

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In re: ZYPREXA PRODUCTS LIABILITY : MDL No. 1596
LITIGATION :
-----X
THIS DOCUMENT RELATES TO: :
 :
ALL ACTIONS :
 :
-----X

**ELI LILLY AND COMPANY’S AMENDED PROPOSED FINDINGS OF FACT
CONCERNING THE TEMPORARY MANDATORY INJUNCTION**

Eli Lilly and Company (“Lilly”) submits the following proposed Findings of Fact in support of its request to extend the December 29, 2006, Temporary Mandatory Injunction, as modified by the Court on January 3, 2007. These Findings of Fact reflect the evidentiary record established during the numerous hearings in this matter, including the evidentiary hearing on January 16 and 17, 2007.

CASE MANAGEMENT ORDER NO. 3

1. On July 2, 2004, when discussing the entry of the protective orders in this case, the Court expressed concern about select disclosures of information because they could harm the vulnerable patient population that is treated with antipsychotic medications, and prejudice the parties rights to a fair trial: “[I]f the newspapers are slathered with material that might be misunderstood by the lay reader, that might do some harm or prejudice a case that is still pending.” (Tr. of Hearing before the Honorable A. Simon Chrein (July 2, 2004) at 10-11, attached Ex. 1.)

2. On August 3, 2004, this Court entered Case Management Order No. 3 (“CMO-3”). (CMO-3, attached Ex. 2.)

3. CMO-3 prohibits dissemination of “Confidential Discovery Materials” to any person with certain specified exceptions. (*Id.* at ¶ 5.)

4. CMO-3 requires, in relevant part, that “[a]ny individual to whom disclosure is to be made . . . shall sign, prior to such disclosure, a copy of the Endorsement of Protective Order.” (*Id.* at ¶ 6.)

5. The Endorsement of Protective Order attached to CMO-3 provides, in relevant part, that the recipient of Confidential Discovery Materials agrees (i) to be “bound by” CMO-3; (ii) “not to disclose [to] others, except in accord with the Order, any Confidential Discovery Materials, in any form whatsoever, and that such Confidential Discovery Materials and the information contained therein may be used only for purposes authorized by the Order”; (iii) that the recipient’s “obligation to honor the confidentiality of such discovery material will continue even after this Litigation concludes”; (iv) to “be subject to sanctions, including contempt of court,” for failure to abide by those orders; and (v) to be “subject to the jurisdiction of the United States District Court, Eastern District of New York, for the purposes of any proceedings relating to the enforcement of the Order.” (*Id.* at Attach. A.)

6. Among other restrictions, CMO-3 requires any recipient of Confidential Discovery Materials, if subpoenaed by another court, to promptly notify the party that produced the Confidential Discovery Materials:

in writing of all of the following: (1) the discovery materials that are requested for production in the subpoena; (2) the date on which compliance with the subpoena is requested; (3) the location at which compliance with the subpoena is requested; (4) the identity of the party serving the subpoena; and (5) the case name, jurisdiction and index, docket, complaint, charge, civil action or other identification number or other designation identifying the litigation . . . or other proceeding in which the subpoena or other process has been issued. In no event shall confidential documents be produced prior to the receipt of written notice by the

designating party and a reasonable opportunity to object. Furthermore, the person receiving the subpoena or other process shall cooperate with the producing party in any proceeding related thereto.

(*Id.* at ¶ 14.)

DR. DAVID EGILMAN

7. David Egilman, M.D., M.P.H., was retained by The Lanier Law Firm to serve as a consulting expert for cases pending in the Zyprexa MDL proceedings. (Pet'r Ex. 12, Affirmation of Richard D. Meadow (January 2, 2007) at ¶ 3 and Attach. D, attached Ex. 3; Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 198, attached Ex. 4.)

8. Before Dr. Egilman received any Confidential Discovery Materials, The Lanier Law firm was required to, and did, inform Dr. Egilman of the multiple protective orders entered in the above-captioned case, including CMO-3, CMO-10, and CMO-11. (Pet'r Ex. 12, Affirmation of Richard D. Meadow, (January 2, 2007) at ¶ 3 and Attach. D, attached Ex. 3.)

9. Before receiving Confidential Discovery Materials, Dr. Egilman executed the Endorsement to CMO-3, agreeing (i) to be bound by those protective orders; (ii) to “be subject to sanctions, including contempt of court,” for failure to abide by those orders; and (iii) to be “subject to the jurisdiction of the United States District Court, Eastern District of New York, for the purposes of any proceedings relating to the enforcement of” CMO-3. (*Id.* at ¶¶ 3, 5–7)

10. Dr. Egilman asked The Lanier Law Firm to modify the terms of his Endorsement, to create special exceptions — which were never communicated to Lilly or the Court. Mr. Meadow rejected the exceptions Egilman made on the first Endorsement to the protective order, and provided documents to Dr. Egilman once he signed the appropriate Endorsement to CMO-3. (*Id.* at ¶¶ 6–7 and Attach. B–C; Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 221–22, attached Ex. 4.)

11. Dr. Egilman received Confidential Discovery Materials from The Lanier Law Firm, and later was granted remote access to the Plaintiffs' Steering Committee-maintained database of Zyprexa-related discovery materials, including documents protected by CMO-3. (Pet'r Ex. 12, Affirmation of Richard D. Meadow, (January 2, 2007) at ¶¶ 4, 7–8 and Attach. B–C, attached Ex. 3).

12. Dr. Egilman has refused to testify in this matter, asserting his Fifth Amendment right against self-incrimination. (Ltr. from Mr. Hayes to Ms. Gussack (Jan. 23, 2007), attached Ex. 5.)

REPORTER ALEX BERENSON

13. Alex Berenson is a reporter for *The New York Times*. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 82–83, attached Ex. 4.)

ATTORNEY JAMES GOTTSTEIN

14. James Gottstein is an attorney practicing in the State of Alaska. (Pet'r Ex. 1, Ltr. from Mr. Gottstein to Special Master Woodin, (Dec. 17, 2006), attached Ex. 6; Tr. of Hearing Before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 11, 18–19, attached Ex. 7.)

15. Mr. Gottstein also serves as the President and CEO of the Law Project for Psychiatric Rights (“PsychRights”). (Pet'r Ex. 1, Ltr. from Mr. Gottstein to Special Master Woodin, (Dec. 17, 2006), attached Ex. 6.)

