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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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

VERIFIED OPPOSITION
to
ELI LILLY AND COMPANY'S AMENDED PROPOSED FINDINGS OF FACT CONCERNING THE TEMPORARY MANDATORY INJUNCTION

James B. Gottstein, Esq., (Gottstein) hereby submits this verified[1]

Opposition to Eli Lilly and Company's (Lilly) Amended Proposed Findings of

[1] At the January 17, 2007, hearing the Court closed the evidence with respect to this matter except to allow Mr. Gottstein to "respond by affidavit to the characterization of any document." Tr. Hr'g, 253 (January 17, 2006). For the convenience of the Court and the parties in avoiding the unnecessary proliferation of separate documents, Mr. Gottstein has verified this Opposition. Corrections of

Fact Concerning the Temporary Mandatory Injunction (Lilly's Proposed Facts). Lilly's Proposed Facts are replete with so many factual misstatements.

Following are corrections to Lilly's Proposed, with the corresponding Lilly Proposed Facts paragraphs, identified by "¶x" where "x" is Lilly's paragraph number. If any paragraph is at least minimally accurate, it is skipped. Objections have been made to words such as "unlawful," "conspire," "stolen," "sham," "scheme," and similar words and phrases that are pejorative and/or legal conclusions, rather than facts. An effort has been made to identify all of these such legal conclusions that should not properly be contained in findings of fact, but in the event any have been missed, Mr. Gottstein hereby makes a blanket objection to including them in any findings of fact.

¶1. Case Management Order No. 3, (CMO-3), was issued on August 3, 2004, in the form negotiated between Lilly and the Plaintiffs Steering Committee (PSC).[2] During the negotiations of CMO-3, Section 14, the section dealing with subpoenas issued by another court or an administrative agency, the parties changed the proposed minimum notice period from " ten (10) business days after notifying counsel for the designating party in writing" to a "reasonable opportunity

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mischaracterizations of documents by Lilly not otherwise contained in the record are cited as "(Herein Verification)." Corrections to the transcript are so indicated.

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

to object"[3] and agreed that "the person receiving the subpoena or other process shall cooperate with the producing party in any proceeding related thereto.

At a minimum, the heading on page 5,

> **Egilman, Berenson and Gottstein Conspire to Get Protected Documents Disseminated to the New York Times and Elsewhere**

should be changed. Whether the facts constitute conspiring is a legal conclusion.

¶16. There is no evidence in the record to support this factual finding. Lilly chose not to call Dr. Egilman as a witness in this proceeding and Dr. Egilman did not assert a 5th amendment privilege in this proceeding. Lilly bases it on Dr. Egilman's exercise of his rights under the Fifth Amendment and asks the Court to adopt this and many other findings based on there being no inconsistent evidence. However, there is no authority cited to support this proposition. At the January 17, 2007, hearing this Court indicated that some adverse inferences could be drawn in civil proceedings, but the only one the Court mentioned was "credibility." Tr. Hr'g 246-7 (January 17, 2007).

In *Mitchell v. U.S.*, 526 U.S. 314, 119 S.Ct. 1307, 1315 (1999)

> This Court has recognized "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them," *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), at least where refusal to waive the privilege does not lead "automatically and without more to

[3] Compare MDL 04-1596 Docket No. 45, 11, to Section 14 of CMO-3, as executed.

> [the] imposition of sanctions," *Lefkowitz v. Cunningham*, 431 U.S. 801, 808, n. 5, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977).

The way Mr. Gottstein interprets *Lefkowitz,* its precursors and progeny, which is consistent with the much more recent *Mitchell* case quoted above, assertion of the right against self-incrimination cannot be used to infer facts that result in the imposition of substantial economic sanctions **in civil cases**. Since Lilly is seeking such civil case sanctions, Dr. Egilman's exercise of the right against self-incrimination cannot be used against him in the way Lilly seeks.

In *Baxter*, the Supreme Court held it was permissible to infer that the failure to confront adverse testimony by exercising Fifth Amendment rights essentially admitted to the accuracy of the adverse testimony.

