

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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In re: ZYPREXA  
PRODUCTS LIABILITY LITIGATION

MDL No. 1596 (JBW) (RLM)

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THIS DOCUMENT RELATES TO:  
UCFW LOCAL 1776 AND PARTICIPATING  
EMPLOYERS HEALTH AND WELFARE FUND,  
ERIC TAYAG and MID-WEST NATIONAL  
LIFE INSURANCE COMPANY OF TENNESSEE  
on behalf of themselves and other similarly situated

-----X  
**DECLARATION OF GERALD HOFFMANN**

GERALD HOFFMANN declares, under penalty of perjury, pursuant to the provisions of 28 U.S.C., Section 1746, as follows:

1. I am employed by Eli Lilly and Company ("Lilly") as Manager of Global Competitive Intelligence Strategy.

2. I have been employed by Lilly since November 1998.

3. I have held a management position in Competitive Intelligence since November 1998, and have worked in the field of competitive intelligence since 1989. Prior to my employment at Lilly, I was the Director of Competitive Intelligence for SBC Communications.

4. The field of competitive intelligence is well established, and the methods described below are well recognized in industry and academia, and are the subject of textbooks and published literature, including: LIAM FAHEY, COMPETITORS: OUTWITTING, OUTMANEUVERING, AND OUTPERFORMING (1999); LEONARD M. FULD, COMPETITIVE INTELLIGENCE: HOW TO GET IT;

HOW TO USE IT (1985); BENJAMIN GILAD, THE BUSINESS INTELLIGENCE SYSTEM: A NEW TOOL FOR COMPETITIVE ADVANTAGE (1988); BENJAMIN GILAD, BUSINESS BLINDSPOTS: REPLACING YOUR COMPANY'S ENTRENCHED AND OUTDATED MYTHS, BELIEFS AND ASSUMPTIONS WITH THE REALITIES OF TODAY'S MARKETS (1994); MICHAEL E. PORTER, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS (1980); as well as numerous articles by Jan Herring, under whom I also trained. I have also been a member of the Society of Competitive Intelligence Professionals since 1989.

5. Part of my responsibilities, as well as the responsibilities of the Competitive Intelligence Group generally, is to educate employees as to the importance of maintaining the confidentiality of internal information and documents ("intelligence data") and as to the dangers of competitive harm from the failure to keep intelligence data – even seemingly innocuous documents – confidential. I also assist global product teams on how to gather competitive data from the public domain for use in gaining advantage in the marketplace.

6. From this experience and training, I understand the value to Lilly's competitors of internal Lilly documents, including those at issue in this case, if they were permitted to be released in the public domain.

7. I have reviewed the Amended Complaint, and each of the documents referenced therein as listed on the attached Schedule "A."

8. Each of the documents listed in the Amended Complaint and Schedule "A" contains information of the type that Lilly treats and protects as confidential, and is subject to Lilly's confidentiality policies and procedures described below.

9. Each of the documents listed in the Amended Complaint and Schedule "A" contains information related to: confidential research and development information;

strategic plans; marketing plans, strategies; competitive analyses; market research; clinical trials and non-clinical trials; or interactions with key regulators or publishers. Each document reveals something about Lilly's internal organization and structure, qualifies as intelligence data, and if disseminated would be useful to Lilly's competitors in the atypical antipsychotic marketplace, and Lilly generally.

10. The pharmaceutical industry operates in an intensely competitive market generating revenues in the hundreds of billions of dollars per year.

11. Lilly dedicates a substantial amount of time, money, and resources to research and development of medicines; strategic plans; marketing plans, competitive analyses; market research; clinical trials and non-clinical trials; and interactions with regulators and publishers. Lilly recognizes the competitive threats within the pharmaceutical industry and has implemented elaborate safety precautions to prevent its confidential information from falling into a competitors' hands.

12. Every Lilly-operated facility employs private security guards and utilizes private security systems. All employees and guests must possess an individually assigned and distributed security badge to enter any Lilly-operated facility. Lilly's computer systems are protected by state-of-the-art security software. To gain access to Lilly's computer system requires a Lilly-controlled and monitored username, as well as a user-specific password. Separate security clearance is necessary to obtain a username. Within Lilly's computer system, each employee is given a personal email account with limited access by others within the company. Lilly's document management system also provides limited employee access to Lilly's documents.

13. In addition to the physical security and electronic security Lilly utilizes, every employee is bound by the provisions of The Red Book – Code of Business Conduct, as well as Global Lilly Policies, each of which delineates employees' responsibilities to maintain the confidentiality of all Lilly information assets, and includes:

a. All information developed by employees relating to company business, such as research and development plans, organizational charts, compounds and processes, manufacturing methods, clinical trial data and marketing, advertising, and business development studies and plans must be safeguarded by all employees.

b. Employees must keep the information in secure locations and limit access to information to those employees who have a need to know in order to perform the duties of their employment.

c. An employee must not disclose information to third parties unless information-specific approval is obtained by the employee's supervisor, and only after considering the need for a confidentiality agreement approved by Lilly's Law Division and signed by the third party.

d. Violations of The Red Book – Code of Business Conduct, or any other physical or electronic policy, are disciplined up to and including termination of employment.

14. Lilly extends its requirements for protection for confidential material to consultants, vendors, and clinical investigators, as well. Every person receiving Lilly confidential materials or data is bound by confidentiality agreements, which protects negotiations, conversations, correspondence with Lilly.

15. Lilly also devotes substantial resources both to monitoring competitor data in the public domain to assist its strategic planning for its products, and to protecting its own data from public dissemination.

16. Lilly currently markets over fifty medications, each with a different market base, as well as many compounds moving toward the market, while developing new indications or line extensions for existing products.

