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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____)
In re: ZYPREXA) 07-0504 (JBW)
PRODUCTS LIABILITY LITIGATION)
_____)
04-MDL-1596 (JBW) [Related]

RESPONDENT GOTTSTEIN'S PROPOSED FINDINGS OF FACT
and
CONCLUSIONS OF LAW

James B. Gottstein, Esq., ("Gottstein") hereby submits the following
proposed Findings of Fact and Conclusions of Law

- (1) in opposition to Eli Lilly and Company's (Lilly) Amended Proposed Findings of Fact Concerning the Temporary Mandatory Injunction (Lilly's Proposed Facts), and
- (2) in support of his Motion To Dissolve December 18, 2006, Order For Mandatory Injunction and For Return Of Produced Documents.

With the possible exception of ¶XLVI,¹ all of the below recited facts consist of un rebutted testimony or other un rebutted evidence.

I. Findings of Fact

I. Case Management Order No. 3, (CMO-3), was issued on August 3, 2004, in the form negotiated between Lilly and the Plaintiffs Steering Committee (PSC).² During the negotiations of CMO-3, Section 14, titled "Subpoenas Issued by Other Courts or an Agencies," Lilly and the Plaintiffs Steering Committee (PSC) changed the proposed minimum notice period from " ten (10) business days after notifying counsel for the designating party in writing" to a "reasonable opportunity to object"³ and agreed to include "the person receiving the subpoena or other process shall cooperate with the producing party in any proceeding related [to such subpoena]."

II. The agreed to form of §14, of CMO-3 signed by the Court, provides:

If another court or an administrative agency subpoenas or otherwise orders production of Confidential Discovery Materials which a person has obtained under the terms of this Order, the person to whom the subpoena or other process is directed shall promptly notify the designating party 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

¹ ¶XLVI relates to this Court's oral order to Lilly towards the end of the full evidentiary hearing held on January 16-17, 2007 and Mr. Gottstein believes it accurately states the substance of the Court's direction, but of course, the Court knows what was intended.

² Transcript of Hr'g. 38-40, (Judge Chrein, August 3, 2004), MDL 04-1596 Docket No.57.

³ Compare MDL 04-1596 Docket No. 45, 11, to Section 14 of CMO-3, as executed. A copy of Docket No. 45 is attached hereto as Exhibit A with the referenced provisions marked by a red box.

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, administrative proceeding 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.

III. §2 of CMO-3 provides in part that documents which become publicly available without a breach of CMO-3, are no longer "Confidential Documents" under CMO-3.

IV. §3 of CMO-3, titled "Confidential Discovery Materials Defined," provides in part,

For the purposes of this Order, "Confidential Discovery Materials" shall mean any information that the producing party in good faith believes is properly protected under Federal Rule of Civil Procedure 26(c)(1).

V. Lilly designated all or virtually all of the millions of pages of documents it produced in this litigation as confidential.⁴

VI. §6 of CMO-3 requires any individual to whom disclosure is to be made under subparagraphs d through m thereof, to sign, prior to such disclosure, a copy of the form of Endorsement of Protective Order, attached as an exhibit to CMO-3 (Form of Endorsement).

⁴ Tr. Hr'g., 213-15 (January 17, 2007). *See*, also, relevant portion of Tr. Hr'g, (July 2, 2004 -J. Chrein) attached hereto as Exhibit B.

VII. David E. Egilman, MD (Dr. Egilman) is a very experienced expert witness with respect to drug products liability litigation and other public health matters, who is highly respected and valued by the Lanier Law firm as an excellent witness for being very concerned about public health and his insistence on providing independent advice whether it helps or hurts their cases.⁵

VIII. On or around November 14, 2006, Dr. Egilman executed the Form of Endorsement, with the addition of the words, "unless this conflicts with any other sworn statement."