EGILMAN, BERENSON, AND GOTTSTEIN CONSPIRE TO GET PROTECTED DOCUMENTS DISSEMINATED TO THE NEW YORK TIMES AND ELSEWHERE

16. In November 2006, Dr. Egilman knew the first trials in the *In re Zyprexa Products Liability Litigation* were only months away. (Ltr. from Mr. Hayes to Mr. Gussack (Jan. 23, 2007), attached Ex. 5.)¹

17. In November 2006, Dr. Egilman also knew that settlement discussions, which had been ongoing for several months, were approaching the point where a resolution of a vast majority of the pending cases in the *In re Zyprexa Products Liability Litigation*, including all the cases filed by the law firm that had retained him as a consulting expert — The Lanier Law Firm — was likely. (*Id.*)

18. Dr. Egilman understood that if he selectively leaked a small subset of the over 15,000,000 pages produced by Lilly in this case to *The New York Times* and elsewhere, the resulting media attention and focus, no matter how temporary or distorted, would likely have an impact on the settlement discussions, and could potentially prejudice Lilly's right to a fair trial. (*Id.*)

19. Nevertheless, Dr. Egilman decided — as he has done in other litigation (e.g., Vioxx), and with other defendants' documents — to selectively leak a small subset of the over 15,000,000 pages produced by Lilly in this case. (*Id.*)

¹ Dr. Egilman has refused to testify in this matter, asserting his Fifth Amendment right against self-incrimination. (Ltr. from Mr. Hayes to Mr. Gussack (Jan. 23, 2007), attached Ex. 5.) Dr. Egilman's counsel agreed that such a letter "will have the equivalence of his taking the Fifth for purposes of evidence." (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 250–51, attached Ex. 4.) As a result, Lilly asks the Court — in the context of these present proceedings — to draw a number of adverse inferences based on Dr. Egilman's refusal to testify. These adverse inferences are not inconsistent with any evidence submitted by any of the parties in these proceedings.

20. These documents were carefully chosen by Dr. Egilman to tell a misleading and distorted story about Zyprexa and its clinical development, and Lilly's sales and marketing practices. (*Id.*)

21. Based on experience, Dr. Egilman knew that by leaking these documents — and not the story told by countless Lilly witnesses during depositions, and millions of pages of other documents produced by Lilly — he could convince Mr. Berenson at *The New York Times* to tell the story he (Dr. Egilman) wanted told. (*Id.*)

22. Dr. Egilman had a problem, though. He needed to find a way to transfer his carefully selected documents, which were subject to this Court's protective orders, to *The New York Times*. (Tr. of Hearing Before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 96, attached Ex. 4; Ltr. from Mr. Hayes to Ms. Gussack (Jan. 23, 2007), attached Ex. 5.)

23. Although CMO-3 provides a procedure for seeking the modification of the protective order, and for the de-designation of documents as confidential, Dr. Egilman never sought to invoke this procedure.² (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 35, attached Ex. 7.)

24. Because Dr. Egilman understood the documents he wanted to leak were properly designated as Confidential Discovery Materials under CMO-3 (and would not be de-designated), or because the timing of such a challenge did not fit his publication timeline, he instead spoke with Mr. Berenson and they agreed on a scheme to bypass CMO-3 and get the protected documents to *The New York Times*. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 96–98, attached Ex. 4.)

² None of the individuals identified in the Temporary Mandatory Injunction took any steps to modify CMO-3 prior to its breach.

25. This scheme was missing an important player — an attorney who would be willing to use a court’s subpoena power to issue a sham request to Dr. Egilman — so Mr. Berenson told Dr. Egilman to contact Mr. Gottstein (with whom Mr. Berenson had prior dealings) and use him as the conduit for getting the protected documents to *The New York Times*:

Q: Why did [Mr. Berenson] call you? What did he tell you when he called you?

A: He told me that he had given Dr. Egilman my name.

Q: Alex Berenson had given Dr. Egilman your name?

A: Yes.

Q: Is that how Dr. Egilman came to contact you on November 28.

A: I think so.

Q: And you said that he had told you that he had given Dr.

Egilman your name. Help me understand that. What did he say?

A: He said that Dr. Egilman had some documents that he wanted to get to the New York Times and that he had, you know, thought that I might be someone who would subpoena them.

(Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 96; attached Ex. 4.)

26. On November 28, 2006, in furtherance of their scheme, Dr. Egilman contacted Mr. Gottstein, informed him that he (Dr. Egilman) “had access to secret Eli Lilly documents pertaining to Zyprexa,” and arranged to have those documents subpoenaed by Mr. Gottstein. (*Id.* at 97; Pet’r Ex. 1, Ltr. from Mr. Gottstein to Special Master Woodin (Dec. 17, 2006) at 4, attached Ex. 6; Tr. of Hearing Before the Honorable Jack. B. Weinstein (Jan 16, 2007) at 24, attached Ex. 7.)

27. Based on this call, Mr. Gottstein understood that Dr. Egilman wanted to make the CMO-3 protected Zyprexa documents public, and needed his help:

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

A: He says that he is a plaintiffs’ expert in this litigation.

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

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

* * *

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

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

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

A: Correct.

Q: And your sense was that Dr. Eagleman [sic] shared your desire to make them public, correct?

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

(Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 24–26, attached Ex. 7; *see also* Ltr. from Mr. Hayes to Ms. Gussack (Jan. 23, 2007), attached Ex. 5.)

28. Dr. Egilman did not send Mr. Gottstein a copy of CMO-3, which contains provisions that must be followed in connection with any subpoena directed to protected documents. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 27–28, attached Ex. 7; Ltr. from Mr. Hayes to Ms. Gussack (Jan. 23, 2007), attached Ex. 5.) Mr. Gottstein believes this was done so that he would not be later “charged with knowledge” of these provisions. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 27–28, attached Ex. 7.)

29. Although Mr. Gottstein was a willing participant in the scheme to disseminate the Zyprexa documents, he had his own problem. He did not have a pending case

that could be used as a vehicle to issue the subpoena for Zyprexa documents. (*Id.* at 31–32; Pet’r Ex. 1, Ltr. from Mr. Gottstein to Special Master Woodin (Dec. 17, 2006) at 5, attached Ex. 6.)

30. As a result, Mr. Gottstein and Dr. Egilman agreed that Mr. Gottstein would find “a [forced drugging] case” that would “occur very quickly” and then issue a subpoena for the CMO-3 protected documents. (Pet’r Ex. 1, Ltr. from Mr. Gottstein to Special Master Woodin (Dec. 17, 2006) at 5, attached Ex. 6; Tr. of Hearing Before the Honorable Jack B. Weinstein (Jan 16, 2007) at 31–32, attached Ex. 7.)