17. Zyprexa® is indicated for use by patients with bipolar disorder and schizophrenia. Like the pharmaceutical industry, the bipolar and schizophrenia markets are fiercely competitive, and Lilly must compete with pharmaceutical companies such as AstraZeneca, Bristol-Myers Squibb, Janssen, Merck, Novartis, and Pfizer, as well as with companies manufacturing generic medications, and potential competitors who may be deciding whether to enter these markets. It is standard practice in the pharmaceutical industry to engage in competitive intelligence and monitor competitor intelligence data.

18. Competitive intelligence requires the gathering of data bit-by-bit; leveraging prior gained intelligence data. The more pieces of information about a competitor that are gathered, the more complete the picture of the competitor that can be gained. With access to the documents at issue here, a competitor could obtain considerable insight into Lilly's structure, decision tree, internal workings, strategies for-development, and its processes for deliberation and strategy-implementation. Public dissemination would reveal the manner in which the company considered or developed research information, strategic plans, marketing plans, strategies, competitive analyses, market research, clinical trials and non-clinical trials, and interactions with regulators or publishers. If Lilly's internal documents were to be publicly disseminated, every pharmaceutical company in the world, including competitors to all of Lilly's

marketed medications, including Zyprexa®, would have access to a treasure trove of competitive intelligence, in an organized and assembled manner.


19. Public dissemination of Lilly's internal documents would work serious competitive harm to Lilly and the Zyprexa® brand.

20. With the benefit of not only the inferences that can be drawn from individual pieces of information, but also by what can be learned by comparing individual documents with other documents – both documents that are publicly available as well as other documents that are subject to this challenge – pharmaceutical companies worldwide would be able to copy Lilly's actions, draw from Lilly's actions, or anticipate Lilly's future actions to plan countermeasures.

21. The documents would also permit competitors to generate lists of current and former Lilly employees and consultants as potential contact people to gather competitive information. Showing Lilly's deliberative processes can also be used by competitors to evaluate whether the Zyprexa® team has weaknesses that can be competitively exploited.

22. In addition to the immediate harm that Lilly would face as a result of public dissemination of its documents, companies with products that compete with Zyprexa® may utilize the Zyprexa®'s documents in counter-detailing presentations to Lilly's customers, showing customers documents and information taken out of context with the aim of damaging Lilly's reputation and bolstering competitors' market shares.

I declare under penalty of perjury and under the laws of the United States of America that the foregoing is true and correct

  
GERALD HOFFMANN  
Executed on January 16, 2006 at  
Chesterfield, Missouri

# **EXHIBIT B**



1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

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IN RE: ZYPREXA PRODUCTS : U.S. Courthouse  
LIABILITY LITIGATION : Brooklyn, New York  
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TRANSCRIPT OF PROCEEDINGS  
January 8, 2007  
-----X 2:00 p.m.

BEFORE:

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

APPEARANCES:

- Eli Lilly & Co. - SEAN P. FAHEY, ESQ.  
NINA GUSSACK, ESQ.
- Mind Freedom International, - TED CHABASINSKI, ESQ.  
Chamberlin, Whittiker
- EFF, John Doe - FRED VON LOHMANN, ESQ.
- AHRP, Vera Sharav - ALAN MILSTEIN, ESQ.
- Gottsteins - JOHN McKAY, ESQ.
- Steering Committee - RICHARD MEADOW, ESQ.
- Third-party claims - TOM SOBOL, ESQ.

Court Reporter: Mickey Brymer, RPR  
Official Court Reporter  
225 Cadman Plaza East  
Brooklyn, New York 11201  
(718) 613-2255

Proceedings recorded by mechanical stenography.  
Transcript produced by computer-aided transcription.

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1 THE CLERK: Civil cause for reargument of motion in

2 re Zyprexa Products Liability Litigation.

3 The Judge is on the bench now.

4 THE COURT: I'll ask for appearances, please.

5 THE CLERK: Counsel, restate your names, please.

6 MR. CHABASINSKI: Ted Chabasinski representing Mind  
7 Freedom International, Chamberlin and as of yesterday Robert  
8 Whittiker.

9 MR. VON LOHMANN: Fred Von Lohmann, Electronic  
10 Frontier Foundation, representing John Doe.

11 MR. MILSTEIN: Alan Milstein, representing Vera  
12 Sharav and the Alliance for Human Research Protection.

13 THE COURT: Anyone else?

14 MS. GUSSACK: Nina Gussack for defendant Eli Lilly  
15 and Company.

16 MR. MCKAY: John McKay for Harry Gottstein,  
17 respondent for the second temporary restraining order and  
18 James Gottstein pursuant to the --

19 THE COURT: Keep your voices up, please. This is the  
20 Judge speaking. When you speak, give your name. I'll have  
21 the people who are present give your names, please.

22 MR. FAHEY: Sean Fahey on behalf of Eli Lilly and  
23 Company.

24 MR. AVELAR: I'm not entering an appearance, your  
25 Honor, I'm not admitted to practice.

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1 MR. MEADOW: Richard Meadow, Lanier law firm,  
2 plaintiffs, and a member of the plaintiff's steering  
3 committee.

4 THE COURT: Your name.

5 MR. AVELAR: My name --

6 THE COURT: Keep your voice up, sir. My name is Paul  
7 Avelar, but I'm not admitted to practice before the Court and  
8 I will not be speaking at the hearing.

9 THE COURT: Who do you represent?

10 MR. AVELAR: I'm here with Mr. Fahey.

11 THE COURT: You are an associate?

12 UNIDENTIFIED SPEAKER: Your Honor, I'm sorry, I can't  
13 hear the conversation.

14 THE COURT: Keep your voice up. Sir, say it again.  
15 If you're studying to be a lawyer, speak up.

16 MR. AVELAR: My name is Paul Avelar. I am an  
17 associate of Mr. Fahey. I will not be entering an appearance  
18 in this case. I am not admitted to practice before this  
19 Court.