In addition, as this Court suggested, the exercise of the right might sometimes be used to impeach credibility in certain circumstances. This was explained in *U.S. v. Hale*, 422 U.S.171, 175, 95 S. Ct. 2133, 2136 (1975), citing to *Raffel v. United States*, 271 U.S. 494, 46 S.Ct. 566 (1926) as follows:

> In reliance on his privilege against compulsory self-incrimination, the accused declined to testify at his first trial. At the second trial, however, he took the stand in an effort to refute the testimony of a Government witness. Over objection, Raffel admitted that he had remained silent in the face of the same testimony at the earlier proceeding. Under these circumstances the Court concluded that Raffel's silence at the first trial was inconsistent with his testimony at the second, and that his silence could be used to impeach the credibility of his later representations.

Thus, the most that can be said is that there might be a permissible inference from Dr. Egilman's exercise of his right against self-incrimination that

he does not dispute Mr. Gottstein's testimony. However, there is nothing to suggest that Lilly can just make up facts, as it has done here, and then say it is permissible to infer their truth because Dr. Egilman invoked his Fifth amendment right against self-incrimination in connection with another proceeding, after the conclusion of this proceeding, in which Lilly chose not to call him and in which he is not a named respondent.

There are a number of Lilly Proposed Facts that follow this one which cites to Dr. Egilman's exercise of his right against self-incrimination as a reason to infer facts not in the record. This will be indicated by the objection that there is no evidence in the record to support the factual finding and inferring such fact is improper.

¶17. There is no evidence in the record to support the factual finding and inferring such fact is improper.

¶18. There is no evidence in the record to support the factual finding and inferring such fact is improper.

¶19. There is no evidence in the record to support the factual finding and inferring such fact is improper.

¶20. There is no evidence in the record to support the factual finding and inferring such fact is improper.

¶21. There is no evidence in the record to support the factual finding and inferring such fact is improper.

¶22. Lilly misstates Mr. Gottstein's testimony; there is otherwise no evidence in the record to support the factual finding and inferring such fact is improper.

¶24. The cited testimony does not support this asserted fact and in fact other testimony and evidence contradicts it.

¶25. The cited testimony does not establish there was any "sham request" to Dr. Egilman and in fact, there is unrebutted testimony that it was a completely proper subpoena. In addition, the cited testimony doesn't say that "Berenson told Dr. Egilman to contact Mr. Gottstein." All it says is that Mr. Berenson gave Dr. Egilman Mr. Gottstein's name (and suggested Mr. Gottstein might be someone who would subpoena documents of interest to him).

¶26. Neither the Draft Response,[4] nor the cited testimony support a finding that Dr. Egilman "arranged" to have those documents subpoenaed. Also, the characterization of the actions of Dr. Egilman and Mr. Gottstein as a "scheme" is unwarranted. What the evidence supports is that upon learning Dr. Egilman had access to documents that were very important to the health of many people and might be legally obtained if subpoenaed, Mr. Gottstein decided to subpoena the documents.

¶27. Mr. Gottstein suggests that a fair reading of his testimony is that Dr. Egilman had certain objectives and Mr. Gottstein had consonant objectives in

[4] December 17, 2006, letter from Mr. Gottstein to Special Discovery Master Woodin, Petitioner's Exhibit No. 1 at the January 16-17, 2007, full evidentiary hearing.

legally obtaining the documents *via* subpoenaing them in compliance with CMO-3. The testimony is very clear that the purpose of issuing the subpoena was not to "assist" Dr. Egilman. Other testimony by Mr. Gottstein, not cited by Lilly makes this very clear.

¶28. Mr. Gottstein's testimony was that he thought it was Dr. Egilman's idea that Dr. Egilman should not send Mr. Gottstein CMO-3, so Mr. Gottstein would not be "charged with knowledge," but that was not Mr. Gottstein's idea. Mr. Gottstein believed he understood the CMO-3 sufficiently as Dr. Egilman had reviewed the relevant section when they spoke by phone; that it was Dr. Egilman's obligation to comply, not his; that he advised and expected Dr. Egilman to comply; and that he would only obtain the documents in compliance with CMO-3. It is also noted here that on page 27, line 20 of the transcript for January 16th, Mr. Gottstein stated that he didn't ask Dr. Egilman for CMO-3 until after the documents were produced pursuant to the subpoena. In fact, he asked for it before the documents were produced as testified to a few lines before (lines 10-15). (Herein Verification).

¶29. Same objection to use of the word "scheme." Mr. Gottstein also objects to the use of the word "problem." Mr. Gottstein's testimony was that he wouldn't characterize it as a "problem," but rather that " it was necessary to have an appropriate case" to issue the subpoena, immediately followed with testimony that he did legal research to make sure it was proper.