IX. The Law Project for Psychiatric Rights, Inc., (PsychRights) is a tax-exempt, public interest law firm whose mission is to mount a strategic litigation campaign against forced (court ordered) psychiatric drugging and electroshock around the country.⁶

X. James B. Gottstein, Esq., is an attorney licensed to practice law in Alaska who devotes a substantial portion of his time donating legal services to PsychRights on a *pro bono publico* basis to further PsychRights' mission.⁷

XI. Some time before November 28, 2006, Alex Berenson began working on a story about Zyprexa.⁸

⁵ Tr. Hr'g, 207-209 (January 17, 2007).

⁶ Petitioner's Exhibit No. 1, p. 1.

⁷ Exhibit 2, page 12 of January 16, 2007, Declaration of James B. Gottstein.

⁸ Tr. Hr'g., 131 (January 17, 2007).

XII. Mr. Berenson had visited PsychRights' website and was aware of Mr. Gottstein's interest in Zyprexa and his previous posting of otherwise unavailable information on Zyprexa.⁹

XIII. Mr. Berenson mentioned to Dr. Egilmant that Mr. Gottstein might be someone with an interest in the Zyprexa documents and who might subpoena the documents.¹⁰

XIV. On or around November 28, 2006, Dr. Egilman called Mr. Gottstein about information on Zyprexa located on PsychRights' website that was not widely available on the Internet, if available anywhere else on the Internet. During that conversation Dr. Egilman advised Mr. Gottstein he was an expert retained by the plaintiffs' in this case, that he had access to documents subject to a protective order, and that Mr. Gottstein might want to subpoena them pursuant to the terms of the protective order.¹¹

XV. Dr. Egilman read Mr. Gottstein §14 of CMO-3, and described other portions of it to Mr. Gottstein.¹²

XVI. Mr. Gottstein asked for a copy of CMO-3 for his review, but Dr. Egilman declined and Mr. Gottstein did not press the matter.¹³

XVII. Mr. Gottstein made clear to Dr. Egilman that Mr. Gottstein was not representing Dr. Egilman, that it was Dr. Egilman's responsibility and not Mr.

⁹ Tr. Hr'g, 96 (January 17, 2007).

¹⁰ Tr. Hr'g, 97 (January 17, 2007)..

¹¹ Tr. Hr'g, 74, 119-120 (January 17, 2007).

¹² Tr. Hr'g, 28 (January 16, 2007); Tr. Hr'g, 121 (January 17, 2007).

¹³ Tr. Hr'g, 27-28 (January 16, 2007).

Gottstein's to make sure Dr. Egilman complied with CMO-3, and that Dr. Egilman should consult his own counsel to ensure he complied with the terms of CMO-3.¹⁴

XVIII. Dr. Egilman and Mr. Gottstein discussed the ambiguity regarding how much notice was required under §14 of CMO-3.

XIX. Mr. Gottstein determined it would further PsychRights' mission to obtain such documents pursuant to the terms of CMO-3 and undertook to obtain an appropriate case from which to subpoena the documents.¹⁵

XX. Mr. Gottstein obtained such a case and on Friday, December 6, 2006, obtained issuance of a subpoena ordering Dr. Egilman to appear telephonically for a deposition to be held December 20, 2006, and to bring with him

Subject to any applicable restrictions, all documents you have in your possession, or have access to, including those in electronic format, and have read, reviewed or considered, pertaining to the testing, marketing, efficacy, effectiveness, risks and harms of commonly prescribed psychiatric drugs in the United States, including but not limited to Haldol, Thorazine, Mellaril, Clozaril, Risperdal, Zyprexa, Seroquel, Abilify, Geodon, Lithium, Depakote, Prozac, Paxil, Zoloft, and Wellbutrin.¹⁶

(Subpoena).

XXI. The Subpoena was served on Dr. Egilman by e-mail and fax on December 6, 2006, and later personally served by a process server in Massachusetts.¹⁷

¹⁴ January 16, 2007, Declaration of James B. Gottstein, ¶6.

¹⁵ Tr. Hr'g, 50-1 (January 16, 2007).