31. Later that same day, Dr. Egilman sent Mr. Gottstein an email that simply contained his contact information. The subject of this email was “subpoena.” (Pet’r Ex. 7 at 0001, Email from Dr. Egilman to Mr. Gottstein (November 28, 2006), attached Ex. 8)

32. Although Mr. Gottstein then “proceeded to try to acquire a suitable case in earnest,” he was unable to find a forced drugging case, with its quick deadlines. Instead, on the evening of December 5, he found a situation where the Alaska Office of Public Advocacy had been granted guardianship rights over a patient (identified as “B.B.”), which allowed the State to make treatment decisions on behalf of B.B. (the “Alaska Action”). (Pet’r Ex. 1, Ltr. from Mr. Gottstein to Special Master Woodin (Dec. 17, 2006) at 5, attached Ex. 6.)

33. The next morning, on December 6, Mr. Gottstein filed papers to terminate the guardianship of B.B., and asked an Alaska state court to issue four subpoenas, including one to Dr. Egilman. (*Id.*)³

³ Nothing has happened with respect to the other three subpoenas issued. Mr. Gottstein cancelled the subpoena directed to Dr. Grace Jackson on December 12, 2006 — the day after Dr. Egilman started sending him the Zyprexa documents — and the other two depositions have not gone forward. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 155, attached Ex. 4)

34. Although Mr. Gottstein now acknowledges that it would be “wrong,” as an attorney and officer of the Court, to misuse or abuse the Court’s subpoena power, he issued his sham subpoena to Dr. Egilman in the Alaska Action even though B.B. was not taking Zyprexa:

Q: I understand what you are saying but I just want to make it clear that you have no evidence to present to the Court today that at any point from December 5th through today, you have no evidence to provide to the Court that [B.B.] was taking Zyprexa at any time during that period, correct?

A: Correct.

Q: And so you issued a subpoena, you found a case with someone who has no evidence of taking Zyprexa and you issued a subpoena to Dr. Eagleman [sic] on December 6. Dr. Eagleman [sic] told you he had Zyprexa documents, right?

A: Yes.

Q: He didn’t tell you he was an expert in any other cases and had any other documents correct?

A: Yes.

(Tr. of Hearing Before the Honorable Jack. B. Weinstein (Jan 16, 2007) at 12, 33–34, attached Ex. 7.)

35. Mr. Gottstein then emailed (and faxed) the Alaska state court subpoena to Dr. Egilman rather than making proper service of a subpoena in Massachusetts, Dr. Egilman’s state of residence. (Pet’r Ex. 7 at 0002, Email from Mr. Gottstein to Dr. Egilman (December 6, 2006), attached Ex. 9.)

36. The Alaska subpoena called for the production of documents on December 20, 2006. (Pet’r Ex. 7 at 0006–07, Dec. 6, 2006 Subpoena at 1, attached Ex. 10.)

37. To further mask the subpoena’s true purpose, Mr. Gottstein buried the request for Zyprexa documents “in the middle” of fifteen other prescription medicines, even though he and Dr. Egilman knew that Dr. Egilman only had — and would only be producing — Zyprexa documents. (*Id.* at 2 ¶ 3; Tr. of Hearing Before the Honorable Jack. B. Weinstein (Jan.

16, 2007) at 34–35, attached Ex. 7; Ltr. from Mr. Hayes to Ms. Gussack (Jan. 23, 2007), attached Ex. 5.)

38. On December 6, 2006, Dr. Egilman sent a fax to General Counsel for Lilly Richard Armitage in Indiana purporting to notify Lilly of the subpoena in the Alaska Action, and its December 20 return date. (Pet’r Ex. 7 at 0005, Fax from Dr. Egilman to Mr. Armitage, attached Ex. 11; Tr. of Hearing Before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 137, attached Ex. 4.)

39. Dr. Egilman never contacted Pepper Hamilton LLP, the Lanier Law Firm, or any attorneys representing either Lilly or the plaintiffs in this litigation regarding the December 6 subpoena.

40. Despite efforts to delay Lilly’s counsel’s involvement in this issue, Pepper Hamilton spoke with The Lanier Law Firm on December 13 — a full week before the announced December 20 production date — and received assurances that plaintiff’s counsel had spoken with Dr. Egilman and that no documents would be produced until Lilly’s motion to quash the Alaska subpoena was ruled upon. (Pet’r Ex. 12, Affirmation of Richard D. Meadow, (January 2, 2007) at ¶ 9 and Attach. D, attached Ex. 3.).

41. Richard Meadow, Esq., of The Lanier Law Firm, confirms that he spoke with Dr. Egilman on December 13. During this conversation, according to Mr. Meadow, he told Dr. Egilman not to produce any documents, and Dr. Egilman responded, “Yes, Ricky.” (*Id.*; Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 199-200, attached Ex. 4.)

LILLY LEARNS OF THE BREACH OF CMO-3

42. On December 15, 2006, counsel for Lilly learned that, despite his representations to Mr. Meadow, Dr. Egilman had violated CMO-3 by sending Mr. Gottstein documents that he had received pursuant to the confidentiality provisions of CMO-3.

43. That same day (which was a Friday), upon the joint application of members of the *In Re Zyprexa Products Liability Litigation* Plaintiffs' Steering Committee ("PSC") and Lilly, and after giving Mr. Gottstein notice and an opportunity to be heard on the matter, Special Master Peter H. Woodin entered an order requiring Mr. Gottstein and Dr. Egilman to immediately send to the Special Master's office in New York any and all documents produced by Lilly pursuant to CMO-3 (including all copies of any electronic documents, hard copy documents and CDs/DVDs). (Order of Dec. 15, 2006; attached Ex. 12.)

44. Mr. Gottstein did not take any steps on December 16 or 17 to comply with the Court's order, although he believes he advised Mr. Berenson about its existence:

Q: Now, once you received the order from Special Master Woodin on December 15th, what action did you take to comply with that order?

A: Well, what I did was I didn't believe that I was subject to Special Master Woodin's directives, that I wasn't a party or anything like that, so I tried to clarify that immediately with Special Master Woodin and I sent them an initial E-mail kind of indicating that and that I would send something further later, which I did.

Q: But you took no further action to actually comply with the order after you received it on December 15th, you sought to clarify but did you take any steps to comply with the order in the midst of your attempting to clarify?

A: By complying, you mean get them back? No.

Q: For example, did you call Alex Berenson and say I just got an order that says these documents were improperly disseminated, I think that might be something you might want to know?