¶30. Mr. Gottstein and Dr. Egilman did not agree that Mr. Gottstein would find a forced drugging case that would occur very quickly. What the Draft Response recites and Mr. Gottstein actually testified to was that forced drugging cases under Alaska Statutes (AS) 47.30.839 normally occur very quickly.

¶32. It wasn't that Mr. Gottstein was unable to obtain a forced drugging case with its quick deadlines, but that the first suitable case was not an AS 47.30.839 case with its quick deadlines, but an AS 13.26 guardianship case.

¶33. At footnote 3, Lilly tries to make something out of postponing three of the four depositions and cancelling Dr. Jackson's, but ignores that Mr. Gottstein testified that the depositions were postponed due to the objections of the other parties in the BB and partly due to Lilly's Alaska counsel's insistence. Tr. Hr'g., 155 (January 17, 2007). If asked, Mr. Gottstein would have explained why the deposition of Dr. Jackson was cancelled.

¶34. It is not that Mr. Gottstein "now acknowledges" it would be wrong to issue a sham subpoena. He always acknowledged it and testified that it was not a sham subpoena and how Zyprexa was relevant to the BB case.

¶35. Dr. Egilman had indicated that he would accept service in that manner, which under Alaska practice is considered sufficient.

¶37. What Mr. Gottstein actually testified to was that it was the Zyprexa documents he and Dr. Egilman had talked about, but that he didn't know if Dr. Egilman had access to documents of interest pertaining to the other psychiatric

drugs listed. There is otherwise no evidence in the record to support the factual finding and inferring such fact is improper.

¶38. "Purporting" should come out. Lilly admits it was notified by the December 6th letter.

¶39. Irrelevant. CMO-3 requires Dr. Egilman to notify Lilly, which he did.

¶40. There is no evidence there were any efforts to delay Lilly's counsel's involvement in the issue and in fact, Lilly admits its General Counsel received the letter the same day and promptly notified Pepper Hamilton of the letter. The affirmation of Richard Meadow does not state Pepper Hamilton received assurances from plaintiff's counsel that no documents would be produced until Lilly's motion to quash the subpoena was ruled on. Neither did Mr. Meadow's testimony. What the affirmation of Richard Meadow actually swears to and what Mr. Meadow testified to was that when Dr. Egilman was actually asked on December 15th what had happened, Dr. Egilman disclosed that documents had been produced on December 12th. Tr. Hr'g., 211 (January 17, 2007). In addition, Mr. Meadow's affirmation, incorporating his letter to Lilly of December 15th, says that he immediately advised Lilly to file a motion to quash the subpoena in both Massachusetts and Alaska. Lilly did not do so until two days later, after it had already been informed documents had been produced pursuant to the subpoena. This letter also indicates that Dr. Egilman told Mr. Meadow that he had already complied with the subpoena prior to the conversation between Mr. Meadow and

Dr. Egilman on December 13th. Petitioners Exhibit 1, pages 19-20, Exhibit D to Lilly Exhibit 3.

The heading "**Lilly Learns of the Breach of CMO-3**," on page 12 contains a legal conclusion. A heading which accurately reflects the established facts would be, "**Lilly Learns of the Production of Documents Pursuant to the Subpoena**."

¶42. Lilly repeats the inaccurate statement that Dr. Egilman had represented to Mr. Meadow that no documents had been produced pursuant to the subpoena. Whether Dr. Egilman "violated CMO-3 by sending Mr. Gottstein documents," is a legal conclusion. What the facts actually establish is that Lilly first learned of the production of the documents pursuant to the subpoena on December 15th, which is when they first asked that question.

¶43. With respect to whether Mr. Gottstein was given notice and an opportunity to be heard, Special Master Woodin left a voice mail message Friday evening, New York time, requesting Mr. Gottstein to call him and giving Mr. Gottstein phone numbers where he could be reached over the weekend, but issued the order shortly after leaving the message. Petitioner's Exhibit 7, 40-41, attached hereto as Exhibit 1.

¶46. These are legal conclusions, not facts, nor did it admit any collusion by Mr. Gottstein. The Draft Response explained how the documents came into Mr. Gottstein's possession, not how Dr. Egilman violated CMO-3, nor admitted Mr. Gottstein's collusion.

