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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re: ZYPREXA LITIGATION

No. 07-CV-0504 (JBW)

**NONPARTIES MINDFREEDOM INTERNATIONAL, JUDI CHAMBERLIN,
ROBERT WHITAKER, VERA SHARAV, DAVID COHEN,
ALLIANCE FOR HUMAN RESEARCH PROTECTION,
AND JOHN DOE'S JOINT PROPOSED FINDINGS OF FACT
AND OBJECTIONS TO ELI LILLY'S AMENDED PROPOSED FINDINGS OF FACT**

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FACT**

With respect to MindFreedom International, David Oaks, Judi Chamberlin, Robert Whitaker, Vera Sharav, David Cohen, the Alliance for Human Research Protection (“AHRP”), and John Doe (collectively, “the Nonparties”), the vast majority of the relevant facts in this matter are undisputed. Nevertheless, Eli Lilly in its Amended Proposed Findings of Fact Concerning the Temporary Mandatory Injunction, filed on January 31, 2007, (“Lilly Prop. Findings”) goes out of its way to muddy the evidentiary record with distortions and unsupported legal conclusions. When shorn of these distractions, the factual record here demonstrates that the Nonparties had no prior knowledge of, nor involvement in, the disclosure of Eli Lilly documents by Dr. Egilman to Mr. Gottstein. In light of this fact, and for the reasons set forth in the Nonparties’ Memorandum of Points & Authorities submitted herewith, this Court should deny

Eli Lilly's request to extend the January 4, 2007 Temporary Mandatory Injunction against the Nonparties.

I. Introduction

The basic chronology of relevant events leading to the disclosure of the Lilly Documents by Dr. Egilman to Mr. Gottstein is undisputed. On November 28, 2006, Dr. David Egilman contacted James Gottstein and informed him that he had access to Eli Lilly documents pertaining to Zyprexa. (Lilly Prop. Findings, ¶ 26). On December 6, 2006, Dr. Egilman received a subpoena from Mr. Gottstein seeking production of these documents. (Lilly Prop. Findings, ¶ 35). On December 12-13, 2006, pursuant to the subpoena, Dr. Egilman electronically transmitted the Lilly Documents to Mr. Gottstein. (Dec. 17, 2006 Gottstein Ltr. to Special Master Woodin at 6, submitted as Exh. 6 to Lilly Prop. Findings). During the next several days, Mr. Gottstein sent copies of the documents to approximately 15 people, either electronically or by postal mail, including Mr. Whitaker, Ms. Sharav, and Ms. Chamberlin. (Lilly Prop. Findings ¶ 62). On December 15, 2006, after receiving a faxed letter from Eli Lilly's counsel, Mr. Gottstein immediately ceased further dissemination of the documents. (Tr. of Jan. 17, 2007 hearing before Hon. J. Weinstein (hereafter "Jan. 17 Tr.") at 147, submitted as Exh. 4 to Lilly Prop. Findings)

II. Objections to Eli Lilly's Proposed Findings of Fact

A. General Objections

In ¶¶ 56, 65, and 66 of its Amended Proposed Findings, Eli Lilly mischaracterizes both Judge Cogan's December 18, 2006 Order for Mandatory Injunction and what Mr. Gottstein communicated in email to Mr. Whitaker, Ms. Chamberlin, Ms. Sharav, and the others to whom he sent the Lilly Documents. Eli Lilly states that "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.” (Lilly Prop. Findings ¶ 65). It also states that “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....”. (Lilly Prop. Findings ¶ 66). These statements are false.

Judge Cogan’s December 18, 2006 Order plainly, by its terms, does not enjoin or order anyone other than Mr. Gottstein to do anything. (Order for Mandatory Injunction of Dec. 18, 2006, submitted as Exh. 15 to Lilly Prop. Findings). Accordingly, nothing in Mr. Gottstein’s December 18, 2006 emails to the Nonparties states that the Court’s Order *required* the Nonparties to do anything. Instead, the Order commanded Mr. Gottstein to *request* that those to whom he had sent the Lilly Document return them to Mr. Woodin, which is precisely what Mr. Gottstein communicated to the Nonparties. (Pet’r Exh. 7 at 330-47, 350-51, 447-48, submitted as Exh. 19 to Lilly Prop. Findings).

