

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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IN RE: ZYPREXA :  
PRODUCTS LIABILITY LITIGATION, :  
:  
:  
- - - - -x

U.S. Courthouse  
Brooklyn, New York  
  
December 18, 2006  
  
3:00 p. m.

TRANSCRIPT OF PHONE CONFERENCE  
BEFORE THE HONORABLE BRIAN M. COGAN, DISTRICT COURT  
JUDGE.

1           **APPEARANCES:**

2

3           **For the Plaintiffs:**

4           **LANIER LAW FIRM, PLLC**  
5           **Tower 56**  
6           **126 East 56th Street, 6th Floor.**  
7           **New York, New York 10022**  
8           **BY:    EVAN M. JANUSH, ESQ.**  
9           **RICHARD D. MEADOW, ESQ.**

10           **For Eli Lilly & Company:**

11           **PEPPER, HAMILTON, LLP**  
12           **3000 Two Logan Square**  
13           **Eighteenth and Arch Streets.**  
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15           **BY:    SEAN P. FAHEY, ESQ.**

16           **LANE, POWELL**  
17           **301 West Northern Lights Boulevard**  
18           **Suite 301.**  
19           **Anchorage, Alaska 99503**  
20           **BY:    BREWSTER H. JAMIESON, ESQ.**

21           **Special Master:**

22           **PETER H. WOODIN, ESQ.**  
23           **280 Park Avenue**  
24           **West Building, 28th Floor**  
25           **New York, New York 11017.**

**REPRESENTING MR. GOTTSTEIN:**

**JOHN MCKAY, ESQ.**

**ALSO PRESENT:**

**JAMES GOTTSTEIN, ESQ.**

24

25           **REPORTED BY:    LISA SCHMID, CCR, RMR**

1           THE COURT: Good afternoon, everyone.  
2    It's Judge Cogan. Judge Cogan. Before we  
3    call the case, is it everyone's preference to  
4    wait and see if we can get Mr. Gottstein on,  
5    or should we go without him?

6           MR. JAMIESON: This Mr. Jamieson, for  
7    Eli Lilly, in Alaska. I have Mr. Gottstein's  
8    office on the line, and he's going to click  
9    back any moment, and so, he could be here for  
10   the conference, I believe.

11          THE COURT: Well, I'm happy to hold,  
12   if you all want to hold.

13          MR. FAHEY: Your Honor, this is Sean  
14   Fahey on behalf of Eli Lilly. If you want to  
15   just put us on hold, and if you have other  
16   matters, we can just call back this line and  
17   let you know when we have Mr. Gottstein on the  
18   phone.

19          THE COURT: All right. Let's give  
20   him no more than half an hour.

21          MR. FAHEY: We think it's within  
22   minutes.

23          THE COURT: Okay. That's fine.  
24   We'll be here.

25          MR. FAHEY: Okay.

1 THE COURT: Okay. Good bye.

2 (RECESS.)

3 THE COURT: Judge Cogan here. This  
4 is Judge Cogan. Who do we have on the line?

5 MR. FAHEY: Sean Fahey, on behalf of  
6 the Eli Lilly and Company.

7 MR. JANUSH: Evan Janush --

8 THE COURT: I'm sorry. Say it again,  
9 please.

10 MR. JANUSH: Evan Janush,  
11 J-A-N-U-S-H, on behalf the Lanier Law Firm,  
12 plaintiff.

13 THE COURT: Okay.

14 MR. JAMIESON: Brewster Jamieson with  
15 Lane, Powell in Anchorage, Alaska, on behalf  
16 of the Eli Lilly Company.

17 MR. GOTTSTEIN: This Jim Gottstein.  
18 I'm not a party or have made an appearance in  
19 the case, and lastly, I have retained counsel,  
20 so it seems like maybe I should -- we should  
21 do this when he's got a chance to be here.

22 THE COURT: Are you a lawyer, Mr.  
23 Gottstein?

24 MR. GOTTSTEIN: I am.

25 THE COURT: You like us to hold on

1 for a brief time while you get your lawyer on  
2 the phone?