¶47. The amended subpoena was issued without any consultation or communication with Dr. Egilman prior to its issuance. It didn't call for immediate production. It called for production "prior" to the deposition that was scheduled for December 20th and requested that they be produced as soon as Dr. Egilman determined he could properly do so under CMO-3. Tr. Hr'g, 42 (January 17, 2007). This amended subpoena was issued because Mr. Gottstein realized it didn't make any sense to try and examine Dr. Egilman with respect to documents he had brought with him in Attleboro, Massachusetts and to allow Mr. Gottstein a chance to review the documents before examining Dr. Egilman on the 20th. Tr. Hr'g., 7 (Judge Mann, December 18, 2007); Tr. Hr'g, 42-3 (January 16, 2007).

¶48. While ¶48 is true it is misleading and incomplete. Mr. Gottstein testified the reason the other parties didn't receive notice of the amended subpoena was the date of the deposition had not changed and he did not consider the change of any relevance to them. It is the practice in Alaska to serve deposition notices, not subpoenas, and Lilly was not a party in any event. It is undisputed that Lilly did not rely to its detriment on the lack of its knowledge of this document when it failed to object over the six days after they received notice. More importantly, Mr. Gottstein testified that he advised Dr. Egilman that Dr. Egilman should provide the amended subpoena to Lilly because he knew that would be something Lilly would likely want to know. *See*, e.g., Tr. Hr'g., 47 (January 16, 2007). *See*, also Tr. Hr'g., 5 & 11 (Judge Mann, December 18, 2007).

¶50. Object to characterization of the amended subpoena as secret.

¶51. Lilly repeats the inaccurate, or at least misleading, statement that Dr. Egilman had falsely told Mr. Meadow that no documents would be produced. It is inaccurate to the extent it means Dr. Egilman had told Mr. Meadow no documents had been produced. It is misleading because such an interpretation would be natural.

¶53. This paragraph is a legal conclusion, an unwarranted one in Mr. Gottstein's view. Also object to characterization of the December 17th Draft Response as admissions.

¶56. Whether at that point the documents were protected under CMO-3 is a legal conclusion, unwarranted in Mr. Gottstein's view.

¶57. There is really no reason to include this paragraph in light of this Court's subsequent ruling that it had drawn no inferences from the materials which Judge Cogan relied upon to make that finding. Tr. Hr'g., 29 (January 3, 2007). This finding was made after Mr. Gottstein's attorney was denied access to the substance of the (oral) application for the injunction, nor a meaningful opportunity to respond.

¶58. There is no reason to say, nor any evidence that the Mandatory Injunction was not entered lightly. Despite requests, neither Mr. Gottstein, nor his counsel have ever been provided with copies of the *ex parte* applications made to Special Master Woodin, Magistrate Judge Mann or Judge Cogan, nor any transcript of any hearings regarding what transpired in connection with the issuance of Special Master Woodin's *ex parte* order. What we do know is that

Lilly consistently mischaracterizes and outright misrepresents and mis-states facts in seeking court orders in this case. This has already been demonstrated in prior paragraphs and there are even more misstatements of facts made to the court in following paragraphs. We also know that the Mandatory Injunction issued orally on December 18th and received by Mr. Gottstein on December 19th was based on the false representation by Lilly that Dr. Egilman had said that no documents had been produced[5] after Mr. Gottstein had already repeatedly said that he would preserve the *status quo*.

What we also know is that Mr. Gottstein ceased disseminating any of the produced documents as soon as Lilly first wrote him and wrote to Special Master Woodin that in spite of his believing Special Master Woodin's order to be without authority, which turns out to be true, that he was voluntarily preserving the status quo. The record also shows, in stark contrast to Lilly, one can take Mr. Gottstein's statements to the bank. The unrebutted record also shows that Mr. Gottstein ceased to further disseminate the documents prior to Master Woodin even calling Mr. Gottstein on December 15th and prior to Judge Cogan issuing the Mandatory Injunction, including to a staff member of United States Senator Grassley[6] who had requested them and at least one member of the press.

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[5] Tr. Hr'g. 18 (Judge Cogan, December 18, 2006).

[6] Mr. Gottstein incorrectly identified Ms. DiSanto as a member of "Senator Waxman's" staff. Waxman is a Representative, not a Senator. Steve Cha is or was a member of Representative Waxman's committee staff and had been sent a copy of the documents before Mr. Gottstein received the first letter from Lilly. (Herein

¶59. The characterization of the documents having been received unlawfully is a legal conclusion, which is greatly disputed.