20 THE COURT: Thank you.

21 MR. SOBOL: One more on the phone, your Honor. Good  
22 afternoon, your Honor. This is Tom Sobol, S-o-b-o-l, I'm one  
23 of the co-lead lawyers for the third-party claims. Good  
24 afternoon.

25 THE COURT: Good afternoon.

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1 Who wishes to speak first? Is there an application?

2 MR. CHABASINSKI: There is a motion for reargument.  
3 This was originally called because I requested wording in the  
4 injunction be changed.

5 THE COURT: Give your name.

6 MR. CHABASINSKI: I did, your Honor. This is Ted  
7 Chabasinski representing, among other respondents to the  
8 injunction, Mind Freedom International. Originally I wrote to

9 you and requested that the wording in the injunction as  
10 applied to my client be changed because I felt it was -- I  
11 felt it was restraining their free speech beyond what the  
12 injunction could call for. I think the situation is  
13 completely changed now and I think it would be more  
14 appropriate for you to hear Mr. Von Lohmann's argument.  
15 Although he's only representing one person in the injunction,  
16 his arguments really apply to everyone who's covered by the  
17 injunction. So, I request that you hear his arguments first.  
18 They would make my argument moot.

19 THE COURT: I will be happy to hear him.

20 MR. VON LOHMANN: Your Honor, this is Fred  
21 Von Lohmann, representing John Doe, and I am happy to restate  
22 the arguments that were made in the brief that was filed very  
23 early this morning. I apologize if you have not had a chance  
24 to take a look at that.

25 THE COURT: I read all the papers.

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1 MR. VON LOHMANN: Excellent, your Honor. Thank you  
2 very much. I appreciate that. Let me recap briefly a few  
3 things before I discuss the argument. First, in response to  
4 the papers filed by Eli Lilly attorney Ms. Gussack, let me  
5 make a few things clear. First, my client John Doe is not  
6 anyone named in the injunction, nor anyone mentioned by name  
7 in Ms. Gussack's papers. Just so we're clear, my client here  
8 is someone who is a member of the public who is interested in  
9 mental health issues, who has heard about this, thanks to The  
10 New York Times article as well as the broad public discussion  
11 about this and is not someone who is enlisted as one of the  
12 individuals in the Court's prior injunction.

13           **Second, your Honor, unlike the assertion in**  
14 **Ms. Gussack's papers, I certainly do not concede personal**  
15 **jurisdiction over my client has been established by the**  
16 **Court. I agree that my client is potentially within this**  
17 **Court's jurisdiction. However, he has not been served, nor**  
18 **otherwise formally brought under this Court's jurisdiction. I**  
19 **appear here today because the case law is relatively clear**  
20 **that someone who has notice of a Court injunction will be**  
21 **bound by that injunction even without formal service, so, I**  
22 **appear here today in order to clarify the Court's order in**  
23 **that regard.**

24           **Third, my client also does not concede that due**  
25 **process has been fulfilled with respect to his situation.**

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1 **This again is something that was asserted by Ms. Gussack's**  
2 **papers filed before the Court this morning. He was not**  
3 **notified in any way prior to the issuance of the court order.**

4           **So, let me just recap briefly the arguments here that**  
5 **he is seeking to make and answer any questions the Court may**  
6 **have. He is someone who contributes to the web site that is**  
7 **mentioned in the Court's January 4 order, the**  
8 **Zyprexa.pbwiki.com web site. He has, in addition to**  
9 **contributing information there, he has also posted links to**  
10 **the Lilly documents that are hosted on third-party web sites.**  
11 **He himself has never posted the documents. He has only posted**  
12 **links that purportedly lead to these documents.**

13           **As the Court may be aware, there are now a number of**  
14 **locations on the Internet where the documents have apparently**  
15 **been republished and again I would like to disagree with**

16 Ms. Guzack's papers. She asserts that the documents are  
17 nowhere available on the Internet currently. I certainly have  
18 no information confirming that. In fact, what I am aware of  
19 is that the documents may in fact already be available on  
20 foreign web sites. Of course, my client is leery of  
21 publishing links to those web sites in light of the Court's  
22 order, but my understanding is the documents are presently  
23 available on third-party web sites with no relation, at least  
24 no relation that my client knows to any party in the case or  
25 any person named in the injunction.

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1           So, very briefly, your Honor, my client makes two  
2 arguments in asking the Court to clarify its order to exclude  
3 him and his activities. First, this Court lacks the authority  
4 to bind nonparties who are not acting in concert with or  
5 participating with or aiding or abetting a party to the  
6 underlying action. And, as described in my brief, my client  
7 certainly does not fall within that circle. He is not a party  
8 to the litigation. He has never taken this drug, he has to  
9 the best of his knowledge never had any direct contact with  
10 any individual who is bound by this Court's protective order  
11 CMO-3.

12           He discovered this controversy, as I said, through  
13 public sources of information and accordingly he is not in a  
14 position of aiding or abetting or otherwise participating with  
15 any party. Therefore, it is his view he is not within the  
16 Court's power, even if he is in fact posting the links to  
17 these documents.

18           The Court's order, however, enjoins any -- apparently  
19 from the language as written in the January 4th order, it

20 appears to enjoin the web site itself and my client therefore  
21 is concerned that that would include his activities, despite  
22 the fact that he is an independent third party and thus beyond  
23 the Court's reach.

24           Secondly, and perhaps even more importantly, my  
25 client believes that this order as applied to his activities

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1 constitutes an unconstitutional prior restraint on speech and  
2 in this regard, as discussed in the brief, the Proctor &  
3 Gamble versus Bankers Trust case, the 6th Circuit case from  
4 1996 that -- where Judge Merritt wrote the majority opinion  
5 there is really almost exactly on all fours with this  
6 circumstance.

