

18 Q Now, before we get to the content of that subpoena, one

19 of the things that -- you and Dr. Eagleman had a problem on

20 November 29, didn't you, you didn't have a case that you could

21 use the subpoena the documents, right?

22 A Did you say November 28, I guess it would be.

23 Q November 28. But on November 28 when you knew that you

24 wanted the Zyprexa documents so that you could publicize them,

25 you had a problem because you didn't have a case that you

1 could issue a subpoena from that would allow you to subpoena
2 the documents?

3 A I don't know if I would characterize it as a problem but
4 it was necessary to have an appropriate case in order to do
5 that.

6 Q Right, because you can't just send out subpoenas without
7 a case, right?

8 A Correct.

9 Q And you are supposed to use a subpoena for the purposes
10 of the case, right?

11 A You know, actually, I researched this before I did it
12 because I wasn't really concerned about the protective order
13 because -- for reasons why I said and probably that will come
14 out that I considered that Dr. Eagleman's responsibility. I
15 advised him to comply with it and in fact to maybe foreshorten
16 it, I told him repeatedly that he should give Eli Lilly the
17 amended subpoena. But what I was concerned --

18 Q Let's just stop there.

19 A Can I answer your question?

20 THE COURT: Finish your answer.

21 A But I was concerned about this issue of whether it would
22 be proper to issue a subpoena in a case that had dual
23 purposes, one in the case, and the other for this
24 dissemination. And I satisfied myself through that research
25 that it was proper.

1 Q There is no evidence that DB was ever taking Zyprexa?

2 A There is no evidence, you mean in the record here?

3 Q You haven't offered any evidence that DB was taking
4 Zyprexa on December 6 when you issued the subpoena or at any
5 time since December 6, is that correct?

6 A That's correct.

7 Q And so you found a case to issue a subpoena calling for
8 Zyprexa documents and there is no evidence that the person
9 involved in that case ever was taking Zyprexa, correct?

10 A Well, again, it hasn't been produced in this proceeding
11 yet. I'm not sure that he has never been. At this time I'm
12 not sure that he has ever been. He certainly was potentially
13 subject to it and Eli Lilly's apparently illegal marketing
14 activity was certainly relevant to the question of whether of
15 not he should be ordered to take this drug against his will.

16 Q I understand what you are saying but I just want to make
17 it clear that you have no evidence to present to the Court
18 today that at any point from December 5th through today, you
19 have no evidence to provide to the Court that DB was taking
20 Zyprexa at any time during that period, correct?

21 A Correct.

22 Q And so you issued a subpoena, you found a case with
23 someone who has no evidence of taking Zyprexa and you issued a
24 subpoena to Dr. Eagleman on December 6.

25 Dr. Eagleman told you he had Zyprexa documents,

1 right?

2 A Yes.

3 Q He didn't tell you he was an expert in any other cases
4 and had any other documents, correct?

5 A Yes.

6 Q Can you read the requested -- why don't you read the
7 attachment to your December 6 subpoena.

8 A Attachment to subpoena duces tecum (production of
9 documents) David Eagleman, MD, MPH; one, your curriculum
10 vitae; two, subject to any applicable restrictions, subject to
11 any applicable restrictions, all expert reports prepared by
12 you within the last five years pertaining to psychiatric
13 medications; subject to any applicable restrictions, all
14 documents you have in your possession or have access to,
15 including those in electronic format and have read, reviewed
16 or considered pertaining to the testing, marketing, efficacy,
17 effectiveness risks and harms of commonly prescribed
18 psychiatric drugs in the United States, including but not
19 limited to Haldol, Thorazine, Mellaril, Clozaril, Risperdal,
20 Zyprexa, Seriquil, Abiliphi, Giadon, lithium, Depakote,
21 Prozac, Paxil, Zolofl and Wellbutrin.

22 Q How many medications besides Zyprexa did you just read
23 out? I lost track.

24 A 14.

25 Q So you, 14 and then Zyprexa is the 15th?

- 1 A Zyprexa is in the middle.
- 2 Q Are you including Zyprexa in the 14 or not?
- 3 A I think you said other, so I don't think I counted it.
- 4 Q So you sent a subpoena to Dr. Eagleman asking for the
5 Zyprexa documents you knew he had plus 14 other, asking for 14
6 other drugs that you knew he didn't have, correct?
- 7 A Yes -- well, excuse me I guess I didn't know that he
8 didn't have. Although -- I mean I didn't know that for a
9 fact. It was Zyprexa that we had talked about for sure.
- 10 Q With respect to your interest to make these documents
11 public, we know you never got a copy of the protective order,
12 correct?
- 13 A Until later.
- 14 Q Did you ever ask Dr. Eagleman whether there was a way to,
15 within the court procedure to seek to dedesignate documents
16 that you wanted to publicize?
- 17 A I don't really recall that I did.
- 18 Q Did Dr. Eagleman ever tell you that there was a way that
19 the documents could be -- apply to the Court and ask for the
20 documents to be made public?
- 21 A No, I don't believe that he did.
- 22 Q Instead as you've said, you decided that you would
23 subpoena them, correct?
- 24 A Yes.
- 25 Q Dr. Eagleman understood that once they were subpoenaed,