¹⁶ Petitioner's Exhibit No. 1, pages 9&10.

¹⁷ Petitioner's Exhibit No. 7, p.2; Tr. Hr'g, 31 (January 16, 2007).

XXII. On December 6, 2007, prior to the end of the business day, Dr. Egilman notified Eli Lilly, of (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, administrative proceeding or other proceeding in which the Subpoena or other process has been issued, as well as enclosing a copy of the Subpoena.¹⁸

XXIII. In the notice to Lilly, Dr. Egilman provided his office and cell phone numbers, fax number, physical and mailing addresses and e-mail address.¹⁹

XXIV. Lilly did not contact Dr. Egilman, Wednesday, December 6, 2006, the day it received notice of the Subpoena, to object or tell Dr. Egilman in what way(s) he should cooperate with Lilly with respect to the Subpoena.²⁰

XXV. Lilly did not contact Dr. Egilman, Thursday, December 7, 2006, to object or tell Dr. Egilman in what way(s) he should cooperate with Lilly with respect to the Subpoena.²¹

¹⁸ Exhibit 3 to January 16, 2007 Declaration of James B. Gottstein.

¹⁹ Exhibit 3 to January 16, 2007 Declaration of James B. Gottstein, Hr'g., 141 (January 17, 2007).

²⁰ Tr. Hr'g., 141, (January 17, 2007)

²¹ Tr. Hr'g., 142, (January 17, 2007).

XXVI. Lilly did not contact Dr. Egilman, Friday, December 8, 2006, to object or tell Dr. Egilman in what way(s) he should cooperate with Lilly with respect to the Subpoena.²²

XXVII. Lilly did not contact Dr. Egilman, Saturday, December 9, 2006, to object or tell Dr. Egilman in what way(s) he should cooperate with Lilly with respect to the Subpoena.²³

XXVIII. Lilly did not contact Dr. Egilman, Sunday, December 10, 2006, to object or tell Dr. Egilman in what way(s) he should cooperate with Lilly with respect to the Subpoena.²⁴

XXIX. On Monday, December 11, 2006, after realizing over the weekend that it didn't make any sense for Dr. Egilman to bring the documents with him in Attleboro, Massachusetts for a telephonic deposition in which Mr. Gottstein would examine Dr. Egilman on the documents, Mr. Gottstein caused the issuance of an amended subpoena, ordering Dr. Egilman to provide the documents subject to the Subpoena to Mr. Gottstein prior to the unchanged deposition date and time (Amended Subpoena).²⁵

XXX. The e-mail from Mr. Gottstein serving the Amended Subpoena states in part, "In order for the deposition to go smoothly and as efficiently as possible

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Petitioner's Exhibit No.1, pages 11-13.

by allowing me to review them ahead of time, please deliver the subpoena'd materials to me as soon as you can."²⁶

XXXI. Mr. Gottstein's intent in asking for the documents "as soon you can" was as soon as Dr. Egilman could do so in compliance with CMO-3.²⁷

XXXII. Mr. Gottstein advised Dr. Egilman to provide Lilly with a copy of the Amended Subpoena and to seek advice of his own counsel.²⁸

XXXIII. Dr. Egilman told Mr. Gottstein that he didn't see how the Amended Subpoena made any difference.²⁹

XXXIV. Lilly did not contact Dr. Egilman, Monday, December 11, 2006, to object or tell Dr. Egilman in what way(s) he should cooperate with Lilly with respect to the Subpoena.³⁰

XXXV. Lilly did not contact Dr. Egilman, Tuesday, December 12, 2006, to object or tell Dr. Egilman in what way(s) he should cooperate with Lilly with respect to the Subpoena.³¹

XXXVI. Lilly did not contact Mr. Gottstein on any of these days and advise him that it objected to production of documents under the subpoena.

²⁶ Petitioner's Exhibit No.1, page 11.

²⁷ Tr. Hr'g., 42 (January 16, 2007).