3 MR. GOTTSTEIN: If I can, yeah. And  
4 how would I -- I can probably --

5 THE COURT: Just put us on hold.  
6 We'll give you five minute to get your lawyer  
7 on the phone.

8 MR. GOTTSTEIN: Thank you.

9 MR. JANUSH: Also present are  
10 Mr. Peter Woodin, W-O-O-D-I-N, and Rick  
11 Meadow, Richard D. Meadow, from my office.  
12 There is Evan Janush from the Lanier Law Firm.  
13 They just joined the call.

14 THE COURT: All right. Let's not  
15 have appearances from anyone unless we think  
16 there's a reasonable chance they'll be  
17 speaking. And I just want to remind all  
18 parties that before you start speaking, say  
19 your name, because we are on the record here.

20 MR. JAMIESON: Your Honor, this  
21 Brewster Jamieson in Alaska. It appears that  
22 Mr. Gottstein's office has put us on hold, and  
23 we have this very pleasant music playing. I  
24 could call him and try to get them to take  
25 that off if you'd like.

1           THE COURT: We agree that he could  
2 put us on hold for I think I said five or ten  
3 minutes, so he could try to get his lawyer on  
4 the line. I think that's what he's trying.  
5 I'm very lucky. I can't hear the music.

6           MR. JAMIESON: Okay. Sounds like Bob  
7 Dylan, so I don't know if you're a fan.

8           THE COURT: No comment.

9                           (RECESS.)

10          THE COURT: All right. Does one of  
11 the defendants want to try Mr. Gottstein  
12 offline, see if we can get him back?

13          MR. JAMIESON: Your Honor, Brewster  
14 Jamieson from Alaska. I'll do that right now.

15          THE COURT: Okay.

16          MR. JAMIESON: Your Honor, Brewster  
17 Jamieson from Alaska. I contacted his office,  
18 and his secretary is following up on him right  
19 now.

20          THE COURT: Thank you, Mr. Jamieson.

21          MR. JAMIESON: You're welcome.

22          THE COURT: Would you tell him that  
23 this is Judge Cogan, and he'd like him to get  
24 back on our line right now? Okay? Thank you.

25          MR. GOTTSTEIN: This is Jim. Sorry

1 about that. Hello?

2 THE COURT: Yes, Mr. Gottstein.

3 MR. GOTTSTEIN: Yes. Can I  
4 conference in my lawyer? I'll try to do that  
5 right now.

6 THE COURT: Please do.

7 MR. GOTTSTEIN: Okay. I think  
8 Mr. John McKay is on the line now, so --

9 THE COURT: Mr. McKay? This is Judge  
10 Cogan in the Eastern District of New York.  
11 Please try to keep your voice up. Are you  
12 affiliated with a firm you'd like to have  
13 shown on the record, as we are on the record?

14 MR. MCKAY: Hello?

15 THE COURT: Yeah.

16 MR. MCKAY: I'm sorry. Evan Janush  
17 was muting that.

18 THE COURT: That's okay.

19 MR. JAMIESON: This is Brewster  
20 Jamieson from Alaska. I'm not sure if Judge  
21 Cogan is on the line.

22 THE COURT: I'm sorry. I am on the  
23 line, and I just want to know if  
24 Mr. Gottstein's lawyer would announce his  
25 appearance one more time a little more

1 clearly, and his firm, if there is one.

2 MR. MCKAY: Yes, Your Honor. This is  
3 John McKay.

4 THE COURT: Mr. McKay, you're very  
5 faint. Can you speak up?

6 MR. MCKAY: Yes, Your Honor. We may  
7 be at the --

8 THE COURT:

9 Yes. I can barely hear you.  
10 Can you yell into the phone?

11 MR. MCKAY: Yes, Your Honor. If you  
12 can't hear, we can probably try a direct line.  
13 John McKay, M-C-K-A-Y, in Anchorage, Alaska.

14 THE COURT: All right. I was able to  
15 hear that a little bit. All right.

16 MR. MCKAY: May I ask what court I am  
17 in?

18 THE COURT: Yes. This is Judge Cogan  
19 from the Eastern District of New York, and  
20 even though we have given appearances already,  
21 I'm going to ask the parties to do that one  
22 more time, so Mr. McKay, you know who's on the  
23 phone. So would everyone please do that once  
24 again?