A: I think I probably did communicate the order -- I may have communicated the order to him, yes.

Q: Did you try to get the documents back?

A: No.

Q: From anybody?

A: No. Well -- no.

(Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 99–100, attached Ex. 4.)

45. Rather than comply with the Order, Mr. Gottstein sent a letter to Special Master Woodin on Sunday evening, December 17, 2006, at 11:30 p.m., questioning Special Master Woodin’s authority and providing his version of the events that led to his possession of CMO-3 protected Zyprexa documents. (*See* Pet’r Ex. 1, Ltr. from Mr. Gottstein to Special Master Woodin (Dec. 17, 2006), attached Ex. 6).

46. Mr. Gottstein’s December 17 letter explained how Dr. Egilman violated CMO-3 and admitted in detail Mr. Gottstein’s collusion in that violation. (*See id.*)

47. More specifically, Mr. Gottstein’s letter described how he and Dr. Egilman had worked in concert to issue a secret “amended” subpoena on December 11, 2006, which called for the immediate production of the Zyprexa documents. (*Id.* at 5–6.)

48. None of the parties in the Alaska case received notice of this amended subpoena. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 46–47, attached Ex. 7)

49. Neither Lilly’s counsel nor The Lanier Law Firm received notice of this amended subpoena, and as Mr. Meadows confirms:

It was not until later that in the business day on December 15, 2006, that I first learned from reading Dr. Egilman’s own narrative timeline that an amended subpoena had been issued by James Gottstein, Esq., calling for the production of Zyprexa-related documents prior to December 20, 2006. It was also on December 15, 2006 that I first learned that Dr. Egilman had produced the Zyprexa-related documents to the requesting party beginning on December 12, 2006.

(Pet'r Ex. 12, Affirmation of Richard D. Meadow, (January 2, 2007) at ¶ 9 and Attach. D, attached Ex. 3; Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 45, attached Ex. 7.)

50. According to Mr. Gottstein, on December 12 — which was only four business days after the original subpoena was issued, and only one day after the second secret amended subpoena was issued — Dr. Egilman began electronically transferring documents to Mr. Gottstein without the knowledge of — or notice to — Lilly, Pepper Hamilton or The Lanier Law Firm:

Q: And earlier you said you had told Dr. Eagleman [sic] repeatedly that he should send the second subpoena to Lilly, correct?

A: Yes.

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

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

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

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

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

A: Correct.

(Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 43–44, attached Ex. 7; *see also* Pet'r Ex. 12, Affirmation of Richard D. Meadow, (January 2, 2007) at ¶ 9 and Attach. D, attached Ex. 3; Pet'r Ex. 1, Ltr. from Mr. Gottstein to Special Master Woodin (Dec. 17, 2006) at 5-6, attached Ex. 6.)

51. Dr. Egilman continued to transfer documents — even after speaking with Mr. Meadow on December 13, and falsely telling Mr. Meadow that no documents would be produced — until Mr. Gottstein received communication from Lilly's lawyers on December 15.

(Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 43, attached Ex. 7; Pet'r Ex. 1, Ltr. from Mr. Gottstein to Special Master Woodin (Dec. 17, 2006) at 5–6, attached Ex. 6)

52. After learning of Dr. Egilman's disclosure of documents to Mr. Gottstein, The Lanier Law Firm demanded the return of all documents in Dr. Egilman's possession, and terminated its relationship with him as an expert in Zyprexa litigation. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 200, attached Ex. 4; *see also* Pet'r Ex. 12, Affirmation of Richard D. Meadow, (January 2, 2007) at ¶ 11 and Attach. D, attached Ex. 3.)

53. Based on the admissions in Mr. Gottstein's December 17 letter (*see* ¶¶ 46, 47, 50, and 51, *supra*), and his continued refusal to comply with Special Master Woodin's order, further court involvement was necessary.

54. The next day, December 18, the Honorable Roanne L. Mann held a telephonic hearing relating to Mr. Gottstein's failure to comply with Special Master Woodin's December 15 order. Mr. Gottstein participated in the hearing. During the hearing, Magistrate Judge Mann made findings relating to Mr. Gottstein, based on admissions in his December 17 letter and his own statements during the hearing:

I think what happened here was an intentional violation of Judge Weinstein's orders. I think it was inappropriate.

* * *

I personally [as a Magistrate Judge, without authority to grant injunctive relief] am not in a position to order you to return the documents. I can't make you return them but I can make you wish you had because I think this is highly improper not only to have obtained the documents on short notice without Lilly being advised of the amendment but then to disseminate them publicly before it could be litigated. It certainly smacks of bad faith.

So this is the extent of what I'm prepared to do is simply state my views on the record and if counsel in the MDL case want

to go before a District Court Judge who has more authority -- I understand Judge Cogan is on miscellaneous duty today.

(Tr. of Telephone Conf. before the Honorable Roanne L. Mann (Dec. 18, 2006) at 10, attached Ex. 13; *see also* Rulings of the Honorable Roanne L. Mann (December 18, 2006), attached Ex. 14 (“[T]he Court concludes that the dissemination of the documents to Mr. Gottstein, and his public dissemination of those documents, violated [CMO-3] and that the E.D.N.Y. has jurisdiction to enforce its orders.”))

55. Shortly thereafter — and again upon the joint application of members of the PSC and Lilly, and after hearing argument from Mr. Gottstein (through his counsel, Mr. McKay) — the Honorable Brian M. Cogan issued an Order for Mandatory Injunction. (Order for Mandatory Injunction of Dec. 18, 2006; attached Ex. 15.)

56. The Mandatory Injunction enjoined Mr. Gottstein from further dissemination of the CMO-3 protected Zyprexa documents, enforced Special Master Woodin’s December 15 order requiring Mr. Gottstein to immediately return all such documents to the Special Master, required Mr. Gottstein to immediately identify any person, organization or entity to which he had disseminated the documents, and required the retrieval and return of all copies of the disseminated documents, regardless of their current location, including the removal of any such documents posted to any website. (*Id.*)

57. The Mandatory Injunction also included a finding by Judge Cogan that Mr. Gottstein had “deliberately and knowingly aided and abetted Dr. David Egilman’s breach of CMO-3.” (*Id.*)

58. This Mandatory Injunction was not entered lightly, and the Court emphasized that its findings rested “exclusively” on the admissions made by Mr. Gottstein in his December 17 letter contesting Special Master Peter Woodin’s authority in this case:

I think it's clear not only that the facts are as stated in the Magistrate's report and recommendation, but I can tell from the December 17th draft letter from Mr. Gottstein that he was aware that these documents were restricted, and that he undertook procedures to help the experts [sic], Dr. Egilman, try to circumvent the restrictions that were on him. He deliberately aided and abetted Dr. Egilman in getting these documents released from the restriction that they were under, under the protective order. He knew what he was doing, and he did it deliberately. Those are my findings, and it's on that basis that I grant the relief.

