

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

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IN RE ZYPREXA PRODUCTS	:	04-MD-1596
LIABILITY LITIGATION	:	
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**SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF  
VERA SHARAV, ALLIANCE FOR HUMAN RESEARCH PROTECTION, AND DAVID  
COHEN FOR AN ORDER VACATING CMO-3 IN PART, OR,  
IN THE ALTERNATIVE, DISSOLVING THE INJUNCTION IN PART**

This firm serves as counsel to Vera Sharav, Alliance for Human Research Protection, and David Cohen (collectively, “enjoined parties”) with regard to the Injunction recently entered in the above captioned matter. Currently pending before this Court is our clients’ motion for an Order vacating CMO-3 in part or, in the alternative, dissolving the Injunction in part. We file this paper as a supplement to the enjoined parties’ motion papers, which were filed of record by the Clerk of Court on January 9, 2007.

The edition of the British Medical Journal (“BMJ”) to be published tomorrow, January 13, 2007, contains an article entitled “Drug Company Tries to Suppress Internal Memos.” The article reveals that Eli Lilly, in an e-mail to the BMJ, stated that it is pursuing action against Mr. Gottstein and Dr. Egilman because “these individuals have violated a federal court order by leaking the documents” and further stated that it has not released its internal documents publicly because the company “has no intention of violating [CMO-3] by releasing documents ourselves.” A copy of the article is annexed for ready reference.

Lilly’s comments in this article lend further support to the enjoined parties’ contention that CMO-3 must be vacated insofar as it allows the Documents to be designated as confidential. It has always been plain that CMO-3 does not serve the plaintiffs, the enjoined parties, or the public-at-large. Assuming that Lilly was being ingenuous to the BMJ and truly wishes to release

to the public the Documents and other internal documents generated during the litigation process, CMO-3 does not serve Lilly either.

Two related points are in order.

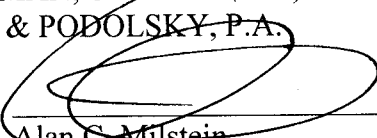
First, on Page 13 of our brief, we observed that the release of the Documents would not pose any “harm” to Lilly because “Lilly is able to post documents providing more ‘complete information,’ if any, on its web sites, take out advertisements clarifying its position, and issue press releases telling its side of the story.” Lilly has now started a web site, found at [zyprefacts.com](http://zyprefacts.com), where it attempts to do just that.

Second, as pointed out in the Electronic Frontier Foundations’ “Supplemental Brief for Clarification of Injunction,” the Documents remain available on the Internet. As such, they are in the public domain, and any Injunction preventing third parties such as the enjoined parties from disseminating them is unnecessary.

Respectfully Submitted,

SHERMAN, SILVERSTEIN, KOHL,  
ROSE & PODOLSKY, P.A.

By:

  
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*Pennsauken, New Jersey*  
Friday, January 12, 2007

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## NEWS

**UK NEWS** Leaked report exposes mismatch in NHS staffing levels, p61  
**WORLD NEWS** German doctors threaten to boycott patient record project, p63  
**bmj.com** London hospital defends decision not to publish damning report

# Drug company tries to suppress internal memos

Jeanne Lenzer BOSTON

The drug maker Eli Lilly instigated legal action against a number of doctors, lawyers, journalists, and activists over hundreds of internal corporate documents and emails said to have been obtained by them regarding the antipsychotic drug olanzapine (Zyprexa). Eli Lilly obtained a court injunction on 29 December ordering 16 individuals and organisations to stop publishing the documents and to remove any copies posted on the internet.

The documents created a furore after they were leaked to the *New York Times*, which reported that they showed that Eli Lilly “engaged in a decade-long effort to play down the health risks of Zyprexa” ([www.nytimes.com/2006/12/17/business/17drug.html](http://www.nytimes.com/2006/12/17/business/17drug.html)). The *New York Times*, which is not named in the injunction, said that Eli Lilly’s chief scientist for olanzapine, Alan Breier, told employees in 1999 that “weight gain and possible hyperglycemia is a major threat to the long-term success of this critically important molecule.”

