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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In re: :
: 04-MD-1596 (JBW)
ZYPREXA PRODUCT LIABILITY :
LITIGATION, : December 18, 2006
: Brooklyn, New York
:
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Eli Lilly: SEAN FAHEY, ESQ.

For Lanier Law Firm: EVAN JANUSH, ESQ.

Local Counsel for Lilly: BREWSTER JAMESON, ESQ.

Court Transcriber: SHARI RIEMER
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Proceedings recorded by electronic sound recording,
transcript produced by transcription service

1 THE COURT: This is Judge Mann on the line. I'm
2 conducting -- one moment. This is Judge Mann on the line. I'm
3 conducting a telephone conference in In re: Zyprexa
4 Litigation, 04-MD, I believe it's 1496.

5 Would counsel please state their -- 1596. Would
6 counsel please state their appearances for the record?

7 MR. FAHEY: This is Sean Fahey on behalf of Eli Lilly
8 & Co.

9 MR. JANUSH: This is Evan Janush on behalf of the
10 Lanier Law Firm plaintiff.

11 THE COURT: I'm sorry. Could you state your name
12 again?

13 MR. JANUSH: Evan Janush, E-V-A-N, last name J-A-N-U-
14 S-H on behalf of Lanier Law Firm plaintiff.

15 MR. JAMISON: This is Brewster Jamison. I'm local
16 counsel in Anchorage, Alaska for Eli Lilly.

17 MR. GODSTEIN: This is Jim Godstein but I'm not in
18 this case in any manner other than that I received documents
19 pursuant to a subpoena in another case.

20 THE COURT: I believe that it was Mr. Fahey who
21 requested that this conference be scheduled.

22 MR. FAHEY: Yes, Your Honor, and we wanted to bring
23 an issue of great importance to your attention. As you may
24 know, Special Master Wooden entered an order on Friday evening
25 which among other things directed Mr. Godstein -- found that

1 the possession of documents produced by Eli Lilly & Co. had
2 been in violation of the Case Management Order Number 3, found
3 that Mr. Godstein had further disseminated these documents to
4 additional third parties in violation of CMO 3 including the
5 New York Times, that Mr. Godstein was ordered to immediately
6 return all the documents until such further order of the Court.

7
8 Mr. Godstein has taken the position that Special
9 Master Wooden doesn't have the power to issue such orders as
10 Special Master even though Case Management Order Number 6
11 provides that he has the authority to -- all discovery matters
12 including the protective orders in the MDL and has at this
13 point refused to return the documents to Mr. Wooden.

14 Let me just address how Mr. Godstein came into
15 possession of these documents. As he details in his letter to
16 Special Master Wooden of last night, he learned from a
17 consulting expert on behalf of the plaintiffs -- a pressure
18 litigation that this consulting expert had possession of
19 documents that were produced by Eli Lilly and were covered by,
20 among other things, Case Management Order Number 3. He then in
21 his own words found a case that could be used to subpoena these
22 documents and had an issue -- had a subpoena issued on the 6th
23 of December. The return date for that subpoena was December
24 20th. That subpoena was sent to Lilly. Lilly took immediate
25 action to identify who was representing Dr. Egelman or who had

1 retained him. By the 13th, still a week before the documents
2 were to be produced, we informed the Lanier Law Firm that we
3 would be moving to quash the subpoena and asked them to convey
4 to Dr. Egelman that he should not produce documents during the
5 pendency of the motion. The Lanier Law Firm called Dr.
6 Egelman, told him not to produce documents. Dr. Egelman said
7 he would not produce documents.

8 It later turned out that Mr. Godstein and Dr. Egelman
9 had communicated through an amended subpoena which no one has
10 ever seen until this issue surfaced on Friday night which
11 called for the immediate production of documents, not on
12 December 20th but immediately, and Dr. Egelman without the
13 consent of the Lanier Law Firm, without the consent of Lilly,
14 started to produce documents subject to the protective order
15 via an internet transfer procedure on December 12th. Days
16 later the New York Times had those documents and we are
17 concerned not only about the violation of CMO 3 but also in
18 terms of the continued dissemination of these documents.

19 What we were asking for is for Mr. Godstein to return
20 the documents to Special Master Wooden so that we could avoid
21 any further dissemination of the documents until the issues
22 about whether he appropriately or inappropriately came upon
23 those documents was resolved.

24 THE COURT: Mr. Godstein, do you want to respond? I
25 have read your letter to Special Master Wooden.

1 MR. GODSTEIN: Well, I guess the main thing is that I
2 told Dr. Egelman that I thought he should give the amended
3 subpoena to Lilly and I'm not sure why he didn't.