* * *

I will say any findings I have made have been made exclusively on the basis of [Mr. Gottstein's December 17 letter]. That's the only evidence I have in front of me.

(Tr. of Phone Conf. before the Honorable Brian M. Cogan (Dec. 18, 2006) at 19–20, 22; attached Ex. 16.)

59. In connection with Mr. Gottstein's compliance with this Mandatory Injunction, the parties learned that as soon as Mr. Gottstein received the unlawfully obtained Zyprexa documents, he began creating DVD copies. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 47–48, attached Ex. 7; *See* Pet'r Ex. 7 at 0606, Email from Mr. McKay to Special Master Woodin (Dec. 22, 2006); attached Ex. 17.)

60. Mr. Gottstein confirmed that, from the beginning, he and Dr. Egilman understood and intended that after Mr. Gottstein took possession of the documents, he would disseminate them as quickly as possible. (Tr. of Hearing Before the Honorable Jack. B. Weinstein (Jan. 16, 2007) at 24–26, 35–38, 48–49, attached Ex. 7.) In fact, before Dr. Egilman even turned over any documents, he made sure that Mr. Gottstein knew that the documents should be sent to Mr. Berenson. (*Id.* at 36–38.)

61. At Dr. Egilman's direction, Mr. Gottstein sent copies of the documents to Snigdha Prakash of National Public Radio, Stephen Cha, an employee of a committee of the

United States House of Representatives, and Emilia DiSanto, an employee of a committee of the United States Senate. (*Id.*)

62. In furtherance of their scheme, on December 12 and 13, Mr. Gottstein created copies of the Zyprexa documents — using two laptops and an office computer — and then sent the DVDs to fifteen individuals, including the individuals specifically named in the Order for Temporary Mandatory Injunction entered by the Honorable Brian M. Cogan. (Tr. of Hearing Before the Honorable Jack. B. Weinstein (Jan. 16, 2007) at 36–40, 47–48, attached Ex. 7; *see also* Order for Temporary Mandatory Injunction of Dec. 29, 2006; attached Ex. 18.)

63. Mr. Gottstein and Dr. Egilman understood that the individuals identified by Dr. Egilman, and the other individuals, with whom Mr. Gottstein was affiliated, would assist in disseminating the unlawfully obtained CMO-3 protected documents more broadly:

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

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

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

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

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

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

(Tr. of Hearing Before the Honorable Jack. B. Weinstein (Jan. 16, 2007) at 48–49, attached Ex. 7; *see also* Pet'r Ex. 1, Ltr. from Mr. Gottstein to Special Master Woodin (Dec. 17, 2006) at 1–2, 5-6, attached Ex. 6).

64. After the December 18 hearing with Judge Cogan, Mr. Gottstein put all of the recipients of the unlawfully obtained Zyprexa documents on notice the Court had concluded that the documents were improperly disseminated in violation of CMO-3. (Tr. of Hearing Before

the Honorable Jack. B. Weinstein (Jan. 16, 2007) at 56, attached Ex. 7; Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 102, attached Ex. 4; Pet'r Ex. 7 at 0330–47, 0350–51, and 0447–48, Emails from Mr. Gottstein to DVD recipients (December 18, 2007), attached Ex. 19.)

65. Mr. Gottstein specifically informed these individuals that a court order required the return of the DVD that he had sent to them, along with all physical and electronic copies of the documents. (Pet'r Ex. 7 at 0330–47, 035–51, and 0447–48, Emails from Mr. Gottstein to DVD recipients (December 18, 2007), attached Ex. 19.)

66. Mr. Gottstein further informed these individuals that the Order required the removal of any copies of these documents from their computers “or any other computer equipment, or in any other format, website(s), or FTP site(s), or otherwise on the Internet.” (*Id.*)

67. On December 22, 2006, Mr. Gottstein’s counsel informed Special Master Woodin that none of the recipients of the unlawfully obtained documents had refused to return the documents. (Pet'r Ex. 7 at 0622, Email from Mr. McKay to Special Master Woodin (Dec. 22, 2006), attached Ex. 17)

68. After learning of the Mandatory Injunction, some of the recipients of the documents unlawfully disseminated by Mr. Gottstein returned them to Special Master Woodin.

69. On December 19, Dr. Grace Jackson returned the DVDs that Mr. Gottstein had shipped to her. (Pet'r Ex. 7 at 0620–21, Email from Special Master Woodin to Counsel regarding the return of DVDs (Dec. 22, 2006); attached Ex. 20.)

70. On December 21, 2006, Representative Henry A. Waxman, then Ranking Member of the Committee on Government Reform and now Chairman of that Committee,

returned the documents that Mr. Gottstein had sent to the House Committee on Government Reform. (*Id.*)

71. On January 9, 2006, Dr. Stefan P. Kruszewski returned the DVDs that Mr. Gottstein had shipped to him. (Pet'r Ex. 7 at 1084–85, Email from Wendy Crane (on behalf of Dr. Kruszewski) to Mr. Gottstein and Mr. Fahey regarding the return of DVDs (Dec. 22, 2006); attached Ex. 21.).

72. Mr. Gottstein also certified on December 21, 2006, that he personally retrieved the DVDs that he gave to Terri Gottstein (his wife) and Jerry Winchester (his neighbor), and, on January 13, 2007, certified that Will Hall has returned the DVDs that Mr. Gottstein had shipped to him. (Pet'r Ex. 6, Declaration of James B. Gottstein in Support of Response to Order to Show Cause (January 16, 2007), at Attach. 4 (Letter from Mr. Gottstein to Special Master Woodin (December 21, 2006) and Letter from Mr. McKay to Special Master Woodin (January 13, 2007)), attached Ex. 22).