²⁸ Tr. Hr'g., 32, 43 (January 16 2007).

²⁹ Tr. Hr'g., 43 (January 16, 2007).

³⁰ Tr. Hr'g., 142 (January 17, 2007).

³¹ Tr., Hr'g., 146 (January 17, 2007).

XXXVII. Having received no guidance from Lilly, after the close of business on December 12, 2006, Dr. Egilman began producing electronic copies of documents subject the Subpoena to Mr. Gottstein.³²

XXXVIII. Believing the produced documents were no longer subject to any restrictions under CMO-3, Mr. Gottstein provided copies to various people who had requested them or he knew would be interested in them, to wit: Mr. Berenson of the New York Times, Steve Cha of the then minority office of the United States Congressional Committee on Oversight and Government Reform, Terrie Gottstein, Jerry Winchester, Dr. Peter Breggin, Dr. Grace Jackson, Dr David Cohen, Bruce Whittington, Dr. Stephen Kruszewski, Laura Ziegler, Judi Chamberlin, Vera Sherav, Robert Whittaker, Will Hall and Snighda Prakash.³³

XXXIX. On December 18, 2006, a Mandatory Injunction was issued against Mr. Gottstein directing, *inter alia*, that he return Produced Documents and take steps to retrieve them from wherever they were located and return them to Special Discovery Master Peter Woodin.

XL. Mr. Gottstein has complied with the Mandatory Injunction issued against him on December 18, 2006.³⁴

XLI. On December 29, 2006, the Court issued a Temporary Mandatory Injunction against Terri (*sic* "Terrie") Gottstein, Jerry Winchester, Dr. Peter

³² Tr., Hr'g., 43, (January 16, 2007); Tr., Hr'g., 128, 129 (January 17, 2007).

³³ Exhibit 4, pages 3-4, to January 16, 2007, Declaration of James B. Gottstein.

³⁴ ¶8 of January 16, 2007, Declaration of James B. Gottstein; Tr. Hr'g, 147 (January 17, 2007).

Breggin, Dr. Grace Jackson, Dr. David Cohen, Bruce Whittington, Dr. Stephen Kruszewski, Laura Ziegler, Judi Chamberlin, Vera Sherav, Robert Whitaker , and Will Hall from further disseminating Produced Documents and further required the removal of Produced Documents posted at any website, and communication of the Order to anyone to whom Produced Documents had already been disseminated, informing them of the terms of the Order.

XLII. The Temporary Mandatory Injunction did not enjoin any activities by Alex Berenson, Snighda Prakash, or Steve Cha, each of whom had received Produced Documents from Mr. Gottstein.

XLIII. On January 4, 2007, the Temporary Mandatory Injunction was amended (Amended Temporary Mandatory Injunction) so as amended, to encompass Terri (*sic.* "Terrie") Gottstein, Jerry Winchester, Dr. Peter Breggin, Dr. Grace Jackson, Dr David Cohen, Bruce Whittington, Dr. Stephen Kruszewski, Laura Ziegler, Judi Chamberlin, Vera Sherav, Robert Whittaker, Will Hall, Eric Whalen (and www.joysoup.net), MindFreedom (and www.mindfreedom.org), the Alliance for Human Research Protection (and www.ahrp,pjg and www.ahrp.blogspot.com) and zyprexa.pbwiki.com and prohibiting them from further disseminating Produced Documents. It further required the removal of Produced Documents posted at any website; communication of the Order to anyone to whom Produced Documents had already been disseminated, informing such persons of the terms of the Amended Temporary Mandatory Injunction; and

enjoined the named individuals, organizations and entities from posting information to websites to facilitate dissemination of Produced Documents.

XLIV. No evidence has been presented of non-compliance with the Temporary Mandatory Injunction, nor of the Amended Temporary Mandatory Injunction.

XLV. A full evidentiary hearing was held January 16 & 17, 2007, regarding the circumstances surrounding the Produced Documents.