It was not until Judge Cogan’s December 29, 2006 Order for Temporary Mandatory Injunction that the Nonparties were ordered to cease dissemination of the Lilly Documents. (Order for Temporary Mandatory Injunction of Dec. 29, 2006, submitted as Exh. 18 to Lilly Prop. Findings). That Order was subsequently modified and extended by this Court on January 4, 2007. (Order for Temporary Mandatory Injunction of Jan. 4, 2007, Case No. 07-CV-0504 Docket No. 22, attached as Exh. A) As this Court recognized in open court on January 17, 2007, neither of these orders required the Nonparties to *return* the Lilly Documents—rather, they simply forbade the documents’ further dissemination. (Jan. 17 Tr. at 180). Eli Lilly has introduced no evidence to suggest that any of the Nonparties ever violated the December 29, 2006 or January 4, 2007 Orders.

B. Mr. David Oaks and MindFreedom International

Lilly incorrectly claims that Mr. Oaks lied in his testimony when he said that “in no way, shape, or form have we...posted these documents ourselves to the internet or disseminated them in that way.” (Lilly Prop. Findings ¶ 79). Petitioner claims that “after being confronted with a copy of the update from the MindFreedom website,... Mr. Oaks changed his testimony and admitted that MindFreedom did provide links to the stolen Zyprexa documents.” (Lilly Prop. Findings ¶ 83.)

Contrary to Eli Lilly’s mischaracterization of the record, there was no contradiction in Mr. Oaks’ testimony. He stated that MindFreedom did not itself post the documents to the Internet or disseminate them in that way. (Jan. 17 Tr. at 228). He never denied that the MindFreedom website directed readers to other websites where the documents could be downloaded. (Jan. 17 Tr. at 228-33). Furthermore, an examination of Mr. Oaks’ testimony shows that he acknowledged, several times, posting links pointing to other websites that purported to have the Lilly Documents, several minutes before he was “confronted” with the document referred to by petitioner. (Jan. 17 Tr. at 232-34.)

C. Mr. Robert Whitaker

Eli Lilly also mischaracterizes a series of emails among various people in which Mr. Gottstein appears to have been a passive recipient. (Lilly Prop. Findings ¶ 97-99; Email exchange, Pet’r Exh. 7 at 0889-91, submitted as Exh. 28 to Lilly Prop. Findings). Mr. Whitaker’s contribution to the “conversation” is a statement to Mr. Gottstein that he had done the right thing, at great risk to himself, and that he need not apologize for having gotten other people involved by sending them the documents. A reading of all the emails in this “conversation” shows nothing about any conspiracy or acts coordinated with Mr. Gottstein or Dr. Egilman. Rather, it shows a discussion among like-minded people, showing sympathy for Mr. Gottstein.

What meaning does this have? As the Court has learned over the course of these proceedings, there is a rather widespread movement now of groups seeking to protect psychiatric patients from abuse, particularly to protect them from being forced to ingest highly toxic psychiatric drugs. In this proceeding, MindFreedom International, the AHRP, the National Association for Rights Protection and Advocacy (NARPA), the Law Project for Psychiatric Rights, and the International Center for the Study of Psychiatry and Psychology (ICSPP), all have been mentioned. (Jan. 17 Tr. at 162, 186; Tr. of Jan. 16, 2007 hearing before Hon. J. Weinstein (hereafter “Jan. 16 Tr.”) at 0039, submitted as Exh. 7 to Lilly Prop. Findings). There are many more. There is nothing sinister about the unsurprising fact that most people involved in these groups will respond the same way to a development like the release of the Zyprexa documents. But a common set of beliefs and principles does not constitute a conspiracy.

In another email from Mr. Whitaker to Mr. Gottstein, dated December 16, 2006, Mr. Whitaker says that if the *New York Times* does not run the story, then he would try to publicize the documents. (Email from Mr. Whitaker to Mr. Gottstein, submitted as Exh. 30 to Lilly Prop. Findings). There is no evidence that Mr. Whitaker actually did so, and importantly, no response by Mr. Gottstein is offered by Eli Lilly, despite extensive access to Mr. Gottstein’s emails over a period of several months. At the time of this email, there was no injunction in place, and the newspaper stories had not run yet either.

Again, this does not show a conspiracy, but simply Mr. Whitaker’s strong feelings about the issue. Eli Lilly has introduced no evidence that Messrs. Whitaker and Gottstein planned any action together regarding the Lilly Documents, or even that Mr. Whitaker did *anything* with the documents, other than receive them. Eli Lilly’s contrary conclusory statements, of course, are not competent evidence.