INDIVIDUALS AND ORGANIZATIONS THAT ACTED IN CONCERT WITH MR. GOTTSTEIN AND OTHERS TO DISSEMINATE THE UNLAWFULLY OBTAINED ZYPREXA DOCUMENTS AND FURTHER ABUSE THE VIOLATION OF CMO-3

73. The evidence shows that several individuals named in the Court's Temporary Mandatory Injunction of December 29, 2006 (as modified on January 3, 2007), have either not returned the unlawfully obtained Zyprexa documents provided by Mr. Gottstein and/or have actively—in concert with Mr. Gottstein and others—further disseminated the unlawfully-obtained confidential documents. These individuals include: Terri Gottstein, Dr. Peter Breggin, Dr. David Cohen, Bruce Whittington, Laura Ziegler, Judi Chamberlin, Vera Sharav, Robert Whittaker, Will Hall, Eric Whalen, and David Oaks. These individuals have utilized the following websites, also mentioned in the Temporary Mandatory Injunction of December 29,

2006 (as modified on January 3, 2007), in connection with these efforts: www.joysoup.net, www.mindfreedom.org, www.ahrp.org, www.ahrp.blogspot.com, and zyprexa.pbwiki.com.

MindFreedom International, Judi Chamberlin, Dr. Peter Breggin, David Oaks, Eric Whalen, zyprexa.pbwiki.com, www.mindfreedom.org, and www.joysoup.net

74. MindFreedom International (“MFI”) is an organization comprised of Affiliates (other organizations that use the MFI name) and Sponsors (organizations with their own name) who share a common goal relating to pharmaceutical use in the mental health system. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 39, attached Ex. 7).

75. Judi Chamberlin, who has not returned the unlawfully obtained Zyprexa documents, is a member of the Board of Directors of MFI. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 236, attached Ex. 4.) There is no evidence that Ms. Chamberlin took any action to stop the efforts of MFI members to disseminate the unlawfully obtained Zyprexa documents.

76. Dr. Peter Breggin, who has not returned the unlawfully obtained Zyprexa documents, is the founder of The International Center for the Study of Psychiatry and Psychology (ICSPP), a sponsor group of MFI. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 39, attached Ex. 7.)

77. David Oaks, the Director of MFI, was actively involved in attempts to disseminate the unlawfully obtained Zyprexa documents, through MFI “alerts” and the zyprexa.pbwiki.com and www.mindfreedom.org websites. (See, e.g., Update 11, MFI Webpage (Dec. 30, 2006), attached Ex. 23; Pet’r 13, Message Bd. Posting by “rafi at phantomcynthetics.com” (Dec. 25, 2006 at 12:53:30); attached Ex. 24; Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 226, 233, attached Ex. 4.)

78. This zyprexa.pbwiki.com website is used to “anonymously” post information about the location of the unlawfully obtained Zyprexa documents, but as Mr. Oaks’s posts make clear, there is nothing anonymous about his involvement or the efforts (of small number of other individuals involved with this wiki) to assist Mr. Oaks in continuing to violate this Court’s orders. (Pet’r 13, Message Bd. Posting by “rafi at phantomcynthetics.com” (Dec. 25, 2006 at 12:53:30); attached Ex. 24.)

79. Mr. Oaks testified that he and others at MindFreedom were just passing along anonymous alerts “similar to a journalist though obviously one with an interest in advocacy for a cause,” and that “in no way, shape or form have we [at MindFreedom] posted those documents ourselves to the internet or disseminated them in that way” (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 228, attached Ex. 4.). This is untrue.

80. The morning after zyprexa.pbwiki.com was launched, on December 25, 2006, Mr. Oaks, congratulated “Rafael”⁴ and another individual setting up the wiki (“Asheesh Laroia”) on their progress — “Way to go!” (Pet’r 13, Message Bd. Posting by “rafi at phantomcynthetics.com” (Dec. 25, 2006 at 12:53:30); attached Ex. 24). He then asked for comments on a proposed MFI alert he planned to send out relating to the unlawfully obtained Zyprexa documents, including “should I advertise this e-mail list on the alert?” (*Id.*)

⁴ It appears that the person using the fictitious screen name “Rafael” is the same individual represented by the Electronic Freedom Foundation, referred to in these proceedings by another fictitious name, “John Doe.” “Rafael” was in the Courtroom on January 16, 2007, but was not present on January 17, 2007, and could not be questioned. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 104, attached Ex. 4.) If either “Rafael” or “Asheesh Laroia” and “John Doe” are in fact the same person, then the claims of “John Doe” — that he was not involved with anyone subject to CMO-3 or involved in these proceedings — is belied by the evidence. (*See e.g.*, Pet’r 13, Message Bd. Posting by “rafi at phantomcynthetics.com” (Dec. 25, 2006 at 12:53:30); attached Ex. 24.)

81. Twenty minutes later, “Rafael” provided suggested edits to the MFI alert, and informed Mr. Oaks that he should “publicize zyprexa.pbwiki.com as I think that is the safest bet for now.” (*Id.*)

82. Over the course of the next several days, the small group of contributors to zyprexa.pbwiki.com worked in concert with Mr. Oaks to disseminate the unlawfully obtained Zyprexa documents, in violation of CMO-3 and the Court’s injunctions.

83. After being confronted with a copy of the update from the MindFreedom website (Update 11, MFI Webpage (Dec. 30, 2006), attached Ex. 23; Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 233, attached Ex. 4.), and his own list-serv postings (Pet’r 13, Message Bd. Posting by “rafi at phantomcynthetics.com” (Dec. 25, 2006 at 12:53:30); attached Ex. 24) — which showed that Mr. Oaks was an active participant with others seeking to unlawfully disseminate the stolen Zyprexa documents — Mr. Oaks changed his testimony and admitted that MindFreedom did provide links to the stolen Zyprexa documents, and took active steps to cause the further dissemination of the documents. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 233–34, attached Ex. 4.) Coming full circle, Mr. Oaks confirmed that when he wrote his MFI alerts, he “tried to post the links where people could obtain” the stolen Zyprexa documents. (*Id.* at 234.)

84. Mr. Oaks further admitted that another MFI member, Eric Whalen, stored the unlawfully obtained Zyprexa documents on his website server, and made these documents available for download for a short time at www.joysoup.net. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 229, attached Ex. 4.) Mr. Oaks added this URL to the MFI website. (*See* Update 11, MFI Webpage (Dec. 30, 2006), attached Ex. 23.)

85. Mr. Oaks misled this Court when he testified that he had no discussions with Mr. Gottstein about the unlawfully obtained Zyprexa documents, or MFI's activities relating to these documents:

Q: Did you ever have any discussion with Mr. Gottstein before, during or after he obtained these documents as to what should be done with them?

A: Absolutely not.

Q: Did you ever have a discussion with Mr. Gottstein about MindFreedom's activities as to these documents?

A: Absolutely not.

(Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 236, attached Ex. 4.)