7           In that case BusinessWeek obtained documents that  
8 were under protective order and submitted to the Court under  
9 seal and wanted to publish an article relating to those  
10 documents. The Court enjoined that publication. On review  
11 the 6th Circuit made it very clear that injunction was a prior  
12 restraint, unconstitutional, and impermissible under the First  
13 Amendment.

14           The circumstance here is again very similar. My  
15 client is an independent third party that has discovered  
16 places that purport to have these documents on line. The fact  
17 that they were under protective order in this litigation  
18 before your Honor should not be a justification to assert a  
19 prior restraint against him.

20           In fact, although Ms. Guzack's papers suggest that  
21 The Seattle Times versus Reinhart case before the Supreme  
22 Court in 1984 upheld similar restrictions, that case and the

23 restrictions that were upheld in that case were against a  
24 party to the litigation itself and, as Judge Merritt describes  
25 in the Proctor & Gamble case, rejecting exactly that argument,

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1 he points out that in The Seattle Times case we were not there  
2 talking about nonparties. My client, just as BusinessWeek was  
3 in the Proctor & Gamble case, is here a nonparty acting  
4 independently of any party or for that matter any person who  
5 is under the Court's protective orders CMO-3.

6 So, for those two reasons, I have suggested in my  
7 brief a revision or clarification of the Court's January 4th  
8 order that I believe would cure both the Court authority  
9 problem as well as the First Amendment prior restraint  
10 problem, and that is essentially to remove mention of the web  
11 site and specifically I think it is more sensible to direct  
12 the Court's orders at individuals rather than a web site that  
13 in this case can be revised by many, many members of the  
14 public and, also, to clarify that the Court's order only  
15 extends to nonparty -- to the extent they are legally  
16 identified with a party, or are acting in concert with or  
17 participate with or aiding and abetting a party, that is  
18 clearly the outer limit of the Court's authority, as made  
19 clear by both 2d Circuit authority and Supreme Court  
20 authority.

21 So, by clarifying the order in that manner it would  
22 retain the Court's power over anyone who is in that close  
23 aiding and abetting relationship, thereby validly protecting  
24 Eli Lilly's interests while not reaching out onto a prior  
25 restraint to nonparties who are both beyond the Court's



1 authority and protected by the First Amendment in their  
2 interest in publicizing and discussing information relating to  
3 the Lilly documents, your Honor.

4 THE COURT: Thank you very much. Do you have the  
5 transcript of the hearing of January 3, 2007?

6 MR. VON LOHMANN: Your Honor, I only obtained that  
7 transcript this morning as an exhibit to Ms. Gussack's  
8 submission. I have not had the opportunity to review it.

9 THE COURT: But do you have a copy?

10 MR. VON LOHMANN: I do, yes, your Honor.

11 THE COURT: Are you appearing on behalf of the web  
12 site?

13 MR. VON LOHMANN: I am appearing on behalf of an  
14 individual who has contributed to the web site, including  
15 contributing links that lead -- at least purportedly lead to  
16 the Lilly documents that are in dispute.

17 It is a bit unclear, your Honor, exactly who the  
18 order is directed toward. As I described in my brief, the web  
19 site is hosted by a service called pbwiki.com. That service  
20 is based in California and it basically provides the tools  
21 that allows anyone to create a web site on any topic of their  
22 choosing. In fact, their information, their public  
23 information on the web site suggests that they have more than  
24 100,000 individual web sites that are hosted by this service.  
25 So, by mentioning a particular web site, in this case the

1 Zyprexa.pbwiki.com web site, I interpret the Court's ruling to  
2 be applied just to that individual web site rather than to the  
3 entire operations of this company which obviously has no  
4 direct interest or involvement in this controversy or this  
5 underlying litigation. And, so, when you say "the web site,"  
6 all I can say, your Honor, is that there are a number of  
7 individuals who are contributors to that web site, each of  
8 whom is entitled to revise the web site as they see fit. The  
9 wiki technology involved here allows that sort of  
10 collaborative authorship.

11 All I can do, your Honor, is represent one of the  
12 authors. I don't know who all the other authors are. As I  
13 mentioned in my brief, the password that is required to be an  
14 author or a collaborator on this web site has been publicly  
15 disclosed so to the best of our knowledge there are a number  
16 of individual contributors, not all of whose identities are  
17 known to my client, or, as far as I can tell, publicly  
18 available. So, I am here representing one individual who  
19 contributes to this particular web site.

20 THE COURT: But you'll have to excuse me, because I  
21 don't know too much about the technology involved and counsel  
22 will have to assist me.

23 MR. VON LOHMANN: I will do my best, your Honor.

24 THE COURT: I know you will.

25 Is there a company that owns and operates the web

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1 site?

2 MR. VON LOHMANN: The company, as I mentioned,  
3 there's a company called P.B. Wiki. It is based in  
4 California. It owns and operates a service that hosts many,

5 as I mentioned, over 100,000 web sites. It has no particular  
6 interest in the content of any particular web site, nor to the  
7 best of my knowledge does it author any of that content. It  
8 simply provides in essence to your Honor something similar to  
9 a generic bulletin board where anyone can come and pin up any  
10 content they like and they -- although I haven't been in touch  
11 with that company, to my knowledge they are not involved or  
12 appearing or otherwise represented here.

13 THE COURT: So, they are not objecting to the order;  
14 is that right?

15 MR. VON LOHMANN: I cannot speak on their behalf. I  
16 -- I did speak with them, because, as I mentioned in my  
17 brief, counsel, Mr. Fahey, who I believe is on the call, today  
18 sent an E-Mail message to the company. This actually occurred  
19 prior to the Court's January 4th ruling, so even before the  
20 web site was mentioned in a court order, counsel for Lilly  
21 already contacted the company and demanded that the entire web  
22 site be taken down or deleted and, so, I got in the touch with  
23 the company in order to discuss this matter with the company.  
24 The company was satisfied that because the web site, as I  
25 mentioned in my brief, has edited itself, the contributors

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1 have chose to abide by the Court's January 4th ruling pending  
2 this hearing. The company was satisfied that the web site, to  
3 the extent it was in compliance with the Court's ruling, no  
4 longer presented any issue that they needed to worry about.