XLVI. On January 17, 2007, the Court directed Lilly to advise the Court by January 31, 2007 (1) which of the Produced Documents were properly designated confidential under CMO-3 and the specific grounds therefor, and (2) how their release harmed Lilly.³⁵ Lilly has failed to do so.

XLVII. On February 6, 2007, counsel for Mr. Gottstein found as a result of pursuing information contained in Lilly's January 31st memo, that Lilly had over a year earlier caused the Produced Documents to lose their confidential status pursuant to the self-executing terms of CMO-3, §9(d), in proceedings initiated by the third party payor plaintiffs.³⁶

XLVIII. Lilly failed to file a motion within the required 45 day time period responding to a motion in late 2005 filed pursuant to §9(b) of CMO-3 involving at least some of the Produced Documents.

³⁵ Tr. Hr'g., 242-3, (January 17, 2007).

³⁶ February 9, 2007, Declaration of D. John McKay.

XLIX. Lilly has misled the court and the respondents by failing to disclose that it failed to file a motion within the required 45 day time period responding to a motion in late 2005 filed pursuant to §9(b) of CMO-3 involving at least some of the Produced Documents and that it has tied this up in litigation before Special Master Woodin since that time.

L. Lilly has repeatedly and consistently mischaracterized facts in its efforts to achieve the relief it has requested.

II. Concusions of Law

A. Documents designated without a good faith belief they are properly protected under Federal Rule of Civil Procedure 26(c)(1), are not protected under CMO-3.

B. Lilly has failed to meet its burden that any of the Produced Documents were designated confidential in the good faith belief they were properly subject to protection under Federal Rule of Civil Procedure 26(c)(1).

C. Dr. Egilman's, Mr. Berenson's and Mr. Gottstein's joint efforts were entirely directed towards complying with the requirements of §14 of CMO-3.

D. Mr. Berenson, and Mr. Gottstein did not engage in active concert or participation with Dr. Egilman to violate CMO-3.

E. The procedure specifically negotiated by the parties under §14 of CMO-3 and signed by the Court, is that upon receipt of notice of a subpoena from

another court or administrative agency Lilly was entitled to object and be given a reasonable opportunity to do so.

F. §14 of CMO-3 is ambiguous with respect to how much time satisfies its "reasonable opportunity to object" requirement.

G. Three days can be a "reasonable opportunity to object" under §14 of CMO-3.

H. Lilly had a reasonable opportunity to object prior to any Produced Documents were provided to Mr. Gottstein.

I. The Produced Documents lost their confidential status and thus all protection under CMO-3 upon production to Mr. Gottstein pursuant to the Subpoena.

J. Any of the Produced Documents which are the same as those which Lilly failed to object to in the related proceeding referred to in the Declaration of D. John McKay are not Confidential Documents under CMO-3.

K. Any and all persons receiving Produced Documents from Mr. Gottstein received them without violation of CMO3.

L. The Produced Documents are not now subject to CMO-3.

M. The December 18, 2006, Mandatory Injunction against Mr. Gottstein should now be and hereby is dissolved and terminated.

N. The December 29, 2006, Temporary Mandatory Injunction, as amended January 3, 2007, against Terri (*sic*. "Terrie") Gottstein, Jerry Winchester, Dr. Peter Breggin, Dr. Grace Jackson, Dr David Cohen, Bruce Whittington, Dr. Stephen

Kruszewski, Laura Ziegler, Judi Chamberlin, Vera Sherav, Robert Whittaker, Will Hall, Eric Whalen (and www.joysoup.net), MindFreedom (and www.mindfreedom.org), the Alliance for Human Research Protection (and www.ahrp.pjg and www.ahrp.blogspot.com) and zyprexa.pbwiki.com, should now and hereby is dissolved and terminated.

O. The Produced Documents, having been lawfully obtained by Mr. Gottstein, should be and are hereby Ordered returned to him.

Dated: February 9, 2007

Respectfully submitted,

/s/ djohnmkay

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