To the contrary — as confirmed in the documents produced by Mr. Gottstein — Mr. Oaks was in constant communication with Mr. Gottstein about the Zyprexa documents, and efforts to further disseminate them. (*See, e.g.*, Pet'r Ex. 7 at 0362, 0540–42, 0672–76, 0780–0802, 0804–18, 0822–23, 0836–40, 0843, 0901, 0987–94, 1016–21, 1062–63, 1174–79, 1189–92, 1214–16, 1221–23, 1245–48, Emails from Mr. Oaks received by Mr. Gottstein (December 19, 2007 through January 8, 2007), attached Ex. 25.) These communications further reflect Mr. Oaks's persistent efforts to provide information to MFI members about ways to obtain the Zyprexa documents. (*Id.* at 0672–76, 1174–79, 1189–92, 1214–16.)

86. In one of the communications received by Mr. Gottstein, Mr. Oaks proclaimed, “We are all Jim [Gottstein]!” and went on to inform the recipients of an alert about a “grassroots Internet campaign” to disseminate the unlawfully obtained Zyprexa documents. (*Id.* at 1176–78.) Mr. Oaks said that this campaign was distributing an “unusual ‘Christmas Gift’” and “counting on the fact that many courts are closed today.” (*Id.*) The alert provided a link to the www.mindfreedom.org and the zyprexa.pbwiki.com websites, where the recipients could link to a free file-sharing website and download the unlawfully obtained Zyprexa documents. (*Id.*)

Although the alert includes a disclaimer that MFI is only forwarding anonymous alerts, and did not originate them, this is likewise untrue.

87. After the Court's modification of the Temporary Mandatory Injunction of December 29, 2006, on January 3, 2007, Mr. Oaks edited zyprexa.pbwiki.com to remove the links to the unlawfully obtained Zyprexa documents. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 235, attached Ex. 4.)

88. Despite a concerted effort by this small group of individuals to take advantage of Dr. Egilman's and Mr. Gottstein's violation of CMO-3, and to violate the Temporary Mandatory Injunctions, this effort fell flat. As Mr. Oaks confirmed in an email to Mr. Gottstein and Mr. Whalen, MFI is "not aware of any links making Zyprexa documents available." (Pet'r Ex. 7 at 0796, Email from Mr. Oaks to Mr. Gottstein (December 30, 2006), attached Ex. 25.)

89. In addition, despite claims that it would be impossible to control the content of a zyprexa.pbwiki.com, because of the variety of people that could contribute to it, David Oaks, "Rafael" and others — who appear to be contributing to zyprexa.pbwiki.com under several different pseudonyms, perhaps in an effort to suggest the existence of widespread contributions — have been able to abide by the terms of the Temporary Mandatory Injunction, and no one has posted information that would facilitate the dissemination of the unlawfully obtained Zyprexa documents.

Vera Sharav, David Cohen, www.ahrp.org, www.ahrp.blogspot.com

90. Vera Sharav, the President and Founder of the Alliance for Human Research Protection ("AHRP"), and David Cohen, an AHRP Board Member, also did not return the unlawfully obtained Zyprexa documents. In separate affidavits submitted in these

proceedings, Ms. Sharav and Mr. Cohen have each expressed their desire to disseminate the unlawfully obtained Zyprexa documents.

91. On January 17, 2007, this Court ordered Ms. Sharav to turn over her copies of the Zyprexa documents to her counsel. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 194, attached Ex. 4.)

92. Prior to January 17, Ms. Sharav disseminated the unlawfully obtained Zyprexa documents received from Mr. Gottstein, and told Mr. Gottstein that she would “like to coordinate” her efforts with him:

Q: The documents arrived in the mail, what did you do at that point with this disc? It’s a computer disc?

A I had it. I didn’t do anything with it but I got some calls.

Q Did you load it up on your own computer?

A Yes.

Q And you tried to open it?

A Yes.

Q And were you able to open it?

A Yes, I was.

Q Did you print up any of those documents?

A Yes.

Q And did you then distribute the documents that you printed to anybody or give them to anybody?

A I read the documents or some of them.

Q Did you give them to anybody else?

A I had calls from a couple of press people and two came, borrowed the disks, made copies and returned them. I didn’t do it.

Q Who were these people?

A Wall Street Journal, Bloomberg News.

(*Id.* at 168; *see also* Pet’r Ex. 11, Email from Ms. Sharav to Mr. Gottstein regarding dissemination of Zyprexa documents to Attorneys General and coordination of efforts with Mr. Gottstein (December 17, 2006), attached as Ex. 26.)

93. Once the Temporary Mandatory Injunction was issued, Ms. Sharav openly violated it by continuing to provide links to the unlawfully obtained Zyprexa documents at AHRP websites, including www.ahrp.com and www.ahrp.blogspot.com:

Something is warped in this picture. The court is helping Lilly intimidate public advocates by issuing Temporary Mandatory Injunctions. See the court injunction several of us received below. But the internet is an uncontrolled information highway – you never know where or when the court suppressed documents may surface! The documents appear to be downloadable at <http://files-upload.com/files/34070/ZyprexaKills.tar.gz.html> at least as of now. It also appears to be at <http://joysoup.net/archives/06/12/23/08052.html>

(Pet’r Ex. 10, Blog Posting of Vera Sharav (Dec. 29, 2006), attached Ex. 27.)

94. Ms. Sharav also continued to coordinate her efforts with Mr. Gottstein, Mr. Oaks, Robert Whitaker, and Will Hall:

It’s important to keep track of where/when the documents may surface again on cyberspace and let people know.

(Pet’r Ex. 7 at 0889–91, Email exchange between Ms. Sharav, Mr. Gottstein, Mr. Oaks, Mr. Whitaker, and Mr. Hall (January 2, 2007), attached Ex. 28.) After being provided a link relating to a potential location for the Zyprexa documents by Will Hall, Ms. Sharav responds, “thanks Will for the tracking url will post ASAP.” (*Id.*)

Will Hall

95. Will Hall, who only recently returned the DVD of documents he received from Mr. Gottstein — he has made no representation relating to any documents he obtained via a FTP link Mr. Gottstein provided to him — acted in concert with Mr. Gottstein and others to ensure the widespread dissemination of the unlawfully obtained Zyprexa documents, including the provision of potential locations where the Zyprexa documents could be downloaded on the Internet. (*See Id.*)

96. Mr. Hall also provided Mr. Gottstein with information about prior attempts to disseminate confidential documents on the Internet, and agreed to keep the Zyprexa documents “under wraps” until December 18, 2006, and then “follow Gottstein’s instructions” concerning the timing for the release of the Zyprexa documents. (Pet’r Ex. 7 at 0115, 1155–56, Emails from Mr. Hall to Mr. Gottstein regarding “diebold vs. the bloggers” (December 13, 2006) and keeping the Zyprexa documents “under wraps” until December 18, 2006 (December 13, 2006), attached Ex. 29.)