One year later an Eli Lilly manager wrote in an email to a colleague that doctors retained by the company warned that “unless we come clean on this, it could get much more serious than we might anticipate.”

Eli Lilly maintains that “numerous studies . . . have not found that Zyprexa causes diabetes.” A spokesperson told the *BMJ*: “We remain confident in the safety and efficacy of Zyprexa.” The product, which came onto the market in 1996, is the company’s top selling drug. With \$4.2bn (£2.2bn; €3.2bn) in sales worldwide in 2005, it accounted for 29% of Eli Lilly’s revenues, says the company’s “Answers for Shareholders 2005.” The company, which has faced numerous product liability law suits concerning olanzapine, mostly relating to diabetes and diabetic ketoacidosis, has agreed to pay approximately \$1.2bn to settle more than 26 000 claims to date. This includes a settlement on 5 January 2007 covering some 18 000 patients. The terms of these settlements have not been made public, although



Shares soared as Eli Lilly won a patent case over olanzapine in 2005

the company said it remained confident that these claims were “without merit.” Regarding these settlements Eli Lilly told the *BMJ* that “the decision to enter into these agreements was driven, not by science, but by our desire to avoid the disruption, uncertainties, and costs of further litigation.”

Eli Lilly disclosed the internal documents to the attorneys for the plaintiffs in a pending class action suit in the US District Court for the Eastern District of New York, but they remained confidential. However, Jim Gottstein, a lawyer representing a client in a separate court case in Alaska complaining about the coercive use of antipsychotic drugs, subpoenaed the documents from David Egilman, a prominent occupational health expert and an expert witness in the New York class action suit.

Alex Reinert, attorney for Dr Egilman, said that his client did not violate the law in releasing the documents under subpoena to Mr Gottstein. Mr Gottstein, who acknowledges giving the documents to the *New York Times*, said that he didn’t violate the law as he was not a party to the confidentiality agreement issued in the New York class action suit.

After the injunction was granted to Eli Lilly the documents rapidly disappeared from the internet. The company was given access to Dr Egilman’s computers for three days for “forensic examination”; and Mr Reinert said that Eli Lilly has indicated that it wants to seek “all possible sanctions” against Dr Egilman. The consequences, said Mr Reinert, “could be very severe” and could

conceivably extend to compensatory damages and time in jail.

Mr Gottstein said that Eli Lilly has also warned him of possible “disciplinary action at the bar.”

Eli Lilly, in email messages to the *BMJ*, states that it is pursuing action because “these individuals have violated a federal court order by leaking the documents” and that it has not released its internal documents publicly because the company “has no intention of violating that order by releasing documents ourselves.”

It added, “We intend to try the remaining cases in court—not in the news media.”

Eli Lilly also states that “documents that have been illegally leaked to the *New York Times* are a tiny fraction of the more than 11 million pages of documents provided by Lilly as part of the litigation process. They do not accurately portray Lilly’s conduct.”

The leaked documents, says the company, were “only a few hundred of the 11 million pages” and had been “carefully selected by the ‘leakers’ to tell a story that the ‘leakers’ want them to tell.”

Eli Lilly’s statement to the *BMJ* continued: “These documents do not in any way represent an accurate view of Lilly company strategy or activities. What these individuals are not likely to show you is the millions of other pages of documents demonstrating how Lilly and its employees have worked to improve the lives of people with schizophrenia and bipolar disorder.”

Eli Lilly had made every effort to publish and present results of its studies, whether favourable or not, said the spokesperson. Since 2003 all atypical antipsychotics in the United States, including olanzapine, have carried a label change warning that “hyperglycemia . . . has been reported in patients” with this type of drug, while observing that “assessment of the relationship between atypical antipsychotic use and glucose abnormalities is complicated by the possibility of an increased background risk of diabetes mellitus in patients with schizophrenia and the increasing incidence of diabetes mellitus in the general population.”