5 Again, your Honor, this is me relaying the content of  
6 my conversation. I don't purport to represent them. They are  
7 not, as far as I know, involved in this action at this time.

8 THE COURT: Thank you. Does anybody else wish to be  
9 heard before I hear from Lilly?

10 MR. CHABASINSKI: Your Honor, this is Ted  
11 Chabasinski. I believe Mr. Von Lohmann's argument applies  
12 equally to the people I represent. The injunction, it  
13 infringes on their freedom of speech. They are in no way  
14 party identified. The event that Lilly claims ties them to  
15 the parties, that is, the alleged violation of the protective  
16 order, there still hasn't been a determination there even was  
17 a violation of protective order. The only thing that connects  
18 people I represent to any party is that they receive some  
19 documents -- not all of them received them. They received  
20 some documents from somebody who is also not a party and that  
21 their connection with this case is extremely tenuous. They  
22 are nonparties, they have no relationship to any party. If,  
23 indeed, they had a relationship to Mr. Gottstein,  
24 Mr. Gottstein is not a party, there's no showing that they  
25 acted in concert with Mr. Gottstein or aided and abetted any

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1 alleged violation of the protective order.

2 So, I think all of Mr. Von Lohmann's argument as to  
3 his client apply to mine as well.

4 I also -- I have not received any papers from Eli  
5 Lilly. I don't know what they say, but whatever they say, I  
6 don't think they change what the law is in this area, which is  
7 prior restraint is disfavored and people have to be related to  
8 the -- to some party in the case in some way before they can  
9 be bound by an injunction.

10 THE COURT: Thank you very much. Does anybody else  
11 on the phone wish to be heard?

12           MR. MILSTEIN: Yes, your Honor, this is Alan  
13 Milstein. I represent Vera Sharav and Alliance for Human  
14 Research Protection. Ms. Sharav is a patient, subject  
15 advocate who indicated to me on her web site and E-Mails  
16 information that she sees as exposing the risks of  
17 pharmaceuticals and of other health related matters and she is  
18 a nonparty, as is AHRP, to the litigation, the subject  
19 litigation and should not be bound by any kind of restraining  
20 order. So, I would again endorse what counsel for the  
21 Frontier Foundation has already said to your Honor.

22           THE COURT: Thank you. Anybody else on the phone?

23           MR. MCKAY: Your Honor, this is John McKay,  
24 representing first Terry Gottstein as a respondent to the  
25 order that is at issue in this case. I would simply -- I have

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1 nothing further to add. It appears the brief filed by  
2 Mr. Von Lohmann correctly states the law that is applicable  
3 and Ms. Gottstein, under her circumstances, is not affected by  
4 this. On behalf of Mr. Gottstein, who is not a party to this  
5 restraining order, I would simply note for the record that we  
6 appreciate that your Honor has provided to Mr. Gottstein an  
7 opportunity to respond more specifically to matters that have  
8 been raised by the pleadings till next Tuesday, January 16th,  
9 and that we believe that a number of the statements in the  
10 pleadings that have been filed that we've had a chance to look  
11 at quickly this morning by Lilly do not accurately reflect  
12 what we believe the record will ultimately show and in  
13 particular consistent with your Honor's determination at our  
14 last hearing on January 3rd that you were not predetermining

15 the factual issues. We appreciate that and the opportunity to  
16 more fully address this next week, when we make a scheduled  
17 filing.

18 Thank you, your Honor.

19 THE COURT: Thank you. Anybody else?

20 (No response.)

21 THE COURT: I will hear from Lilly.

22 MR. FAHEY: Your Honor, I want to start by focusing  
23 the Court's attention on why we're here. This is a motion for  
24 reargument, which is a very high standard that must be met in  
25 order to change a prior ruling if the Court overlooked the

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1 controlling decision, factual matters that would have likely  
2 changed the result, and, secondly, argument would be necessary  
3 to correct error. Neither of those is present here. The  
4 reason for needing the reargument stated in Mind Freedom's  
5 letter to the Court was that the order resulting from the  
6 January 3rd hearing was the result of a lack of due process.  
7 That is not true either.

8 First of all, due process is a very low standard.  
9 Notice and opportunity to be heard are all that is needed.  
10 Both of those were provided to all the parties on the phone  
11 today. Particularly in a situation as we have here, where the  
12 proceedings are to be followed by a more extensive proceeding  
13 which is still scheduled for January 16 on a lot of the First  
14 Amendment issues that were raised in the call today, the due  
15 process standard is even lower.

16 There was communication or allegations in both the  
17 moving papers and, also, on various web sites that there were  
18 ex parte communications which resulted in an expansion of the

19 Court's order. As our papers show, the expansion of the order  
20 in this case was specifically discussed on the record and the  
21 expansion of the order was directed by the Court after  
22 discussion with all the parties participating. Let me try to  
23 briefly address some of the issues with respect to -- I guess  
24 I will take them in order.

25 With respect to the EFF motion, we would like to

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1 discuss the issue of the anonymity of John Doe. We think  
2 that's a very important issue. The allegations are that John  
3 Doe has nothing to do with the people who are under court  
4 order on the 29th, that he has never spoken with anyone that  
5 had anything to do with that, but he failed to tell us who he  
6 is. And, so, we think the cases cited by EFF in their brief  
7 do not support the preservation of John Doe's identity. We  
8 are more than happy to have John Doe's identity sealed in the  
9 record, but in order for the Court to determine whether or not  
10 he was aiding and abetting people who were under Court orders  
11 and injunctions in this case, we need to know who he is. And,  
12 so, that's the first thing.