¶60. What the cited testimony actually shows is that Dr. Egilman requested Mr. Gottstein to send the documents to Mr. Berenson once they were produced pursuant to the subpoena. Tr. Hr'g., 37-8 (January 16, 2007).

¶61. Mr. Gottstein did nothing at Dr. Egilman's direction. There is no evidence that Mr. Gottstein did anything at Dr. Egilman's direction as confirmed by a word search on "direction" on the January 16th and 17th hearings. Mr. Gottstein sent copies to certain people at Dr. Egilman's request and, for that matter, anyone who requested them.

¶62. Object to the use of the word "scheme."

¶63. Object to the use of the word "affiliated." While, as the testimony shows, Mr. Gottstein may have had various levels of contact with each of the people to whom he disseminated the document, for a number of them, their only involvement in this matter was the unsolicited receipt of the documents produced pursuant to the subpoena. What Mr. Gottstein testified to was that a majority of five individuals who received the documents were expected to further disseminate the documents. Tr. Hr'g., 93, (January 17, 2007) The testimony was that they were "expected" to further disseminate them, not "assist." There is no testimony that anyone who received the documents from Mr. Gottstein assisted him in

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Verification). Mr. Gottstein understands Emila DiSanto is the Chief Investigative Counsel, or something like that, for Senator Grassley or his committee.

further dissemination as confirmed by a word search of the January 16th and 17th hearings.

¶65. This is a mischaracterization. These e-mails actually state that Mr. Gottstein had been orally ordered to return them and then requested each of the recipients to return them to Special Master Woodin. The distinction has already been recognized by the Court. Tr. Hr'g, 190-4 (January 17, 2007).

¶66. This is a mischaracterization. The Order did not require any of these steps. Mr. Gottstein, going beyond what he was ordered to do, requested them, though.

¶67. Object to the word, "unlawfully." That is a legal conclusion that is hotly disputed.

¶68. Same objection.

¶72. Mrs. Gottstein's first name, "Terrie," is spelled wrong as has been pointed out before.

At a minimum, the heading on page 20,

> **Individuals and Organizations that Acted in Concert With Mr. Gottstein and Others to Disseminate the Unlawfully Obtained Zyprexa Documents and Further Abuse the Violation of CMO-3,**

should be changed. Whether anything was unlawful or an abuse are legal conclusions, and unwarranted ones. The heading would be accurate and neutral if it were changed to "**Individuals and Organizations Subject to the Temporary Mandatory Injunction, as Amended.**"

¶73. The use of "and/or" means that one can't tell who satisfies either or both conditions (not returned/further disseminated). Object to the use of the word "unlawfully," which is a hotly contested legal conclusion. The paragraph is also untrue. Terrie Gottstein, Dr. Peter Breggin, Bruce Whittington, Laura Ziegler have returned the documents. There is no evidence that Terrie Gottstein, Dr. Peter Breggin, Dr. David Cohen, Will Hall, Bruce Whittington, Judi Chamberlin, Laura Ziegler, Robert Whitaker, or David Oaks further disseminated the documents. As to Mr. Oaks, he testified that he didn't. Eric Whalen never received the documents from Mr. Gottstein. Saying individuals have "utilized" websites does not say in what way. If it means posting the produced documents, there is no evidence that Terrie Gottstein, Dr. Peter Breggin, Dr. David Cohen, Bruce Whittington, Judi Chamberlin, Robert Will Hall, MindFreedom, or Laura Ziegler did so. In fact, with the exception of Eric Whalen, there is no evidence as to who posted the documents on any website, other than Mr. Whalen's.

¶75. Object to the use of the word, "unlawfully," because it is a hotly contested legal conclusion. Judi Chamberlin, who hadn't received the documents as of December 29th, indicated she was going to return them pursuant to Mr. Gottstein's request if or when she did. Petitioner's Exhibit No. 7, pages 340-1,392, 843, 744, 754, 779, also submitted herewith as Exhibit 2. However, on December 29th, the Temporary Mandatory Injunction was issued that only ordered her not to further disseminate them, rather than to return them, and she has since been represented by Mr. Ted Chabasinski. The statement about there being no evidence

Ms. Chamberlin took any action to stop the efforts of MFI members to disseminate the unlawfully obtained Zyprexa documents is misleading at best. Mr. Gottstein believes the only evidence of any MFI member(s) disseminating the documents is Eric Whalen, who did so entirely independently of and unrelated to his status as a MindFreedom member.[7]

¶76. Contrary to Lilly's affirmative representation of fact, Dr. Breggin did return the documents.