1 that you were going to disseminate them to the individuals
2 that you later certified as having disseminated them to?

3 A Yes, I think I already said that.

4 Q Did he share with you anybody that he would like to have
5 them disseminated with?

6 A Yes.

7 Q One was Alex Berenson from the New York Times?

8 A Yes. Yes.

9 Q Who else did Dr. Eagleman ask you to send the documents
10 to after he had given them to you?

11 A For sure Steve Cha.

12 Q He is with the Senate Finance Committee?

13 A He was with at the time the House Committee On Government
14 Reform minority office which is now the majority office.

15 Q Who else?

16 A Amelia Desanto. Yes.

17 Q Who is Amelio Desanto?

18 A She I think is the chief investigator for Senator
19 Waxman's committee and that may be the finance committee. I'm
20 not sure what committee it is.

21 Q Who else?

22 A I spelled her name wrong. Snigdha Prakash.

23 My counsel probably knows how to spell it.

24 MR. McKAY: I believe it's S-N-I-G-D-H-A,

25 P-R-A-K-A-S-H.

1 Q And Ms. Prakash is with NPR?

2 A Yes, National Public Radio. I believe that is true,
3 that's what he indicated.

4 Q Did he give you these names on a phone or in an E-mail or
5 how did he communicate the names to you?

6 A I think he E-mailed Ms. Prakash's address to me. I
7 remember that. Steve Cha called me and he E-mailed Amelia
8 Desanto and copied me with that.

9 Q So he gave you some E-mails and then he copied you on
10 other E-mails to other people to provide you with the
11 information by which you could use to send these documents,
12 correct?

13 A Yes.

14 Q Did he identify anybody else?

15 A You know, I don't recall at this time. If I went through
16 the list, that might jog my memory.

17 Q And these names were given to you before you were even
18 produced documents, correct, you started sending the documents
19 out the day you got them, right?

20 A Alex Berenson, yes. I don't think any of these others
21 were before I got them.

22 Q So before you got the documents you already knew that
23 when you got them you needed to send them to Alex Berenson at
24 the New York Times?

25 A I don't know that I would say needed to but.

1 Q Dr. Eagleman had requested that you send them to Alex
2 Berenson?

3 A Yes.

4 Q Who did you decide to disseminate them to?

5 A There is Peter Bregan.

6 Q Who is Dr. Peter Bregan?

7 A He is a well-known psychiatrist, expert on psychiatric
8 drugs and psychiatric treatment, an author of many drugs -- I
9 mean many books and scholarly articles and a critic of current
10 psychiatric practices, just basically.

11 Q All psychiatric practices, not just Zyprexa?

12 A No, I wouldn't say all psychiatric practices.

13 Q He is not in favor of medicating patients with diagnosis
14 of psychiatric disease?

15 A I think that is generally true. I don't know that he
16 would say it's quite so categorically. For example, I think
17 he like another big critic who passed away a couple of years
18 ago and testified in the Meyers case feels like especially the
19 benzodiazepines might be helpful short-term to help people
20 recover, to get sleep and that will oftentimes bring them out
21 of psychosis. And so I think that he -- I'm not sure about
22 that but I think that he is not against that and then I know
23 Dr. Moser felt that even maybe Zyprexa was appropriate in some
24 circumstances when other efforts hadn't worked and you had
25 given them enough time and it might be helpful. So I'm not

1 sure what Dr. Bregan's position on that is.

2 I do know that his position is, which I believe is
3 accurate, that these drugs basically are brain damaging and
4 therefore they should be used -- and have other problems, and
5 that therefore they should be used very carefully.

6 Q Dr. Bregan was the founder of an organization, and I
7 always have trouble remembering all the initials. Do you know
8 what I'm talking about?

9 A I believe you are referring to the International Center
10 for the Study of Psychiatry and Psychology, which is known as
11 ICSPP.