Robert Whitaker

97. Robert Whitaker, who has not returned the documents he received from Mr. Gottstein, similarly acted in concert with Mr. Gottstein and others to ensure the widespread dissemination of the unlawfully obtained Zyprexa documents. (Pet’r Ex. 7 at 0889–91, Email exchange between Ms. Sharav, Mr. Gottstein, Mr. Oaks, Mr. Whitaker, and Mr. Hall (January 2, 2007), attached Ex. 28.)

98. On December 16, 2006, in an email — with the subject line “It’s Been Quite a Day now destroy this email” — Mr. Whitaker explains his intentions to Mr. Gottstein:

I am not sure what the New York Times is going to do with the documents, but if it for some reason doesn’t run with the story, I will certainly try to do so, and I would consider building a website that would, ahem, make all the documents available. What could they do to me? And how could they know how the documents got to me? There are several channels apparently that could be the source. You should proceed now in whatever makes it easiest for you, and let others worry about getting this information out or making it public.

(Pet’r Ex. 7 at 0133–34, Email from Mr. Whitaker to Mr. Gottstein (December 16, 2006), attached Ex. 30.)

99. In another email, on January 2, 2007, Mr. Whitaker congratulates Mr. Gottstein on his attempts to make the unlawfully obtained Zyprexa documents public, and then

says the “same kudos should go to the others who have helped get this information out — Will Hall, David Oaks, Vera Sharav, MindFreedom.” (Pet’r Ex. 7 at 0889–91, Email exchange between Mr. Sharav, Mr. Gottstein, Mr. Oaks, Mr. Whitaker, and Mr. Hall (January 2, 2007), attached Ex. 28.)

Laura Ziegler

100. Laura Ziegler has not returned the documents provided by Mr. Gottstein. In her January 1, 2007, email to Mr. Gottstein, Ms. Ziegler indicates that she is concerned about attending any hearing on the injunction because she might need to answer — “or dodge” — questions about her activities relating to the Zyprexa documents. She also tells Mr. Gottstein that it might be “easier to answer these questions after finding out what’s happened on Jan. 3.” (Pet’r Ex. 7 at 0863–67, Email from Ms. Ziegler to Mr. Gottstein (January 1, 2007), attached Ex. 31.)

101. Ms. Ziegler has never challenged the injunction.

Bruce Whittington and Terri Gottstein

102. Mr. Whittington is the Executive Director of PsychRights, Mr. Gottstein’s organization. He has not returned the documents provided by Mr. Gottstein, and has been a conduit of information to Mr. Gottstein of efforts to disseminate the unlawfully obtained Zyprexa documents, including those by MindFreedom members such as Eric Whalen and Pat Risser. (*See e.g.*, Pet’r Ex. 7 at 0653–55, 0858, Emails from Mr. Whittington to Mr. Gottstein regarding dissemination efforts of Mr. Whalen and Mr. Risser (December 30, 2006 and January 1, 2007), attached Ex. 32; Pet’r Ex. 7 at 0626, Email from Mr. Gottstein to Lawrence A. Plumlee (December 22, 2006), attached Ex. 33.)

103. Terri Gottstein is Mr. Gottstein’s wife. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 16, 2007) at 46, attached Ex. 7.) Although she has returned

the Zyprexa documents given to her by her husband, she has been involved with Mr. Gottstein's efforts to disseminate the Zyprexa documents from the beginning, and may have been the only other individual — besides Mr. Gottstein and Dr. Egilman — with prior knowledge of the secret December 11 subpoena. (*Id.*)

104. On January 11, 2007, she communicated with her husband about ways to raise Congressional interest in the Zyprexa documents. (Pet'r Ex. 7 at 1136, Email from Ms. Gottstein to Mr. Gottstein (Dec. 22, 2006), attached Ex. 34.)

105. Neither Mr. Whittington nor Ms. Gottstein has challenged the injunction.

The Enjoined Parties Submitted No Competent Evidence of Widespread Dissemination of the Unlawfully Obtained Zyprexa Documents or the Bates Numbers of the Documents Purportedly Available on the Internet

106. The enjoined parties have asked this Court to assume a critical fact in this case, namely, the nature and extent of the unlawfully obtained Zyprexa documents availability on the Internet. They have submitted no competent evidence on either of these issues, and the evidentiary record — at least with respect to the injunction as to them — is now closed.⁵

107. Mr. Gottstein's counsel has informed the Court that there were at least two, and possibly more, collections of the documents Mr. Gottstein obtained from Dr. Egilman. (Pet'r Ex. 7 at 0606, Email from John McKay to Special Master Woodin (Dec. 22, 2006); attached Ex. 17.)

108. The enjoined parties have not provided any evidence — even assuming that documents are available on the Internet — which grouping (or groupings) of documents is purportedly available.

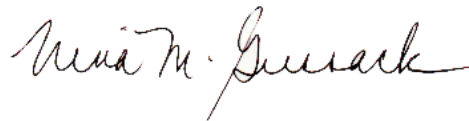
⁵ Lilly understands that the Court has invited Mr. Berenson to appear on February 7, 2007, in order to address Mr. Gottstein's testimony, which implicated him in a conspiracy to obtain, and publish, documents subject to this Court's protective order, and Lilly reserves its right to supplement the factual record in support of this motion.

109. The rhetoric about the availability of Zyprexa documents on the Internet has always far outpaced their actual availability. As Mr. Gottstein, and others, have conceded privately:

I am surprised, but it is not inconceivable Eli Lilly is going to get the cat back into the bag. I would have sent more copies out if I thought they could get back all the ones they seem to be.

(Pet'r 7 at 0626, Email from Mr. Gottstein to Lawrence A. Plumlee (December 22, 2006), attached Ex. 33; Pet'r Ex. 7 at 0796, Email from Mr. Oaks to Mr. Gottstein (December 30, 2006), attached Ex. 25.)

Respectfully submitted,



Nina M. Gussack
George A. Lehner
Sean P. Fahey
PEPPER HAMILTON LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 981-4000

Sam J. Abate, Jr. (SA 0915)
MCCARTER & ENGLISH LLP
245 Park Avenue
27th floor
New York, NY 10167

Dated: January 31, 2007

Counsel for Defendant, Eli Lilly and Company