13 So, there's two factual points that EFF relies on in  
14 their argument. First is that there was no aiding and  
15 abetting, that we don't know who John Doe is. The second is  
16 that the documents are widely available on the Internet.  
17 There's no evidence before you, your Honor, that they are  
18 widely available on the Internet. The only evidence is the  
19 evidence that we submitted this morning from the director of  
20 Mind Freedom, who said and we quoted in our brief, "I know of  
21 no place on the Internet where these documents can be

22 located." So, the factual basis for EFF's motion for  
23 reargument, first of all, doesn't make the standard for  
24 reargument, but even on a factual basis the factual record is  
25 not sufficient for your Honor to rule on their request to

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1 change the order.

2           The second point and I do think that regardless of  
3 who the John Doe is the evidence of the aiding and abetting of  
4 individuals in -- that are under court order is significant by  
5 the members of the contractors of the pbwiki. I will go  
6 through those in a moment.

7           And, so --

8           THE COURT: I don't want to hear the evidence in  
9 detail. I have your papers.

10           MR. FAHEY: Okay. Some of this is just responding to  
11 the brief we just got this morning to which we didn't have an  
12 opportunity to respond.

13           THE COURT: I don't want to hear that detail.

14           MR. FAHEY: Okay.

15           The next issue with respect to the EFF's argument  
16 about the 6th Circuit case, again, this is something we would  
17 be prepared to address on the 16th with respect to the First  
18 Amendment issue, but the fact is that the Proctor & Gamble  
19 case is not at all similar to this case and Proctor & Gamble  
20 there was not a court ordered protective order, there was an  
21 agreement reached by the parties to keep information  
22 protected. There was no good cause showing that there is here  
23 which allowed the Court to make a determination about whether  
24 a protective order was necessary.

25           In the Proctor & Gamble case the parties were allowed



1 on their own without Court approval to modify the terms of the  
2 protective order, and, so, the government action in this case  
3 was not present in the Proctor & Gamble case. Seattle Times  
4 is controlling here. Seattle Times made clear that it has  
5 been in the Court's power to issue protective orders  
6 recognizing there's going to be some restraint of the First  
7 Amendment rights. The Court balanced that, U.S. Supreme Court  
8 balanced the interests and said protective orders are  
9 appropriate.

10 And, so, moving on to the other individuals here, the  
11 arguments raised by all of the other parties are essentially  
12 that they are not parties in the underlying action, but we  
13 have submitted clear evidence confirming that we believe these  
14 individuals have all aided and abetted Mr. Gottstein and  
15 Dr. Egilman in the dissemination of documents protected by  
16 CMO-3.

17 The fact of the matter is that one of the documents  
18 we submitted says and we quote: We can all be Jim, and that's  
19 exactly what they're trying to do here. There have been  
20 orders issued by the Court. They have done everything in  
21 their power to evade those orders to put the documents into  
22 other people's hands or to have other people try to post  
23 information about them and the information that I'm suggesting  
24 that I have here relates to David Oaks who is the director of  
25 Mind Freedom who is in constant communication with the

1 contributors to the pbwiki and he's telling them please post  
2 this to the wiki. How do I get the information out  
3 anonymously? People working on the pbwiki are aiding and  
4 abetting Mind Freedom, David Oaks, director of Mind Freedom,  
5 and the intentional violation of this Court's December 29th  
6 order.

7           And, so, all of the people, Terry Gottstein,  
8 Mr. Gottstein, Judy Chamberlin, Robert Whittiker, all of those  
9 people had notice and opportunity to be heard on the 3rd.  
10 They either did not appear or they did appear and argued. The  
11 motion for reargument is not met here. There's no new facts  
12 and no new clear controlling law that modifies it.

13           On the issue of the Court's ability to extend these  
14 issues as it previously did, which is to the 16th, the  
15 standards in the 2d Circuit for temporary restraining order  
16 and preliminary injunction are the same. All the Court needs  
17 to identify is that there is a compelling interest that must  
18 be preserved and there would be irreparable harm if not for  
19 the injunction or restraining order.

20           The courts are clear in the 2d Circuit that the  
21 protection of trade secrets is something that needs to be  
22 protected. If it is not protected you have irreparable harm.

23           The second issue is whether there is success on the  
24 merits, which we believe we will be able to establish, or,  
25 second, the need for a fair and fuller hearing. The parties

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1 have already said on January 3rd, if a more fair and full  
2 hearing is necessary, that's why the original hearing was  
3 scheduled for the 16th and, so, your Honor, is well within its

4 discretion to deal with the specific issues raised today,  
5 which are whether there's factual matters that were not --  
6 that could have been but were not presented to the Court and  
7 whether it is clear error and we don't think either of those  
8 is present.

9           So, we ask that the injunction or preliminary  
10 injunction be continued until January 16th at two o'clock,  
11 when we can hear the First Amendment issues which we really,  
12 quite frankly, saw for the first time this morning at 9 a.m.

13           THE COURT: Thank you. Does anybody on the phone  
14 wish to briefly speak? I think I have the full positions of  
15 both parties and if you want to I'll hear you.

16           MR. VON LOHMANN: Your Honor, this is Fred Von  
17 Lohmann.

18           Let me respond very briefly to a few of the points  
19 that were made by I assume Mr. Fahey before the Court. First,  
20 let me respond to the concern regarding anonymity. I, of  
21 course, am very sensitive to my client's desire to speak  
22 anonymously, which, of course, the Court will recognize as a  
23 constitutionally protected right repeatedly recognized by the  
24 Supreme Court. At the same time, I certainly understand  
25 Lilly's concerns as well. That is exactly why I propose a

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1 clarification of the Court's order that I believe addresses  
2 both concerns.