25 MR. FAHEY: Sure. This is Sean



1 Fahey, on behalf of Eli Lilly and Company.

2 MR. JANUSH: Evan Janush and Rick  
3 Meadow, on behalf of plaintiff.

4 MR. WOODIN: Peter Woodin, Special  
5 Discovery Master.

6 MR. JAMIESON: Brewster Jamieson for  
7 Eli Lilly here in Anchorage Alaska.

8 THE COURT: All right. And so just  
9 so we know what case this is about, this is In  
10 Re: Zyprexa Products Liability Litigation,  
11 Multi-district Litigation Number 1596. I'm  
12 covering as the miscellaneous judge in the  
13 Eastern District of New York, for Judge  
14 Weinstein, who is outside of the district  
15 today.

16 I understand there's an  
17 application by the defendant, Eli Lilly. Just  
18 so you know going in, everyone, I have  
19 reviewed the Case Management Order Number 3,  
20 that was signed by Judge weinstein on  
21 August 3rd, 2004. I have also reviewed the  
22 order entered by Mr. Woodin on the 15th of  
23 December, 2006. I have also reviewed the  
24 December 17th, 2006 -- I'll call it a draft  
25 because it's labeled "draft" -- letter from

1 Mr. Gottstein. And lastly, I have reviewed  
2 the proposed recommendation -- I'll call it  
3 the report and recommendation from Magistrate  
4 Judge Mann, in response to the parties'  
5 earlier conference today, at 12:18.

6 Let Maine just hear briefly from  
7 the defendants. Obviously, I'm familiar,  
8 having read these papers, with what's going  
9 on, but would you please just summarize for me  
10 the nature of your application?

11 MR. FAHEY: Yes, Your Honor, this is  
12 Sean Fahey, on behalf of Eli Lilly and  
13 Company.

14 Your Honor, the application is  
15 really at this point asking for Mr. Gottstein  
16 to return the documents that we believe he  
17 improperly obtained, in violation of CMO 3, to  
18 Special Master Woodin, until such time as  
19 there is a ruling about whether there is a  
20 proper way that he can obtain them.

21 We are aware that he's already  
22 disseminated these materials beyond the scope  
23 of his case, where he has allegedly subpoenaed  
24 them, including the New York Times, and there  
25 may be other places.

1                   So the first thing we're asking  
2 for is for him to return all documents.  
3 Second, I him to provide specific information  
4 about who he disseminated the documents to,  
5 and on what date. The third is to --  
6 obviously, no further dissemination of the  
7 materials, and the fourth is a requirement  
8 that he preserve all emails and all  
9 correspondence of any kind, whether it's voice  
10 mail, written letters, emails, so that we can  
11 pursue a contempt proceeding against both he  
12 and Dr. Egilman, who we believe clearly  
13 violated CMO 3.

14                   THE COURT: All right.

15                   Do the plaintiffs need to be  
16 heard on this?

17                   MR. JANUSH: No, Your Honor.

18                   THE COURT: Okay. Mr. McKay, as I  
19 said, I have read Mr. Gottstein's letter. Do  
20 you have anything that you want to add to  
21 that?

22                   MR. MCKAY: Well, Your Honor, I don't  
23 want to add anything because I am ahead of you  
24 at this point --

25                   THE COURT: I'm sorry, Mr. McKay.

1 You faded out. The only thing I heard for  
2 sure was you that you didn't want to add  
3 anything because I am a head of you at this  
4 point.

5 MR. MCKAY: Yes, Your Honor. You  
6 know that at only this time, Mr. Gottstein  
7 this morning --

8 THE COURT: And he says it's still  
9 morning here in Alaska.

10 MR. MCKAY: What I'm telling you,  
11 Your Honor -- I apologize. I hope you can  
12 hear me. What I'm telling you is that I have  
13 not had an opportunity to review the documents  
14 that you have referred to. I have received a  
15 copy of the documents from my client, at least  
16 some of the documents that you have referred  
17 to, but I've only been able to begin reviewing  
18 them, and in addition, Mr. Gottstein indicated  
19 that the magistrate called him this morning.  
20 I'm not sure that it's from a phone  
21 conference, but the short of it is, we would  
22 be not prepared at this time to fully or  
23 fairly respond to the petition. I have not  
24 seen a copy of the petition. I don't know if  
25 Mr. Gottstein has it or not, but I have not.