4 THE COURT: When was it issued?

5 MR. GODSTEIN: December 11th. So I think he didn't
6 see the -- kind of the significance of it as I understand
7 although I tried to convey that to him. So I don't know. I
8 mean I feel like I have the doc -- I haven't seen Case
9 Management Order 6 or other documents, you know, and you've
10 read my letter so you see that the case that I got was part of
11 Psychrights [Ph.] mission and so it's in my view, and I don't
12 think there's much question about it, is entirely legitimate
13 use. I mean that's what Psychrights does is pick strategic
14 cases to further its mission.

15 THE COURT: Well, certainly you could have subpoenaed
16 documents from Lilly and then you could have litigated that in
17 the court in Alaska, but instead you chose to obtain these
18 documents through an expert who I presume you knew had come
19 into possession of them subject to the terms of a
20 confidentiality order. Is that correct?

21 MR. GODSTEIN: Yes, but I didn't know -- I didn't see
22 the confidentiality order until just this last Friday.

23 THE COURT: But you knew that he had obtained those
24 documents pursuant to a confidentiality order and before you
25 obtained the documents and before you amended the subpoena to

1 require immediate production you did not ask to have a copy of
2 it. Is that correct?

3 MR. GODSTEIN: Correct. Well, I -- I indicated and
4 he indicated that he had to comply with it and I understood
5 that and expected him to comply with it and frankly I never
6 expected to get the documents as I put in my little letter.

7 MR. JANUSH: Your Honor, this is Evan Janush on
8 behalf of --

9 MR. GODSTEIN: And then I didn't really -- the
10 amended subpoena doesn't say immediately.

11 MR. JANUSH: Your Honor, this is -- if I may, this is
12 Evan Janush.

13 THE COURT: Well, I'd like to hear -- please don't
14 interrupt one another. Mr. Godstein, do --

15 MR. JANUSH: I apologize.

16 THE COURT: Do you have anything further to say?

17 MR. GODSTEIN: You characterized the amended one as
18 saying immediately.

19 THE COURT: Well, you did -- you asked for it prior
20 to the return date which is on the 20th and as I understand it
21 from the documents that I've been reviewing in the last few
22 minutes there were some discussions going on about adjourning
23 the return date so that all counsel would have sufficient time
24 to consider these issues and to litigate them if need be.

25 MR. GODSTEIN: That happened later. That happened

1 after the production had already occurred. So what happened is
2 I had -- there were three other subpoenas issued in this case
3 because it's a real case and I -- it's a subpoena for a
4 telephonic deposition and it said for him to appear and bring
5 with him those documents and then I realized over the weekend
6 well, that doesn't make any sense. I can't examine him over
7 the telephone if he's got the documents. So I did the amended
8 one and said to -- the amended subpoena says to provide them
9 before the date and then in my email I said basically to give
10 me a chance to review them and make for an efficient deposition
11 to send them as soon as he can. So that's what it -- that's
12 how it was set up. I mean that was what happened.

13 MR. JAMISON: Your Honor, this is Brewster Jamison
14 for Lilly in Anchorage.

15 THE COURT: Yes.

16 MR. JAMISON: As far as I can tell, Your Honor, I've
17 spoken with the counsel for the State of Alaska. The amended
18 subpoena has not been served or was not served on James Parker
19 as far as we can tell and so the existence of the amended
20 subpoena seeking the unusual production of documents earlier
21 than the original subpoena date was not delivered and didn't
22 come to our attention until frankly last night.

23 MR. JANUSH: Well, the practice of --

24 MR. GODSTEIN: May I, Your Honor?

25 THE COURT: Well, I asked them not to interrupt you.

1 So if you would not interrupt them. I don't know that they've
2 finished.

3 Anything further from the defense?

4 MR. JAMISON: No, I think Mr. Janush was trying to
5 speak on behalf of the plaintiffs, Your Honor.

6 MR. JANUSH: Your Honor, this is Evan Janush and I
7 just wanted to add one point which I -- we are dealing with a
8 situation in which we have an attorney from Alaska who is quite
9 clearly aware of the concept of jurisdiction. In fact, he
10 challenged Special Master Wooden's jurisdiction in this very
11 matter and yet he issued a state subpoena on a state resident
12 of Massachusetts, my consultant, which he clearly as a Harvard
13 Law trained lawyer and as a -- as any lawyer clearly knows has
14 no jurisdiction over a Massachusetts resident.

15 So for someone who's challenging the jurisdiction of
16 this court on an order to have issued a state subpoena on a
17 Massachusetts resident is entirely suspect.