¶77. Mr. Oaks testified that neither he, nor MindFreedom ever disseminated the documents and they had only provided information, exercising their free speech rights. With respect to the pbwiki website he testified that even though he wasn't in control of it in that it was open for many people to edit he took the link down from the pbwiki website. The unrebutted evidence is that not only did Mr. Oaks not violate the Temporary Mandatory Injunction, but that he went beyond what was required of him. Tr. Hr'g, 228-35.

¶78. Mr. Oaks testified that even though he could have anonymously posted information on the wiki, he was always open about what he did. There is no evidence Mr. Oaks has ever violated this Court's order, which means no one assisted him in doing so.

¶79. There is no testimony or other evidence that Mr. Oaks' testimony was untrue in any respect.

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[7] Pat Risser might also be a MindFreedom member, but the same would also apply to him.

¶80. Object to the use of the word, "unlawfully." It is a hotly contested legal conclusion. As to the rest of it, Mr. Oaks testified that they were indeed publicizing how to obtain the documents before he and MindFreedom were enjoined from doing so. There is nothing inconsistent with his testimony in the referenced document nor any other document to Mr. Gottstein's knowledge. Footnote 4 should be struck. There is no evidence to support any of it.

¶82. Object to the use of the word, "unlawfully." It is a hotly contested legal conclusion. There were many people who were interested in the documents and believed they should be available to the public. However, it is a legal conclusion as to whether or not they acted in concert. What acting in concert under F.R.C.P 65(d) means in light of the way the wiki and the Internet in general is set up and the facts in this case is unknown.

¶83. Object to the use of the word "stolen." There is no evidence to support it. Mr. Oaks did not change his testimony. He consistently stated MindFreedom, after inquiry, provided information about how to obtain the documents on the Internet until the January 3rd amendment prohibiting even "facilitating dissemination," which Mr. Oaks interpreted as meaning a prohibition of free speech reporting on the location of the documents, but with which he more than complied nonetheless.

¶84. Object to the use of the word "unlawfully." The reference to "his website" is ambiguous. At no time were the documents on any website under Mr. Oaks' control. Finding that Mr. Whalen is acting in concert with MindFreedom by

virtue of being member is like saying AARP is an accessory to a crime because one of its members robbed a convenience store.

¶85. Object to the use of the word "unlawfully." Lilly throws in almost 100 pages of mostly irrelevant e-mails to support its unwarranted conclusion that Mr. Oaks misled the Court. Most of the e-mails were copies of e-mails I received as a recipient of MindFreedom Alerts or copies of such or similar e-mails that other people sent to me, are unrelated or can't possibly be interpreted as a discussion of MindFreedom's activities as to the documents. There is a lot of duplication. There are 3 e-mail exchanges in which Mr. Gottstein (1) requested, in compliance with the Mandatory Injunction, that MindFreedom post his request that the documents be returned pursuant to the Mandatory Injunction,[8] (2) suggested that MindFreedom correct its factual error that Lilly settled *Zyprexa II* for $500 Billion,[9] and (3) reacting to alerts that suggested Mr. Gottstein was potentially facing jail time and loss of his license to practice law, indicated he liked to think that was relatively remote.[10] This does not constitute misleading the court.

¶86. Object to the use of the word "unlawfully." These were all copies of the MindFreedom human rights alerts Mr. Oaks testified about sent before the Court enjoined this free speech activity, with the exception that Mr. Gottstein responded to one by requesting his e-mail address be changed to his new one and

[8] Petitioner's Exhibit 7, 804, 987.
[9] Petitioner's Exhibit 7, 1062.
[10] Petitioner's Exhibit 7, 991, 1016.

which also mentioned that he had been ordered to save all e-mails.[11] Lilly misrepresents what MindFreedom said about anonymous alerts. MindFreedom's statements were accurate.

¶87. Object to the use of the word "unlawfully." Mr. Oaks testified that even though he didn't control the wiki because any number of people could edit it anonymously, he went farther than the January 3rd amendment to the Temporary Mandatory Injunction required and removed the link.