1 In addition, I think the one thing I can add  
2 in addition is that Mr. Gottstein would be  
3 prepared to preserve the status quo by  
4 agreeing -- if this has not already been done  
5 -- not to further dissimilate the documents,  
6 until we have had an opportunity to --

7 THE COURT: All right. Thank you,  
8 Mr. McKay. I believe we got all of that.

9 Let me ask the defendant, Eli  
10 Lilly this: Are you comfortable with the  
11 offer that's been made to freeze the status  
12 quo, in lieu of the mandatory injunction that  
13 you are seeking?

14  
15 MR. FAHEY: Your Honor, based on  
16 Mr. Gottstein's prior contact and conclusions  
17 with an expert, we're not comfortable with it.  
18 We know that he's already disseminated  
19 information. We have no problem with him  
20 talking the time to more adequately respond to  
21 the issues that we are presenting, but we do  
22 believe, that he needs to immediately return  
23 the documents in his possession to Special  
24 Master Woodin, and provide the information as  
25 to who has received the document.

1 THE COURT: All right, Mr. Fahey.  
2 Let me ask you this. What's the rule or  
3 statutory predicate for this application?

4 MR. FAHEY: It's a violation of  
5 Section 37, and also what's provided for under  
6 CMO 3.

7 THE COURT: You mean Rule 37?

8 MR. FAHEY: Sorry. Yeah, Rule 37.  
9 It's also provided for under CMO 3.

10 THE COURT: Okay.

11 MR. FAHEY: And there is --

12 THE COURT: Are you still there,  
13 Mr. Fahey?

14 MR. FAHEY: Yes, I'm here.

15 THE COURT: You kind of trailed off.  
16 But I understand the basis for your relief is  
17 Rule 37?

18 MR. FAHEY: Well, it's Rule 37. We  
19 also believe the All Writs Act should apply,  
20 since the action that Mr. Gottstein is  
21 attempting to take into state court is  
22 frustrating the purpose of federal litigation  
23 and the orders issued by the federal court  
24 much, and so that those are the bases for our  
25 request.

1           THE COURT: All right. Anything  
2 further from anyone or from Mr. Gottstein's  
3 lawyer?

4           MR. MCKAY: Your Honor, this is  
5 nothing -- again, I'm at a significant  
6 disadvantage. Number one, I haven't seen an  
7 application. It sounds like the grounds for  
8 the application are being researched as we  
9 speak --

10          THE COURT: Mr. McKay, you trailed  
11 off after you said, "The grounds of the  
12 application are being thought of or researched  
13 as we speak."

14          MR. MCKAY: As I understand,  
15 Mr. Fahey is attempting to respond to your  
16 question about the grounds for the  
17 application. I understand it's a short  
18 notice, but I have not seen an application. I  
19 am also at a disadvantage of not seeing Mr.  
20 Gottstein, where my client is. I cannot talk  
21 to him about this now.

22          THE COURT: Okay.

23          MR. MCKAY: What I can tell you, Your  
24 Honor, is what I have been able to see so far  
25 is that Mr. Gottstein served the subpoena. He

1 did not receive these documents.

2 THE COURT: Pardon. I'm just  
3 repeating what you said before you trail off.  
4 You said he did not receive these documents.

5 MR. MCKAY: He did receive these  
6 documents pursuant a subpoena that was issued.  
7 The suggestion that he somehow acted  
8 inappropriately, could not be trusted to enter  
9 a stipulation, which he as an attorney is  
10 offering here not to disclose those documents  
11 further, is not warranted in part, Your Honor,  
12 because if there was any failure, Eli Lilly  
13 received notice on December 6th that the  
14 documents had been requested. At this point,  
15 I think what we know there is no immediate  
16 response to that. I told him that without  
17 knowing more than we know at this stage of the  
18 record -- but what we know is that  
19 Mr. Gottstein in a separate litigation --  
20 there is certainly no reason to believe at  
21 this point that he is not entitled to get  
22 those documents and have those document for  
23 use in the other litigation. Also, not to  
24 make further use of those documents until  
25 there's been --