12 Q Right.

13 And ICSPP, they are -- are they a sponsor or are
14 they an affiliate of MindFreedom do you know?

15 A I don't really know. Well, they are probably a sponsor.

16 Q What is a sponsor for MindFreedom?

17 A It's basically someone who supports their mission, I
18 think.

19 I don't know if it even has to involve any kind of
20 fee or anything like that.

21 Q But you share common goals and interests?

22 A Right. Mainly I think it's people have the right to not
23 be forced to take these drugs.

24 Q And who are the other people that -- can you identify the
25 other people that you decided to disseminate the documents to?

1 A Dr. Grace Jackson.

2 Q Who else?

3 A Dr. David Cohen, Judy Chamberlain, Bob Whitiker, Vera
4 Sharav. Did I say Will Hull? Laura Zigler.

5 It doesn't sound like that is enough. Is it in my
6 list?

7 Q Would your certification help you?

8 A Yes.

9 Q You mentioned Bruce Whittington?

10 A I hadn't mentioned him, yes.

11 Q Dr. Steven Kruszewski?

12 A Yes, I was going to say him but yes.

13 Q Then the two other people were Terrie Gottstein?

14 A Yes, that is right.

15 Q Is that your?

16 A And Jerry Winchester.

17 Q And Jerry Winchester lives in Alaska?

18 A Yes, his office is right next to mine.

19 Q Is there any other people that you remember disseminating
20 the documents to?

21 A No, but I mentioned Vera Sharav. I had spoken to her and
22 she wanted to get them to the Wall Street Journal and so I
23 gave her a password to access the FTP site but I don't believe
24 they did that.

25 Q They, meaning the Wall Street Journal?

1 A Yes.

2 Q So your understanding was that Vera Sharav was going to
3 provide the password to your FTP server which contained the
4 Zyprexa documents to the Wall Street Journal?

5 A Right.

6 Q What is an FTP server?

7 A FTP stands for file transfer protocol, and it's a
8 mechanism to do just that, transfer files and especially
9 multiple files over the internet more reliably for sure than
10 E-mail attachments and with -- it's a lot easier than trying
11 to do it over say a website.

12 Q It's faster?

13 A And more reliable. You can do multiple documents that
14 way. That is relatively hard if you don't have special
15 software that will like what do they call it, crawl a website
16 or something like that to retrieve everything. File transfer
17 protocol is designed to -- you can download a whole directory.

18 Q So this FTP server and the data around the FTP server was
19 built on your computers, your servers?

20 A Yes, it was on one of our servers. I don't know about
21 built but.

22 Q Let's take a step back and we've already talked about the
23 December 6th subpoena and that called for the production of
24 documents on December 20th, correct?

25 A Correct.

1 Q And you then issued an amended subpoena, correct?

2 A Correct.

3 Q And told Dr. Eagleman to start producing documents in
4 your words and I quote "as soon as possible", correct?

5 A No, it's as soon as you can and I realized since then
6 that can is ambiguous but what I meant was as soon as -- you
7 know, as soon as.

8 Q As soon as you can?

9 THE COURT: Don't interrupt him.

10 A As soon as he could under the protective order is what I
11 meant by it.

12 Q Did you say that?

13 A Well, I thought that -- that's what I intended when I
14 said that in the E-mail to him. I don't -- I don't know that
15 I communicated that separately to him.

16 Q Why did you move the date up from December 20 to as soon
17 as you can?

18 A I didn't really move the date of the deposition up.

19 Q You moved the date of the production of documents up,
20 correct?

21 A Well, I mean, what it said was -- it's like I put in the
22 E-mail, it didn't make any sense for him to bring the
23 documents with him in Attelboro, Massachusetts for me to try
24 to examine them in Anchorage, Alaska. So I had an amended one
25 that said to give it to me prior to the deposition and o give

1 it to me as soon as he could so that I would have a chance to
2 review them before the deposition.

3 Q And the E-mail that you sent to Dr. Eagleman said produce
4 the documents "as soon as you can", correct?

5 A I believe that's true.

6 Q And that same day you set up the FTP server that you are
7 talking about that allowed for the rapid and efficient
8 transfer of documents, correct?

9 A Is that what I said -- is that what I wrote -- yes, could
10 be.

11 Q Then the production of documents started the next day on
12 December 12, correct?

13 A Yes.

14 Q And it continued until in your words you received the
15 December 14th fax from Lilly's counsel on the morning of
16 December 15th, correct?

17 A If that's what I said, yes.

18 Q And earlier you said you had told Dr. Eagleman repeatedly
19 that he should send the second subpoena to Lilly, correct?