D. Ms. Vera Sharav, Mr. David Cohen, and AHRP¹

Ms. Sharav is the founder of the Alliance for Human Research Protection (AHRP). She considers it her “life’s calling to inform the public about unethical practices of pharmaceutical companies like Eli Lilly.” (Jan. 17 Tr. at 187). Mr. Cohen is a full professor at Florida International University whose widely read publications focus on the clinical trial and federal approval processes. (Cohen Aff., ¶¶ 1-10, submitted as Exh. C to Motion by Ms. Sharav, Mr. Cohen, and AHRP for an Order Modifying CMO-3 in Part, filed Jan. 22, 2007, attached hereto as Exh. C). Ms. Sharav, Mr. Cohen, and their affiliated entity AHRP wish to disseminate the documents, and feel that the dissemination of the documents is critical to the public health and welfare. The documents, however, cannot be disseminated due to the restraints currently in effect. (Sharav Aff., ¶¶ 13-15, submitted as Exh. A to Motion by Ms. Sharav, Mr. Cohen, and AHRP for an Order Modifying CMO-3 in Part, filed Jan. 22, 2007, attached hereto as Exh. C; Cohen Aff., ¶¶ 17-19).

In order to be entitled to an injunction against nonparties such as Ms. Sharav, AHRP, and Mr. Cohen, Lilly must demonstrate that those nonparties were “in active concert” with one of the “parties to the action” or one of their “officers, agents, servants, employees, [or] attorneys.” *See* F.R.C.P. 65(d). In its Proposed Findings of Fact regarding Ms. Sharav, Mr. Cohen, and Ms. Sharav’s entity AHRP, Lilly fails to provide a single allegation that Ms. Sharav, Mr. Cohen, or AHRP ever communicated with Dr. Egilman regarding the documents, much less acted in concert with him. (Lilly Prop. Findings ¶¶ 90-94). Thus, this Court should find that neither

¹ On January 25, 2007, this Court entered an Order providing that the brief filed on behalf of Ms. Sharav, Mr. Cohen, and AHRP in connection with their motion for a modification of CMO-3 “will also be treated as a submission in the pending injunction proceedings.” (Order of Jan. 25, 2007, attached hereto as Exh. B). This being so, Ms. Sharav, Mr. Cohen, and AHRP hereby incorporate the statement of facts in that brief, along with accompanying affidavits, as a counter-statement of facts herein.

Ms. Sharav, Mr. Cohen, nor AHRP acted in concert with Dr. Egilman. For this reason alone, Lilly is not entitled to a preliminary injunction, or any other sort of restraints, against Ms. Sharav, Mr. Cohen, or AHRP.

Lilly also woefully mischaracterizes Ms. Sharav's statement to Mr. Gottstein that she would like to "coordinate ... efforts" with him as a statement that she would like to conspire with him in an unlawful enterprise. (Lilly Prop. Findings ¶ 92). In reality, Ms. Sharav merely advised Mr. Gottstein in an e-mail that she would like to "coordinate with" him in providing a summary of the threats to the public posed by Lilly's conduct: "I intend to call New York State Attorney General Andrew Cuomo tomorrow to deliver, then will send to other attorneys general. I think that is ground-breaking. Lilly is finally having a PT disaster. *I'd like to coordinate with you when you write up the summary of threats*, et cetera. Forward so that I can incorporate into infomail" (Jan. 17 Tr. at 184 (emphasis added); Pet'r Exh. 11, email from Ms. Sharav to Mr. Gottstein, submitted as Exh. 26 to Lilly Prop. Findings). A "summary of threats" had appeared in the *New York Times* that morning.

It is uncontradicted in the record that Ms. Sharav and Mr. Cohen had no knowledge of, or involvement in, Mr. Gottstein's efforts to obtain the Lilly Documents from Dr. Egilman, and that neither became aware of the Lilly Documents until after Mr. Gottstein had already obtained them from Dr. Egilman. (Jan. 17 Tr. at 164-66). It is also uncontradicted in the record that Mr. Gottstein advised those individuals—and everyone else—that the documents were obtained lawfully. (Sharav Aff., ¶¶ 11-12; Jan. 17 Tr. at 169 ("What I was given to understand is that the documents were obtained legally, that certain legal procedures were undertaken and that's it and I accepted that. And of course by the time I got them, they had been in the *New York Times* so I figured that is the public domain.")). Thus, this Court should not find that Ms. Sharav,

Mr. Cohen, or AHRP were “in active concert” with Mr. Gottstein in his efforts to allegedly aid and abet Dr. Egilman’s violation of CMO-3.