1           THE COURT: Hold on, Mr. McKay. You  
2 trailed off, again. Mr. McKay, we're not  
3 hearing you. Is.

4           MR. MCKAY: I think I'm hearing you  
5 say you're not hearing me.

6           THE COURT: You are correct.

7           MR. MCKAY: I'm not sure whether I  
8 should start over.

9           THE COURT: No, I think I heard  
10 everything you said. Let me just summarize  
11 what I think you said, so that we have it on  
12 the record here.

13                       What you're saying is, number  
14 one, that Eli Lilly had notice of this on  
15 December 6th; number two, there is no reason  
16 to distrust Mr. Gottstein, as he is an  
17 attorney, and obtained these pursuant to a  
18 subpoena in a separate case. And I think  
19 you're main point is he ought to be trusted  
20 with his proffer to keep the documents intact,  
21 until a fuller hearing can be had. Have I got  
22 it?

23           MR. MCKAY: That's right. And also,  
24 there is no showing that any extraordinary  
25 relief is necessary at this point,

1 particularly in light of the fact that the  
2 distribution of the documents has already  
3 occurred.

4 THE COURT: Particularly in light of  
5 the fact that the distribution of these  
6 documents has already occurred? Is that what  
7 you're saying?

8 MR. MCKAY: Yes. There is no  
9 suggestion by Eli Lilly that there is any  
10 further relief necessary.

11 THE COURT: Okay.

12 MR. FAHEY: Your Honor, if I could  
13 address two of the points that Mr. McKay just  
14 spoke to?

15 THE COURT: Briefly, please.

16 MR. FAHEY: Lilly received notice on  
17 December 6th of the subpoenas that call for  
18 the production of documents on December 20th.  
19 One week before that production date, we had  
20 assurances from the producing party, meaning  
21 the consulting expert of the Lanier Firm,  
22 through the Lanier firm, that no document  
23 production will be made.

24 We then found out on Friday  
25 evening that, in fact, a second subpoena had

1 been sent, which was not copied to any of the  
2 parties in the Alaska case or us, which called  
3 for the immediate production of documents. So  
4 there is no question that we acted as quickly  
5 as we possible with the information we had.

6           And the second issue is, let me  
7 be clear, you know. There is no kind of  
8 wondering what our position for relief is.  
9 It's Rule 37B, it's the All Writs Act. It's  
10 also Section 18 USC 401 and 402, which is  
11 criminal contempt proceedings, as well as the  
12 inherent power of this Court to enforce its  
13 own orders.

14           THE COURT: All right. Having  
15 reviewed the papers -- and I should point out  
16 the reason, Mr. McKay, you don't have the  
17 petition, as you call it, is because this is  
18 an oral application based on the emergency  
19 nature of the relief sought. Having reviewed  
20 the papers, I'm going to grant the  
21 application. I think it's clear not only that  
22 the facts are as stated in the Magistrate's  
23 report and recommendation, but I can tell from  
24 the December 17th draft letter from  
25 Mr. Gottstein that he was aware that these

1 documents were restricted, and that he  
2 undertook procedures to help the experts,  
3 Mr. Egilman, try to circumvent the  
4 restrictions that were on him. He  
5 deliberately aided and abetted Dr. Egilman in  
6 getting these documents released from the  
7 restriction that they were under, under the  
8 protective order. He knew what he was doing,  
9 and he did it deliberately. Those are my  
10 findings, and it's on that basis that I grant  
11 the relief.

12 I'd like the defendant, Eli  
13 Lilly, to immediately fax to me a form of  
14 written injunction that I will look over,  
15 modify, and enter as I deem appropriate.

16 But I think, Mr. McKay, your  
17 client should be on notice that as of this  
18 moment, he is under a mandatory injunction to  
19 return those documents to Mr. Woodin, to take  
20 them down from any websites that he may have  
21 posted them on, and to take any reasonable  
22 effort to recover them from any sites or  
23 persons to which he has delivered them.  
24 Mr. McKay, is that clear?

