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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]

DECLARATION OF D. JOHN MCKAY
IN SUPPORT OF OPPOSITION TO CONTINUATION OF INJUNCTION

The undersigned, D. JOHN MCKAY, declares:

1. I am an attorney in solo private practice in Anchorage, Alaska, and I represent Respondent James B. Gottstein (as well as Terrie Gottstein) in the above-referenced litigation. I have personal knowledge of the matters asserted herein.

2. On the evening of January 31, Lilly filed its Memorandum of Points and Authorities Concerning Its Request to Modify and Extend the Court's January 3, 2007 Temporary Mandatory Injunction ("Memo"), with two exhibits to the Memo including Ex. A, a Declaration of Dr. Gerald Hoffman, dated January 16, 2006. These documents were part of several hundred pages filed by Lilly at that time. When I initially read

through these materials, I did not note that the Hoffman Declaration had been executed in January 2006 rather than January 2007, and I did not focus especially on footnote 8

(Memo at p. 10), which states:

Lilly has submitted this Declaration in response to a confidentiality challenge pending before Special Master Woodin, relevant portions of which are attached hereto. The documents subject to that challenge and the documents subject to the injunction proceedings are of similar nature, and indeed, there is a substantial overlap in the documents in these two actions. Mr. Hoffmann's statements about how Lilly protects its documents, limits their disclosure, and the resulting harm caused upon disclosure apply with equal force here.

Upon a more careful reading in the following days, I determined that we needed to see the pleadings from which the Hoffman Declaration was drawn, to understand its context and the arguments being made by both sides in the proceedings before Special Master Woodin alluded to by Lilly. I tried without success to find the pleadings on any court docket sheet, and on February 5, 2007, I e-mailed Special Master Woodin asking for a copy of the relevant pleadings. [See attached Ex. 1] (I sent copies of this to counsel, but inadvertently failed to include Sean Fahey in the cc's. However, in our communications later that same day, we discussed it, and Mr. Fahey informed me that he was out of the office and would be unable to address the matter with me until Tuesday.) Mr. Woodin suggested that I contact counsel for the parties about obtaining the briefs, and I set out to do so, but encountered substantial difficulty at first because the information about who is counsel for UCFW and related parties is not ascertainable from the court's docket sheet in 04-MDL-1596. Eventually, I was able to track down this information, found which firm representing Third Party Payors ("TPP") was handling this matter, and left a phone message.

3. On Tuesday, February 6, I received a call back from the Hagens, Berman, Sobol and Shapiro firm, and spoke with TPP counsel Tom Sobol and David Nalven. They confirmed, as revealed in fn. 8 of the Lilly Memo, that briefing had been submitted to Special Master Woodin. They said they were unable to provide me copies of these briefs, however, unless I had signed a CMO-3 confidentiality waiver and took any documents subject to that. I said I had not, and that I should only be given non-confidential information about the matter. After checking, they informed me that all pleadings and correspondence relating to the matter were filed under seal, including the Hoffman Declaration used by Lilly in its January 31 filing.

4. Mr. Sobol explained that the matter pending before Special Master Woodin arose from a motion made by TPP counsel in 2005, pursuant to ¶9(b) of CMO-3, to make public hundreds of Zyprexa Documents that had been designated confidential by Lilly. He said that counsel for Lilly and TPP followed the process set forth in CMO-3, ¶9(c), by the terms of which Lilly was required to file a motion within 45 days if it wanted to maintain these as confidential documents. He said that Lilly failed to do this, so that by the express terms of CMO-3, ¶9(d), the Confidential Discovery Materials lost their confidential status, in December 2005.

5. Mr. Sobol further explained that since that time, Lilly has been attempting to avoid the consequences of its having failed to timely comply with CMO-3, and that this is the subject matter of the proceedings before Special Master Woodin that Lilly referred to but not identified by Lilly in its recent filing, and that they are awaiting a decision concerning these now presumptively non-confidential documents.

6. I spoke with Mr. Fahey late Tuesday. He informed me that Lilly was not in a position to make available to me any of the briefing in the matter referred to in fn. 8 of Lilly's January 31 Memo, because it is all under seal.

7. In its January 31 memo, Lilly makes certain new assertions of fact, with no basis in the record and which could have been addressed through witnesses at the January 16-17 hearing, going to Lilly's counsel reasonable opportunity to object. Had Lilly, given ample opportunity to do so, presented evidence at the hearing on this, we would have been happy to cross-examine, rebut and otherwise establish the facts. It chose not to do so. (*see*. January 12, 2007, letter from Nina Gussack to Hon. Jack B. Weinstein, attached as Ex. 2) Having the issue raised in this manner, aside from objecting, we can only make the following observations on the matter, from personal knowledge. 1) I have no personal knowledge about whether the office of Lilly's General Counsel Mr. Armitage has or lacks sufficient resources to have allowed him to make a single phone call, or send a single fax or e-mail, to either Dr. Egilman or Mr. Gottstein on any of the seven days from when he first received the notice of the subpoena as required by CMO-3 until Dr. Egilman produced the Documents in response to the subpoena. I do know, based on representations of Lilly's counsel in this case, that Lilly's General Counsel was able to promptly forward it to them (Pepper Hamilton) for appropriate action, if any; 2) According to a Pepper Hamilton website, "More than 10 partners in Pepper's Health Effects Litigation Practice Group are directing the (Zyprexa[®]) litigation, working with a score of associates and affiliated counsel around the country and Canada," Pepper Hamilton 2005 Annual Review, <http://www.pepperlaw.com/pdfs/PepperHamilton2005annualreview.pdf>, at 3, but I have

personally met few than a dozen of these Lilly attorneys in the two months I have been involved in this matter. In my personal experience, counsel for Lilly in the Zyprexa matter work at all hours, and all days of the week, as they deem necessary. When they have wanted something from me or my client, I have had frequent, and insistent communications. (I would hasten to add that Lilly's counsel have been cordial, professional, and generally responsive.) For example, in the first week I was involved in this case, I received over a dozen e-mails from one Lilly lawyer over four days — fewer days than elapsed between Dr. Egilman's notice to Lilly and his production of the Documents. These included e-mails sent by Lilly counsel to me at 1:29 am, 2:10 a.m., 3:00 am and 3:04 a.m., as well as all hours of the day and evening. Also, exhibits filed by Lilly with its January 31 proposed Findings leave no question about Lilly's ability to promptly object or respond on matters of concern to it. *See, e.g.*, Ex. 25 to Lilly's January 31 proposed Findings, at Pet. 7: 0780-82, 0785-89, 0790-94, 797-98 (showing extreme diligence on a Friday evening and all day Saturday). [These are essentially the same documents; Lilly has simply submitted multiple copies as part of its exhibit].

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is made and executed by me in Anchorage, Alaska, on this 9th day of February, 2007.

/s/D.JohnMcKay/

D. John McKay