20 A Yes.

21 Q And you knew he planned not to send it to Lilly, correct?

22 A Yeah, I think -- he told me he didn't see that it made
23 any difference.

24 Q And you decided that it was not important for you to send
25 the subpoena to Lilly either, correct?

1 A My -- my position is that it was his responsibility under
2 the CMO and not mine.

3 Q As an officer of the Court, I'm just asking you, you made
4 the decision not to send the amended subpoena which called for
5 production of documents prior to December 20th to Eli Lilly,
6 correct?

7 A Correct.

8 Q And you knew at that time that Lilly had been provided
9 information that the document production would occur on
10 December 20th, correct?

11 A Yes, well, I mean that's what the subpoena says but
12 that's not -- I think it's not uncommon for documents to be
13 produced prior to the actual date.

14 Q I'm sorry, I may have interrupted.

15 A I think I was done.

16 Q Under Alaska rules, and you are an attorney in Alaska,
17 correct?

18 A Yes.

19 Q The Alaska rules for subpoenas are basically identical to
20 the Federal Rules, correct?

21 A I guess. I couldn't really say for sure.

22 Q Then let's just talk about the Alaska rule. You are
23 familiar with those rules?

24 A Yes. Like I said, I haven't done a lot but I reviewed
25 the rules before, I did.

1 Q Under the Alaska rules, a party, all interested parties
2 are supposed to be given 10 days notice prior to a production
3 occurring, correct?

4 A Well, I don't know that is entirely accurate. I think
5 what it says is that any party to whom the subpoena, something
6 like that, to whom a subpoena is directed may object within 10
7 days.

8 Q And the production in this case occurred prior to 10
9 days, correct?

10 A Right, Dr. Eagleman did not object.

11 Q Of course.

12 Now, the second subpoena that we're talking about,
13 we already confirmed that you did not send that to Lilly,
14 right?

15 A I believe I've said that a number of times, yes.

16 Q And you did not send it to Dr. Eagleman's -- the law firm
17 that retained Dr. Eagleman in the Zyprexa litigation, correct?

18 A I don't think I even knew who that law firm was but no, I
19 didn't.

20 Q And you didn't send it to the parties in the Alaska
21 litigation at that time, did you?

22 A Well, under the Alaska rules, you don't send the
23 subpoena. You are required to send a notice of deposition and
24 when I -- actually when I went to get the subpoena issued, I
25 had a certificate of service that said I'm sending notices of

1 deposition. There were three other ones and the clerk said
2 no, that's not good enough, I want to see the actual notices
3 of a deposition. So I went back and got them and brought them
4 to the clerk and showed them to her and then she issued the
5 subpoenas and that was December 6.

6 Q December 11?

7 A It was probably both actually.

8 Q But no other parties of the Alaska litigation received a
9 copy of the December 11 subpoena, correct?

10 A Right. That is not the practice.

11 Q So the only people knew that the subpoena had been
12 amended was you and Dr. Eagleman, correct?

13 A The only people?

14 I don't know if it's the only people. I didn't
15 notify Eli Lilly if that's really the question.

16 Q The question is you didn't notify anybody other than Dr.
17 Eagleman that there had been a change in the production date,
18 correct?

19 A Really, the deposition date hadn't changed.

20 Q The production date, the document production date, the
21 only person you notified of a change in the production date
22 was Dr. Eagleman, correct?

23 A I don't know about the only person. I might have told my
24 wife. I guess that is privileged, but anyway, I might have
25 told somebody else, but no, I didn't tell the other parties

1 because it didn't change -- the deposition date wasn't changed
2 so there was really no reason to tell them unless Eli Lilly
3 was already in cahoots with them or something.

4 Q I'm not sure what that means.

5 A There is no -- I mean; A, they had notice of the
6 deposition. That hadn't changed and there was no reason to
7 notify them of this as far as I was concerned.

8 Q You already told us that you told Dr. Eagleman repeatedly
9 to notify?

10 A Eli Lilly, yes.

11 Q So that --

12 A I knew that Eli Lilly had an interest in this and so I
13 really -- I suggested that Eli Lilly should be notified but
14 the other parties in the Alaska case; A, they weren't -- I
15 didn't see why they would have an interest in knowing that.
16 The deposition date hadn't changed.

17 Q When you issued the subpoena, you reason you said you
18 needed the subpoena was so that you could review the documents
19 in advance of Dr. Eagleman's deposition, correct?

20 A Yes.

21 Q And instead of reviewing the documents you start making
22 copies of them as soon as you received them, correct?

23 A Yes.

24 Q And you proceeded to make copies for the next two days
25 and send them out to the people on your and Dr. Eagleman's

1 list, correct?