25 MR. MCKAY: Your Honor, I could hear

1 you and --

2 THE COURT: Mr. McKay, we're not  
3 hearing you after you said, "I can hear you."

4 MR. MCKAY: Your Honor, for the  
5 record, yes, I could hear your ruling. I  
6 would like to state for the record our  
7 objection to both the timing and the findings.

8 THE COURT: Mr. McKay, let me stop  
9 you because it's coming through faintly enough  
10 for me to hear 90 percent of it, but the court  
11 reporter, who is a couple of feet away, can't.

12 I understand you're preserving  
13 all your objections. You're particularly  
14 disputing the findings that I've made, and  
15 you're about to say something about Mr. Fahey  
16 suggesting criminal liability. That is not  
17 the basis for my order, so you need not worry  
18 about that.

19 MR. MCKAY: I understand it's not the  
20 basis for your order, but I understand it's  
21 the --

22 THE COURT: Mr. McKay, we didn't get  
23 any of that.

24 MR. MCKAY: I'll try the speak up,  
25 more clearly.

1           THE COURT: I think it's better if  
2 you speak slower, and even this slow, okay?

3           MR. MCKAY: On behalf of AT&T or  
4 whoever may be culpable, we apologize for the  
5 faulty connection here.

6           Your Honor, particularly, I  
7 would like to note for the record our  
8 objection to your findings, for the injunction  
9 granting, which suggests deliberate  
10 wrongdoing, or don't believe are necessarily  
11 warranted and we were certainly not given any  
12 adequate opportunity, notice or opportunity to  
13 respond to those kinds of allegations, and I  
14 have not been given notice of a hearing.  
15 These are serious allegations.

16           THE COURT: Mr. McKay, I have to  
17 interrupt you. I don't want to stop you from  
18 making your record, but you're not making it  
19 anyway, because you're fading out so badly.

20           I will say any findings I have  
21 made have been made exclusively on the basis  
22 of the letter signed by your client. That's  
23 the only evidence I have in front of me.

24           MR. MCKAY: It wasn't signed by my  
25 client.

1 THE COURT: Mr. McKay, if your client  
2 is not now denying that he sent this letter --

3 MR. MCKAY: I believe he is denying  
4 that, Your Honor.

5 THE COURT: Okay. Well, then, you  
6 know, I don't think we need to argue about it.  
7 You have your objection. You know what to do  
8 about an objection, and that's my ruling.  
9 Please be guided accordingly.

10 MR. MCKAY: Your Honor?

11 THE COURT: Yes?

12 MR. MCKAY: May I, while we're on the  
13 record here, and so that I can hear -- I  
14 believe I can hear.

15 THE COURT: Mr. McKay, we are not  
16 hearing you.

17 MR. FAHEY: Your Honor, this is Sean  
18 Fahey. I believe he said he thought he heard  
19 your ruling, but he wanted to make sure that  
20 the order was faxed to him upon issue, which I  
21 assume will be done anyway.

22 THE COURT: The defendants have  
23 ordered a daily copy on the transcript, so  
24 you'll get that, you know, sometime today or  
25 tomorrow. Obviously, they will also fax you

1 the signed injunctive order, once I enter  
2 that. I just wanted to give you and Mr. McKay  
3 notice that my oral ruling is binding.

4 MR. MCKAY: Yes, I understand that,  
5 Your Honor, and perhaps after the hearing is  
6 concluded --

7 THE COURT: Sorry, Mr. McKay. You  
8 said, "After the hearing is concluded" --

9 MR. MCKAY: I can give information to  
10 the court staff, so that I can be given  
11 copies.

12 MR. FAHEY: If you want to give me  
13 your number -- this is Sean Fahey -- I can  
14 send you whatever we're sent from the Court.

15 MR. MCKAY: That will be fine. I  
16 will take care of this once the --

17 THE COURT: All right. I would like  
18 the hearing to be concluded now. Anything  
19 further.

20 MR. FAHEY: No, Your Honor. Thank  
21 you.

22 MR. MCKAY: No, Your Honor.

23 THE COURT: Okay. Thank you all.

24 (PROCEEDINGS CONCLUDED.)

25