18 THE COURT: Mr. Godstein, is there anything else you
19 wanted to add?

20 MR. GODSTEIN: Well, there was something that Mr.
21 Jamison was saying that I wanted to respond to.

22 THE COURT: All right. If you have nothing you want
23 to add let me just say that I am very distressed about what
24 happened here. The issue before me is not whether ultimately
25 Mr. Godstein would be entitled to obtain these documents from

1 Eli Lilly. He could have subpoenaed Elli Lilly directly and
2 they could have litigated his entitlement to Lilly's documents
3 in state court in Alaska. The issue really is the propriety of
4 what was done here which was to obtain documents that had been
5 produced by Lilly pursuant to a protective order. To subpoena
6 them not even from opposing counsel in this litigation but from
7 an expert one step removed who when he received those documents
8 took an undertaking to comply with the protective order under
9 the terms of Case Management Order Number 4, he had to sign a
10 document indicating that he was aware of the conditions which
11 included that those documents would be used solely for purposes
12 of this litigation.

13 To have obtained them under these circumstances with
14 a return date of the 20th and then to have after Lilly was
15 notified and there apparently were communications with Lilly
16 concerning adjourning the return date to almost surreptitiously
17 modify that subpoena so that the documents would be produced
18 without Lilly's knowing at the time, without knowing that the
19 date had in effect been moved up, this is highly suspect. It
20 certainly has the ring of collusion here and I find it very
21 disturbing.

22 There is no doubt in my mind that the Court in the
23 Eastern District of New York has the authority to enforce its
24 orders and my only hesitation is as a Magistrate Judge. I do
25 not have the authority to grant injunctive relief or to hold

1 any individual in contempt of court. That would be a matter
2 that the District Court Judge would have the authority to do.
3 As I assume you're all aware, Judge Weinstein is traveling and
4 is unavailable at this time. So I am not in a position to
5 order -- issue any injunctive relief, but I am prepared to say
6 that I think that what happened here was an intentional
7 violation of Judge Weinstein's orders. I think it was
8 inappropriate. I cannot make -- if you want to litigate your
9 entitlement to these documents in Alaska, Mr. Godstein, then
10 you can subpoena Lilly but as I said, it appears to me that you
11 rather than face Lilly directly you were trying to attempt for
12 the back door what you should have done through the front door.
13 This was improper.

14 I personally am not in a position to order you to
15 return the documents. I can't make you return them but I can
16 make you wish you had because I think this is highly improper
17 not only to have obtained the documents on short notice without
18 Lilly being advised of the amendment but then to disseminate
19 them publicly before it could be litigated. It certainly
20 smacks as bad faith.

21 So this is the extent of what I'm prepared to do is
22 simply state my views on the record and if counsel in the MDL
23 case want to go before a District Court Judge who has more
24 authority -- I understand Judge Cogan is on miscellaneous duty
25 today.

1 MR. FAHEY: Yes, Your Honor. This is Sean Fahey on
2 behalf of Eli Lilly. We do intend to go before Judge Cogan
3 today and I would ask Mr. Godstein to provide me his
4 availability this afternoon for a hearing with Judge Cogan.

5 MR. GODSTEIN: Well, I'm going to get counsel here
6 and discuss this whole situation. I would want to say -- I do
7 want to say that I did advised Dr. Egelman to give the amended
8 subpoena to Lilly and he didn't seem to think it made any
9 difference.

10 THE COURT: Well, don't you think that you should
11 have done that directly? You were aware of the fact that these
12 documents were subject to a confidentiality order and you chose
13 to go through the expert who had them solely for purposes of
14 this litigation rather than subpoena Lilly directly. So don't
15 you think that you had an obligation to inform Lilly?

16 MR. GODSTEIN: No.

17 THE COURT: All right. Well, I think I've said all I
18 need to say. Is there anything further?

19 MR. FAHEY: Your Honor, I'm wondering if it would be
20 beyond your authority to at least ask Mr. Godstein to not
21 further disseminate the documents until we can have the issue
22 brought emergently to Judge Cogan?

23 THE COURT: Well, I can ask him not to and I think,
24 although I haven't used those precise words, I've certainly
25 suggested that he should not further disseminate them. Indeed

1 he ought to give them back and then litigate the issue.

2 MR. FAHEY: Thank you, Your Honor.

3 THE COURT: But he can't undo what's already been
4 done but that should not be an excuse for him to further
5 disseminate the documents.

6 MR. FAHEY: Thank you very much, Your Honor.

7 THE COURT: Thank you. Goodbye.

8 MR. GODSTEIN: I'll not further disseminate them.

9 THE COURT: All right. Goodbye.

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

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Shari Riemer

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Dated: 12/19/06

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