2 A I made two batches.

3 Q Right, for the next two days, correct?

4 A In the next two. It wasn't for them. I didn't spend all
5 say two days doing it.

6 Q This is the question I want to make clear. You were so
7 busy making copies of these documents that you never got to
8 review them, did you?

9 A I looked at some of them. The deposition was quite -- a
10 few days off which is, I think, your complaint. So I would
11 pull up some of them and look at them and I -- and it wasn't
12 that I was so busy make copies. I had my laptop burning DVDs
13 and my main computer burning DVDs, another laptop making sure
14 that they were -- I would make them and then I would put them
15 in this other one to make sure that they came up and I don't
16 know, I don't think it took me an hour to do it each time.
17 Probably less.

18 Q And you were anxious to get them out as quickly as you
19 could, right?

20 A Anxious, yes, I thought it would be good to get them out.

21 Q Before the Court could enter an order telling you you
22 shouldn't?

23 A Well, I don't know. I mean I guess -- I don't know that
24 -- you know, I knew that Eli Lilly would want to try to stop
25 it.

1 Q Right, and you wanted to get them out as quickly as you
2 could to make that harder?

3 A Well, I would say yeah, I wanted to get them out of the
4 way that would make it impossible to get them back.

5 Q Right. And I just want to confirm that you, sir, as an
6 officer of the Court and an attorney in the State of Alaska,
7 relied on a physician to determine the legal implications of a
8 protective order, correct?

9 A No, that is not precisely true. I advised him to get
10 counsel repeatedly and I looked at it in terms of what my
11 obligations were and that I didn't have any obligations under
12 what is called CMO-3 here, I think, the protective order, that
13 I had to follow the rules. I felt that the protective order
14 essentially provided a road map of how to do it and that I
15 followed that road map.

16 Q Based on Dr. Eagleman's description of that road map,
17 right?

18 A His -- well, he read that paragraph to me.

19 Q And let me just -- and the reason why I'm asking the
20 question, you submitted a declaration to the Court this
21 morning?

22 A Yes.

23 Q In paragraph 6 of that declaration, you wrote, and these
24 are your words: Dr. Eagleman indicated that three business
25 days could be construed as sufficient notice to comply?

1 A Yes.

2 Q And you relied on Dr. Eagleman's interpretation of the
3 case management order and the procedures under which you were
4 supposed to be operating as an officer of the Court and you
5 never asked for the protective order and you never had a copy
6 of the protective order before you pursued your course of
7 action with Dr. Eagleman?

8 A There is a lot there and I'm kind of tired from
9 everything, flying all night and stuff but you said as an
10 officer of the Court. I was certainly an officer of the
11 Alaska Court and followed those rules.

12 I never did and I don't believe now that I am
13 subject to -- a party to that case management order. Now, I
14 think really the guts of the question is what was reasonable
15 notice. We discussed that and how -- actually, we discussed
16 and I know more about the law now but how ambiguous that order
17 was and so he said that he felt it could be construed that
18 way. One of the things, for example, that we discussed was,
19 and I mentioned it, that initially I assumed that I was going
20 to get one of those AS 47.30.839 proceedings where the usual
21 practice, which I think is an absolute outrage, is for the
22 hospital to file a petition sometimes only an hour before the
23 hearing and then go through and get a forced drugging order
24 then the hearing that starts an hour from when the respondent
25 was served. And that what is reasonable notice under those

1 circumstances? And what I said, and I think I put it in my
2 draft response, is that well, I'm not going to do a hearing
3 under those conditions, and I always get a continuance. And
4 so we talked about that and what it meant to be reasonable
5 notice and we talked about that but I made it clear I was not
6 his attorney and he needed to consult his own attorney and
7 that it was his obligation to comply with the order.

8 Q Did he consult with his own attorney, if you know?

9 A He gave me the name of one attorney -- the name who
10 escapes me, they are not here -- who he said and I called them
11 and that attorney said no, I'm not his attorney.

12 Q Was that the law firm that terminated him after they
13 found out what he had done in this case?

14 A No.

15 Q A different law firm?

16 A A different lawyer.

17 Q Do you remember the first name?

18 A I don't.

19 Q Do you have -- how did you get the name of the attorney
20 to call?

21 A Dr. Eagleman told me.

22 Q Was it in an E-mail?

23 A No, I don't believe it was.

24 Q Where was the attorney that you called, what part of the
25 country?

1 A I think it was in the Boston area, certainly the
2 northeast.

3 Q Is the name Tom Sobel?

4 A I don't know. It's not inconceivable but it doesn't
5 totally ring a bell.

6 Q So you had this conversation with this attorney?

7 A Yes, and that basically terminated after he said he
8 wasn't representing him.

9 Q What did you say to the attorney?

10 A I understand you are representing Dr. Eagleman and he
11 said no, I'm not, and that was pretty much it.

12 Q I wasn't on the call so I'm trying to understand how it
13 happened.

14 You picked up the phone, dialed the number, somebody
15 answered the phone, you asked to speak with the attorney that
16 you thought was representing Dr. Eagleman and that person gets
17 on the phone and what did he say?