E. Mr. John Doe

Eli Lilly mischaracterizes the representations of John Doe, stating that Doe has stated “that he was not involved with anyone subject to CMO-3 or involved in these proceedings.” (Lilly Prop. Findings ¶ 80 n4). This is not accurate. John Doe has consistently maintained that (1) he is not a party to this case; (2) he has no connection to any party in this case; (3) he has not, to the best of his knowledge, had any communication with anyone who is subject to CMO-3 (such as Dr. Egilman); and (4) he is not any of the individuals specifically named in this any of this Court’s Temporary Mandatory Injunctions. (John Doe’s Motion for Reconsideration or in the Alternative for Stay Pending Appeal, submitted Jan. 8, 2007, at 4, attached hereto as Exh. D; Tr. of Jan. 8, 2007 Hearing before Hon. J. Weinstein at 5, attached hereto as Exh. E). John Doe has never made any representation regarding whether he has or has not been in contact with any of the *nonparties* named in this Court’s December 29, 2006 or January 4, 2007 Orders.

III. Nonparties’ Proposed Findings of Fact.

A. Mr. David Oaks

Strike ¶¶ 73, 77-85 of Lilly’s Amended Proposed Findings of Fact and replace with the following:

1. David Oaks is the director of MindFreedom International, a nonprofit organization dedicated to the protection of the human rights of individuals in the mental health system. (Jan. 17 Tr. at 226.)

2. He first became aware of the Lilly Documents when he read about them in the article published by *New York Times* on Dec. 17, 2006. (Jan. 17 Tr. at 236). Mr. Oaks had no prior knowledge of, or involvement in, Mr. Gottstein’s efforts to obtain these documents from

Dr. Egilman. (Jan. 17 Tr. at 235-36). He never received the Lilly Documents from Mr. Gottstein, nor did he have any discussions with Mr. Gottstein about the documents prior to reading about the documents in the *New York Times*. (Jan. 17 Tr. at 152.)

B. Mr. Robert Whitaker

Strike ¶¶ 97-99 of Lilly's Proposed Findings and replace with the following:

3. Robert Whitaker is a journalist, an expert on schizophrenia, and the author of *Mad in America*, a book about the mistreatment of psychiatric patients. (Jan. 17 Tr. at 91-92.)
4. On December 12 or 13, Mr. Gottstein mailed a DVD containing the Lilly Documents to Mr. Whitaker. (Lilly Prop. Findings ¶ 62). Prior to that time, Mr. Whitaker had no knowledge of, or involvement in, Mr. Gottstein's efforts to obtain these documents from Dr. Egilman. (Tr. at 151-152). Mr. Whitaker had no knowledge of the Lilly Documents or Mr. Egilman's disclosure of them until after Mr. Gottstein had, unsolicited, already put a copy of them in the mail. (Jan. 17 Tr. at 151, 154). His lack of involvement is further corroborated by an email from Mr. Gottstein, wherein Mr. Gottstein apologized for "getting you in the middle of this without asking you all first." (Pet'r Exh. 7 at 843, submitted as Exh. 25 to Lilly Prop. Findings).

5. Eli Lilly has produced no evidence to suggest that Mr. Whitaker has further disseminated the Lilly Documents after receiving them from Mr. Gottstein.

C. Ms. Judi Chamberlin

6. Judi Chamberlin is a member of the board of directors of MindFreedom International. (Jan. 17 Tr. at 236.)

7. On December 12 or 13, Mr. Gottstein mailed a DVD containing the Lilly Documents to Ms. Chamberlin. (Lilly Prop. Findings ¶ 62). Prior to that time, Ms. Chamberlin had no knowledge of, or involvement in, Mr. Gottstein's efforts to obtain these documents from

Dr. Egilman. (Tr. at 151-152). Her lack of involvement is further corroborated by an email from Mr. Gottstein, wherein he apologized for “getting you in the middle of this without asking you all first.” (Pet’r Exh. 7 at 843, submitted as Exh. 25 to Lilly Prop. Findings).

8. Until Ms. Chamberlin was informed by Mr. Gottstein of this Court’s Dec. 18 Order, she had no reason to believe the Lilly Documents had not been obtained lawfully.