3           My proposed clarification would have the Court's  
4 order apply to anyone who is aiding, abetting, participating  
5 or otherwise within this proper scope of the Court's  
6 authority.

7           My client is quite confident given his relationship  
8 or non relationship, as it were, to anyone who is a party to  
9 this case, that if that language were in the Court's order, he  
10 would be confident he was not covered and would feel free to  
11 behave and speak freely without any fear of the Court's  
12 order. Of course, if it turns out that he or anyone else who  
13 is on this list in fact is in that relationship, aiding,  
14 abetting, act in concert or participation, to use the language  
15 from the cases, then Eli Lilly would remain free under the  
16 revised order to instigate contempt proceedings and be in a  
17 position where they could try to prove the relationship.

18           Again, my client is absolutely confident that he  
19 would not be found to be within the scope of the order.  
20 That's the proposed language to clarify the order I hope will  
21 balance the interest in anonymity against Lilly's interests in  
22 being able to develop a record.

23           The second point I want to emphasize, your Honor, is  
24 that with respect to whether or not Mr. Oats or Mind Freedom  
25 may in fact be encouraging others to publicize information,

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1 the Lilly documents, et cetera, I don't believe that changes  
2 the analysis in the least. Mr. Oats and Mind Freedom, neither  
3 of them are parties to the underlying action, neither of them  
4 are, to the best of my knowledge, subject to CMO-3. They are,  
5 of course, named in the latest or I should say Mind Freedom is  
6 named in the latest court order. However, I found no case to  
7 suggest that the Court's injunctive authority reaches to  
8 parties and nonparties and nonparties who aided and abet  
9 nonparties. At some point this tenuous, tertiary chain has to  
10 end, otherwise the Court's power would be against the whole

11 world, which is exactly what Judge Learned Hand in the  
12 Alamine (ph.) Manufacturing case made clear cannot be the  
13 case.

14           A third point I want to make briefly, Mr. Fahey  
15 suggests all of this can wait until the Court's January 16th  
16 hearing. Well, I'm afraid as Judge Merritt made clear in the  
17 Proctor & Gamble case, that is not acceptable in a case  
18 involving a prior restraint and, in fact, Mr. Fahey recites  
19 the standard for granting temporary restraining order and  
20 notes it is the same as a preliminary injunction.

21           Well, that standard is precisely and expressly  
22 rejected in the Proctor & Gamble case itself, where Judge  
23 Merritt points out while that standard may be acceptable in  
24 cases not involving a prior restraint on speech, that standard  
25 is not the appropriate standard where prior restraints are

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1 concerned and he specifically lays out the appropriate  
2 standard and requires that the party seeking a prior restraint  
3 must show that the interests involved are more fundamental  
4 than the First Amendment itself and I am quite confident that  
5 Lilly has made no showing that rises to that level here.

6           And Lilly in their brief and in their argument here  
7 today suggested they have trade secrets on the line. On that  
8 question I direct the Court's attention to the Bridge CAT Scan  
9 case, a 2d Circuit case cited in our brief, where the 2d  
10 Circuit specifically says it is inappropriate for a party to  
11 recite a trade secret interest to support an injunction  
12 against free speech where the underlying action has nothing to  
13 do with trade secret.

14           Again, to the best of my knowledge, the underlying  
15 product liability litigation here is not a trade secrets case  
16 and I'm not aware of any case where a party is entitled to  
17 recite this completely separate interest that's collateral to  
18 the underlying ruling.

19           If Lilly believes its trade secrets are on the line  
20 here, it is free to instigate separate action and seek  
21 injunctions to protect those interests in a different Court  
22 and that's not, I think, a basis for granting prior restraint  
23 here.

24           Finally, your Honor, if you are not inclined to  
25 revise your ruling, as we mention in our brief, we would

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1 request in the alternative a stay pending our seeking mandamus  
2 relief from the 2d Circuit. So, I just want to ask once again  
3 respectfully for a stay in the event the Court rules in that  
4 manner.

5           MR. MILSTEIN: Judge, this is Alan Milstein again for  
6 Vera Sharav and AHRP. If I can respond briefly to one point?  
7 I know we're going to deal with some of this on the 16th, but  
8 the allegation of trade secrets is what I need to talk about.

9           This isn't a case where Lilly is afraid that these  
10 documents are going to be in the hands of their competitors.  
11 This is a case in which Lilly is afraid that these documents  
12 are going to be in the hands of consumers who might purchase  
13 their product.

14           THE COURT: Excuse me.

15           MR. MILSTEIN: These consumers might find out  
16 information about the product that might make them fear or  
17 decide not to take the product.

18 THE COURT: Excuse me.

19 MR. MILSTEIN: This is a trade secrets case, this  
20 is --

21 THE COURT: Excuse me, sir. I'm not interested in  
22 the trade secret argument. It is irrelevant to this  
23 discussion.

24 MR. MILSTEIN: Okay.

25 MR. CHABASINKSI: May I speak again, your Honor?

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1 This is Ted Chabasinski.

2 THE COURT: Yes.

3 MR. CHABASKINSKI: I haven't received a copy, as I  
4 said, of the brief the defendants filed this morning, but I  
5 heard Mr. Fahey recite one thing that troubles me. He says  
6 they have submitted clear evidence that the respondent,  
7 including my clients, aided and abetted this alleged violation  
8 of the protective order. I haven't seen any such evidence.  
9 They have huge resources, as I think you can take judicial  
10 notice of. In eight days, ten days, or whatever number of  
11 days they got the temporary restraining order, they surely  
12 could have come up with something more than just that my  
13 clients received some documents from Mr. Gottstein. And I  
14 think Mr. Von Lohmann made a good point, it becomes more and  
15 more tenuous.

16 We have nonparties allegedly acting in concert with  
17 other nonparties who then allegedly aided and abetted  
18 something it hasn't yet found to have happened. The only  
19 thing that connects my client with this case --

20 THE COURT: Excuse me. I don't want to hear that

21 argument again.