18 A I think I already said that, that Dr. Eagleman says that
19 you are representing him with respect to this.

20 Q What is this?

21 A Documents in this case, the Zyprexa multi-district
22 litigation. I'm not sure exactly how I described it but I
23 described the case somewhat.

24 MR. HAYES: The time when this happened, judge?

25 Q This is before the documents were produced, correct?

- 1 A Yes.
- 2 Q So prior to you receiving Dr. Eagleman -- documents from
3 Dr. Eagleman, he gave you the name of an attorney that he
4 thought was representing him in connection with his
5 communications with you, correct?
- 6 A That he told me that he was, yes.
- 7 Q I'm sorry?
- 8 A Yeah, he told me that he was representing him.
- 9 Q So you called that person and said?
- 10 A I think I have described pretty much the whole
11 conversation except for one other thing which is that he said
12 that he, he did know Dr. Eagleman and he -- I don't know if he
13 represented him or not in other matters but he definitely said
14 he wasn't representing him in this matter.
- 15 Q Do you have phone records that would show who you called?
- 16 A I believe buried on my desk somewhere is that note. I
17 tried to bring everything with me but I have a lot of stuff at
18 my desk and so I think -- so I think it's somewhere there.
- 19 Q What have you brought with you today?
- 20 A I brought -- I tried to get on my computer basically, I
21 think, most everything that they would be interested in. I
22 did bring hard copies of the E-mails from and to Dr. Eagleman.
- 23 Q Phone records?
- 24 A It's on my computer.
- 25 Q Any --

1 A Not all of them. I mean I could go into why but I don't
2 think -- you might ask me a question about some of them but I
3 don't think there is anything in the phone records other than
4 his attorney's name and number. I don't know. One of the
5 things is that when I was ordered to preserve all my voice
6 mail, that actually presented a problem. And so I had my
7 secretary while I was gone take a little recorder and record
8 them before she deleted them. And then she E-mailed me the
9 records. But they would be in one E-mail. They didn't all
10 pertain to this case.

11 So where I filed them on my computer is in my law
12 office folder and so it's not here, but I can access my office
13 computer via the internet and so I could actually find that.

14 Q Did you bring anything with you that relates to your
15 communications with the people who you disseminated the
16 documents to?

17 A Well, I didn't -- there really isn't any. I mean there
18 is a, I think there is a cover letter to Mr. Cha, I believe I
19 have a copy of that.

20 I brought pretty much what I thought would be
21 responsive that I could do at the time before I left.

22 Q After you got off the call with the person that said they
23 weren't representing Dr. Eagleman for the purposes of your
24 communications, did you have any discussions with anybody else
25 who purported to be representing Dr. Eagleman?

1 A I don't believe so.

2 Q Your Honor I think at this point I just want one minute
3 to check my notes.

4 (Pause.)

5 After you received a copy of the order of this Court
6 saying that you had improperly disseminated the documents in
7 violation of CMO-3, did you communicate that fact to the
8 recipients of the documents to whom you sent them to?

9 MR. McKAY: Objection, your Honor. As Mr. Fahey
10 knows, your Honor specifically struck the word improperly from
11 that order.

12 Q You received a copy of the mandatory injunction directed
13 to you, did you not, sir?

14 A Yes.

15 Q And that document said that you aided and abetted a
16 violation of CMO-3, correct?

17 A Yes, and I strenuously objected -- tried to object to
18 that before it got issued but it got issued before we were
19 able to.

20 Q You actually objected to that on the call with Judge
21 Cogan and your attorney?

22 A That is probably true, yes. I was pretty offended by it.

23 Q Then --

24 MR. McKAY: Your Honor, I apologize but in fairness,
25 and for the record I think I misheard or misunderstood what

1 Mr. Fahey was understanding.

2 You struck the word improperly from your order. I
3 believe that he is referring to an earlier order so I
4 apologize for misunderstanding.

5 Q You communicated the fact that you were asked to
6 communicate, you were ordered to in fact communicate to
7 everyone who you disseminated the documents to and retrieve
8 them, right?