9. Eli Lilly has produced no evidence suggesting that, since receiving notice of the Court’s Dec. 29, 2006 and January 4, 2007 Orders, Ms. Chamberlin has acted in any way to violate them.

D. Ms. Vera Sharav and AHRP

10. Ms. Vera Sharav is the founder of the Alliance for Human Research Protection (AHRP). She considers it her “life’s calling to inform the public about unethical practices of pharmaceutical companies like Eli Lilly.” (Jan. 17 Tr. at 187). Mr. David Cohen is a full professor at Florida International University whose widely read publications focus on the clinical trial and federal approval processes. (Cohen Aff., ¶¶ 1-10.)

11. Lilly has failed to provide any evidence that Ms. Sharav, Mr. Cohen, or AHRP ever had any communications regarding the Lilly Documents with Dr. Egilman, much less acted in concert with him. (Lilly Prop. Findings ¶¶ 90-94).

12. It is uncontradicted in the record that Ms. Sharav and Mr. Cohen had no knowledge of, or involvement in, Mr. Gottstein’s efforts to obtain the Lilly Documents from Dr. Egilman, and that neither became aware of the Lilly Documents until after Mr. Gottstein had already obtained them from Dr. Egilman. (Jan. 17 Tr. at 164-66). Their lack of involvement is further corroborated by a subsequent email from Mr. Gottstein, wherein he apologized for “getting you in the middle of this without asking you all first.” (Pet’r Exh. 7 at 843, submitted as Exh. 25 to Lilly Prop. Findings).

13. It is also uncontradicted in the record that Mr. Gottstein advised those individuals—and everyone else—that the documents were obtained lawfully. (Sharav Aff., ¶¶ 11-12; Jan. 17 Tr. at 169.)

14. Eli Lilly has produced no evidence suggesting that since receiving notice of the Court’s Dec. 29, 2006 and January 4, 2007 Orders, Ms. Sharav, Mr. Cohen, or AHRP have acted in any way to violate them.

E. Mr. John Doe

15. Eli Lilly has produced no evidence contradicting John Doe’s representation that he is a contributor to the zyprexa.pbwiki.com website (“Wiki”).

16. Eli Lilly has produced no evidence suggesting that Doe had any contact with Mr. Gottstein, or ever received the Lilly Documents from him, or had any knowledge of, or involvement in, Mr. Gottstein’s efforts to obtain the Lilly Documents from Dr. Egilman.

17. Eli Lilly has not disputed that, in order to participate in the public debate regarding Zyprexa, Doe published information on the Wiki, including links to other websites purporting to offer copies of the Lilly Documents.

18. Eli Lilly has not disputed that the Lilly Documents themselves have never been posted on the Wiki. Rather, until receiving notice of this Court’s January 4, 2007 Order, contributors to the Wiki posted only links to other sites that purported to offer the Lilly Documents. (Jan. 17 Tr. at 233-35).

F. Continued Availability of Lilly Documents

19. Contrary to Eli Lilly’s statements, the Lilly Documents have been, and continue to be, readily available on the Internet from a variety of sources, some of which appear to be located outside the United States. (Declarations of Laura R. Mason, attached hereto as Exh. F.)

G. The Lilly Documents Relate to a Matter of Great Public Concern

20. It is clear that the Lilly Documents relate to a matter of overriding public concern. They have already been the basis of a front-page story in the *New York Times*, suggesting that the documents reveal a pattern of unlawful activities by Eli Lilly that may have left the 20 million individuals who have taken Zyprexa with incomplete information regarding the side effects of the drug. (Alex Berenson, "Eli Lilly Said to Play Down Risk of Top Pill," *New York Times*, Dec. 17, 2007 at A1, Case No. 07-cv-0504, Docket No. 8, filed Dec. 28, 2006, attached hereto as Exh. G). In the immediate wake of the *New York Times* article, reporters from the *Wall Street Journal* and *Bloomberg* approached Ms. Sharav hoping to review the Lilly Documents. (Jan. 17 Tr. at 168). Reporters from *Pharma Marketing News* and *Slate* approached Mr. Gottstein, as did a professor pursuing research regarding the ethical disclosure practices of the pharmaceutical industry. (Pet'r Exh. 7 at 275, 295, 398, attached hereto as Exh. H). Eli Lilly has not contested this evidence establishing that the Lilly Documents relate to a matter of public concern.

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Respectfully submitted,

/s/
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