22 MR. CHABASINSKI: All right, your Honor.

23 MR. FAHEY: Your Honor, if I could just --

24 THE COURT: No, I don't want to hear any further  
25 argument at this time.

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1 As all these attorneys know, an interlocutory  
2 decision under Section 1292 of Title 28 is appealable. The  
3 words are "granting, continuing, modifying, refusing or  
4 dissolving injunctions, or refuses to dissolve or modify  
5 injunctions".

6 If the parties wish, I can characterize this as a  
7 preliminary injunction, although I don't think it is necessary  
8 to do so.

9 In any event, as counsel has already pointed out,  
10 mandamus is certainly available, but so is, I believe, an  
11 appeal, but that is for the attorneys to decide.

12 Now, we'll have full argument on all legal issues and  
13 a full evidentiary hearing on January 16th, 2007 at 2:00 p.m.  
14 The reason for putting it off until January 16th is because a  
15 number of the parties wished additional time with respect to  
16 the matter.

17 At that time I will hear all of your arguments and  
18 all evidence. If you're going to have any witnesses, please,  
19 give each other notice of the witnesses and the substance of  
20 the testimony. If you have any documents or other materials,  
21 do the same so that we can proceed expeditiously with the  
22 hearing. We're starting late in the afternoon because we have  
23 some Alaska people and people from the Pacific Coast, which is  
24 on a different time line than the Eastern District of New



25 York. So, we can proceed into the early evening and then

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1 start the next afternoon.

2 I find that Lilly has a substantial probability of  
3 success on the merits in obtaining appropriate relief in these  
4 proceedings and that it will suffer irreparable harm without  
5 appropriate action by the Court.

6 I emphasize, as I did at the hearing on January 3rd,  
7 that I have made no findings nor have I even decided who has  
8 the burdens of proof. If Lilly expects to proceed by  
9 contempt, I should like to know against which parties and on  
10 which issues, because the Court would prefer to expedite  
11 discovery on any procedures for contempt or for modification  
12 or for dissolving of the injunction so that the matter can be  
13 taken up by the Court of Appeals on the fullest possible  
14 record as soon as possible.

15 I should like to emphasize again, as I did I thought  
16 on the 3rd, that no one is enjoined from discussing anything  
17 they wish to discuss. New York Times is not enjoined from  
18 doing anything it wishes to do. The injunction only covers  
19 the publication and the cooperation in publishing particular  
20 material which is alleged to have been stolen in violation of  
21 this Court's orders.

22 So, I really don't see at this moment how free speech  
23 of anybody is affected, but my mind is open on the matter. It  
24 is an important matter and I will be glad to have full briefs,  
25 full argument and full evidence beginning on the 16th. I've

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1 set down for a status conference on Zyprexa cases for  
2 discussion of some settlement and other related matters and  
3 I'll have to hold both hearings, but I would appreciate  
4 counsel being available. I'm sure that they understand that  
5 the Court has other matters and they will be cooperative.

6           So, if you will get in touch with Ms. June Lowe --  
7 you have her phone number, (718) 613-2525 -- she'll give you  
8 every possible assistance in communicating. I would be happy  
9 to have counsel physically present. Obviously, it is easier  
10 to deal with this matter where I can hold up my hand and stop  
11 you from talking rather than shouting. If we have witnesses,  
12 I'll hear them by phone, but again I would prefer to see them  
13 in person.

14           Is there anything else that anybody on the phone  
15 wishes to bring up before I adjourn?

16           (No response.)

17           THE COURT: Anybody present wishes to bring anything  
18 up?

19           MR. FAHEY: Your Honor, I just don't know where we  
20 left the John Doe issue. Whether the EFF client should at  
21 least disclose to the people involved in this hearing the  
22 identity of the person?

23           THE COURT: I'm not so ordering it at this time, no.

24           MR. FAHEY: Okay.

25           THE COURT: You have your resources for investigation

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1 and it is a matter we can take up on the 16th.

2           MR. FAHEY: Thank you, your Honor.

3           THE COURT: I do not want this sensitive and  
4 difficult case handled with letters. I do not want any of you  
5 calling my law clerk. If you want to communicate, please do  
6 it in writing and if you want information, please do it with  
7 the case coordinator, Ms. June Lowe.

8           Is there anything else, any question that you have?

9           MR. CHABASINSKI: Yes, your Honor. Regarding what  
10 you just said about not contacting your law clerk, I know  
11 you've already chided me for my rather informal method of  
12 communicating.

13           THE COURT: I haven't chided you. I told you I  
14 prefer to get briefs and written material and I did not  
15 appreciate you sending a letter to the Court without a copy to  
16 the parties.

17           MR. CHABASINSKI: I apologize, your Honor. I did  
18 copy the last letter.

19           THE COURT: When you do so, please put it on your  
20 letter. It is, as I understand it, ordinary professional  
21 practice.

22           MR. CHABASINSKI: Yes, your Honor.

23           THE COURT: I'm not chiding you, I don't even know  
24 you.

25           MR. CHABASINSKI: I want to make sure I am proceeding

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1 the way you want me to. I want to tell you this morning I  
2 called your law clerk only to find out about whether certain  
3 papers had been filed.

4           THE COURT: It is perfectly appropriate.

5           MR. CHABASINSKI: Please tell me what you prefer I

6 do.

7 THE COURT: Call Ms. June Lowe. She's just in charge  
8 of case coordination, she is not in charge of  
9 decision-making. I think we all know the difference between  
10 an elbow law clerk and a case coordinator.

11 MR. CHABASINSKI: Yes, your Honor.

12 THE COURT: Both are vital, but they are not the  
13 same.

14 All right, thank you very much. I will see you or  
15 hear from you on the 16th. Good night.

16 (Proceedings concluded.)

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