9 A Yes.

10 Q And that was on December 18 and 19, right, you started
11 doing it in the middle of the night, at least East Coast time
12 on the 18th?

13 A I think that is correct.

14 Q And by the time on the 19th, you had communicated with
15 everyone to whom you had disseminated the documents, correct?

16 A I don't think that is correct. I think -- I think I kind
17 of remembered other people and the one that comes to mind is
18 when I was preparing the -- maybe it was on the 19th,
19 preparing a compliance certificate, I came across Prakash's
20 name which I had forgotten. So then I sent her a letter so I
21 think that was the last one and maybe it was the 19th but it
22 might have been the 20th or even later.

23 Q When you communicated these documents in the first
24 instance to the recipients that you've identified, the 13 or
25 16 people, did you communicate to them that they had been

1 received pursuant with your discussions -- or strike that.

2 When you communicated with the people who had --
3 when you were disseminating the documents, did you tell them
4 that you had received them from Dr. Eagleman and they involved
5 the Zyprexa litigation?

6 A I have to look at the E-mails. You have them. You were
7 copied on those E-mails because that way you could contact
8 them immediately.

9 Q Actually, what we were copied on was your request to have
10 them returned.

11 A I thought that was the question.

12 Q No. When you originally disseminated them on the 12th
13 and 13th, did you tell them these are the Zyprexa documents I
14 got from Dr. Eagleman?

15 A No.

16 Q What did you tell them?

17 A I didn't tell them -- it depends. Some people had no
18 idea they were coming and other people did.

19 Q What how did the other people know what were coming?

20 A I called them.

21 Q What did you tell them?

22 A It varied. Bob Whitiker, I just talked to Bob Whitiker
23 and told him that they were coming.

24 Q And you told him that they were the confidential
25 documents that you received from Dr. Eagleman from the Zyprexa

1 litigation, correct?

2 A I don't know if I mentioned Dr. Eagleman by name.

3 Q But you were getting confidential documents from the
4 Zyprexa litigation?

5 A Actually at that point I did not consider they were
6 protected anymore.

7 Q But you understood that a lot of people in New York
8 thought they were protected, right?

9 A Well, I guess I didn't know that.

10 What timeframe are you talking about?

11 MR. McKAY: Your Honor, if I might object to that
12 question because it assumes facts not in evidence and it talks
13 about what people in New York unidentified thought at a time
14 when he wasn't --

15 THE COURT: Why don't you ask a more direct question
16 with respect to a specific person.

17 MR. FAHEY: Okay.

18 Q With respect to Dr. Whitiker, you said you called?

19 A He is not a doctor.

20 Q Robert Whitiker, before you sent him the documents you
21 said you had a telephone conversation with him, correct?

22 A I think I did.

23 Q And you told him these were the documents that had been
24 obtained from the Zyprexa litigation in New York, correct?

25 A I think I probably told him something like I've received

1 documents pursuant to a subpoena out of this case and that I
2 was sending them to him.

3 Q And these were the secret documents that Dr. Eagleman had
4 told you about?

5 MR. McKAY: Objection, your Honor, Mr. Gottstein has
6 previously testified that he no longer considered them to be
7 confidential or secret.

8 THE COURT: Sustained.

9 Q When you told Robert Whitiker that you were getting
10 Zyprexa documents --

11 A I think I -- I'm sorry for interrupting.

12 Q Go ahead.

13 A I think I already had them at that point. In fact, I --
14 it may have been that they were -- that they were already in
15 the mail and I told him that they were in the mail. That is
16 almost certainly the way that -- the way it happened.

17 MR. FAHEY: Your Honor, without waiver we would like
18 to stop the examination at this point and request that the
19 documents that Mr. Gottstein has described that he has brought
20 with him as well as those that are subject to the order to
21 show cause be produced.

22 THE COURT: Well, we have representatives of Dr.
23 Eagleman here and I understand they want to leave at 3:30,
24 correct?

25 MR. HAYES: Yes, judge.

1 THE COURT: It's now 3:25. I suggest that the
2 documents be made available to Dr. Eagleman and any of the
3 other parties who are present for immediate examination with
4 copies to be made by Lilly.

5 I guess you have the best access to a copier so why
6 don't you make copies for everybody that needs them, that we
7 then break the examination so that you can look at the
8 documents.

9 There will be possible cross-examination certainly
10 by Dr. Eagleman. I have a 4:00 hearing so we can't complete
11 this tonight.

12 Can you be here tomorrow?

13 THE WITNESS: Yes, your Honor.

14 THE COURT: I have a 10:00 motion. I suggest that
15 we convene again at 10:30 tomorrow, that you get all these
16 documents, immediately have them copied, return the originals
17 to the witness, make them available, whoever asks for them.
18 You can do that. If the witness would be so kind as to call
19 somebody in his office to look at his desk to get the name of
20 that -- try to get the name of that person who he called in
21 Massachusetts apparently. That would be helpful. Give that
22 to counsel.

23 Is there anything else you need before
24 10:30 tomorrow?

25 MR. FAHEY: I don't think so.

1 THE COURT: Anybody else need anything?

2 MR. McKAY: Your Honor, I will note that Lilly
3 specifically was directed to provide before the hearing today
4 notice of any documents they intended to rely on, the
5 substance of those, and of course didn't. And I understand
6 that these are documents that Mr. Gottstein has that are
7 responsive to the order to show cause, if the order to show
8 cause were to be issued, and it shouldn't. The only reason I
9 raise that is that Mr. Gottstein has done his best to have
10 available, should the need arise, these documents but I think
11 he indicated that they are in his computer. We will do our
12 best to work with counsel locally to physically get these
13 things available. And I suggest that we may, because we may
14 run into questions, for example, if their request is for
15 anything close to the breath of the show cause request, which
16 I don't understand to be relevant here, but if it is, there is
17 no question that we may have some issues that arise about
18 privilege or anything else. So I would ask whether Mr. Woodin
19 or somebody else be made available if those questions should
20 arise.

21 THE COURT: Mr. Woodin, would you stay for a little
22 while at least to do that?

23 But I understood from the witness that he had hard
24 copy of most or all of what was in his computer?

25 THE WITNESS: Oh, no, your Honor. I can look but I

1 think basically what I brought hard copies of are the E-mails
2 to and from Dr. Eagleman.

3 I've got -- I tried to like -- I copied my whole --
4 I copied all my Psych Rights E-mails. So I think -- it's an
5 unGodly amount. The other thing that I thought would be
6 fairly easy for me to do is I scanned a copy of the phone
7 records and I brought that. And if I can get a printer, I
8 think I can find that and get that out pretty quickly.

9 THE COURT: Work with counsel. They have technical
10 equipment. Your lawyer may want to look at some of these
11 documents before you turn them over.

12 You have a law office.

13 MR. LEHNER: Yes, we have a law office in New York.
14 We would be happy to make arrangements this evening for a
15 printer.

16 THE COURT: It's now 3:30. Your counsel wants to
17 look at the documents first, I'm sure.

18 MR. McKAY: Yes.

19 THE COURT: So arrange to be at the office of Lilly
20 at 5:00 this evening to turn over the documents. And if they
21 make a request for additional documents that you can easily
22 get, you'll try to get them.

23 The special master will be available immediately and
24 then by telephone. You can go back to your family tonight and
25 just be available by telephone.

1 THE WITNESS: Your Honor, can we have an outside
2 time because I really -- I'm very tired and if I'm going to be
3 here at 10:45 in the morning, I would like to at least -- if
4 we can agree to cut it off at 9:00 or something.

5 THE COURT: They will accommodate you. They will
6 probably even give you dinner since it's --

7 MR. HAYES: I have some suggestions for restaurants.

8 THE COURT: It will be within the law firm, not at a
9 restaurant.

10 MR. McKAY: And I assume we're talking about in
11 terms of the breath of the order that hasn't been addressed
12 yet, we're talking about things that are reasonably addressed
13 to the proceedings before your Honor.

14 THE COURT: I want to move this forward. Let's not
15 have a lot of unnecessary effort. The central issues are
16 fairly clear.

17 THE WITNESS: If I may, I think I can really
18 identify what I think would be most relevant.

19 THE COURT: Try to do that so we can finish this as
20 quickly as possible and you can go back to your home.

21 THE WITNESS: Thank you.

22 THE COURT: I'll see you at 10:45 and the special
23 master will tell you how he can be consulted.

24 MR. VON LOHMANN: We can then at the 10:45 hearing
25 also hear from the other nonparties -- as you Honor knows,

1 there are at least three represented non-parties who are
2 arguably named in the injunction who would like to argue the
3 motion to clarify or modify the Court's prior mandatory
4 injunction.

5 So I'm just clarifying are we on for that as well
6 after the close of evidence?

7 THE COURT: Yes, I'll hear from anybody who wants to
8 be heard. And if necessary, we'll go over to the following
9 day.

10 MR. HAYES: Thank you, your Honor.

11 THE COURT: And the day following.

12 Thank you very much, everybody.

13 (Matter concluded.)

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I N D E X

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