¶88. Object to the use of the phrase "concerted effort by this small group," because the evidence shows it was mostly independent action by similarly publicly motivated people. It also doesn't identify who were the members of the small group. Also object to the use of "violate the Temporary Mandatory Injunction." Not only is it a legal conclusion, but all of the evidence shows there was no violation. While Mr. Oaks was unaware of any links making the Zyprexa documents available as of that date, December 30, 2006, it is now known that they were available or were available shortly thereafter. *See*, e.g., Declaration of Laura R. Mason, filed in support of the Electronic Freedom Foundation's Supplemental Brief for Clarification of Injunction, dated January 12, 2007; Docket No. 1111, "Documents Borne by Winds of Free Speech." New York Times, January 15, 2007; Exhibit B to the Electronic Freedom Foundation's Supplemental Brief filed January 12, 2007.

[11] Petitioner's Exhibit 7, 672.

¶89. Since the enjoined parties have been prohibited from posting information on where the documents can be downloaded they stopped doing so. There is no evidence that non-enjoined websites are not posting information about where the documents may be downloaded. In fact, a quick search on wikipedia.org yielded the report that following the issuance of the January 3rd amendment to Temporary Mandatory Injunction, "the documents can now only be downloaded from public Internet sites outside the US,"[12] identifying two such websites.[13] There is no question but that the documents are available on the Internet maintained by persons or organizations outside the United States and available for download anyone anywhere in the world with an Internet connection.

¶90. Object to the use of the word unlawfully. Dr. Cohen expressed a desire to publish a scholarly analysis of the documents and what they show about pharmaceutical company marketing practices.

¶92. Ms. Sharav's e-mailed statement about coordinating with Mr. Gottstein pertained to Eli Lilly's public relations disaster, not dissemination of the documents.

¶93. The web posting complained of by Lilly predates the Court's amendment of the Temporary Mandatory Injunction prohibiting "facilitating dissemination." There was no evidence presented Mr. Gottstein is aware of that demonstrates Ms. Sharav violated the terms of the order prohibiting dissemination

[12] http://en.wikipedia.org/wiki/Olanzapine#_ref-9, accessed February 4, 2007.
[13] http://zyprexakills.ath.cx/ and Canadian journalist, Rob Wipond at http://robwipond.com/archives/47

or "facilitating dissemination" after such injunction and the amendment were respectively issued.

¶95. Object to the use of the word "unlawfully." As Lilly was advised, the DVD from Mr. Hall was received in his Anchorage office while he was out of town. In fact, Mr. Hall mailed the DVD back on December 20, 2006. Exhibit 3. With respect to the FTP issue, Lilly could have subpoenaed Mr. Hall to answer that question and other questions, but chose not to do so. He was not ordered to certify anything and there was no evidence presented that he further disseminated the documents, let alone acted in concert with Mr. Gottstein or others to do so. Mr. Hall's provision of the locations where the documents could be obtained on the Internet pre-dated any order against doing so.

¶96. Mr. Hall's e-mails were on December 13th, which pre-dates even the New York Times' series of articles. The second one cited by Lilly states that Mr. Hall will "follow your [Mr. Gottstein's] instructions before proceeding on anything." On December 18, 2007, Mr. Gottstein e-mailed Mr. Hall:

> [P]lease return the DVD(s), hard copies and any other copies to Special Master Woodin immediately. If you have not yet received it, please return it to Special Master Woodin when you do receive it. In addition, please ensure that no copies exist on your computer or any other computer equipment, or in any other format, website(s) or FTP site(s), or otherwise on the Internet.

As indicated in the previous paragraph, Mr. Hall mailed the DVD back to Mr. Gottstein on December 20, 2007, which may have been the day he received it, and there was no evidence presented that he did not follow Mr. Gottstein's instruction

to "ensure that no copies exist on your computer or any other computer equipment, or in any other format, website(s) or FTP site(s), or otherwise on the Internet" as Mr. Hall said he would do.

¶97. Object to the use of the word "unlawfully" and "in concert" because they are legal conclusions.

¶98. Mr. Whitaker is an author/journalist.

¶99. Object to the use of the word "unlawfully."

¶100. Contrary to Lilly's factual assertion, Ms. Ziegler has returned the documents. Exhibit 31 was inadvertently produced even though it is the subject of a claim of privilege. Its relevance and probative value is marginal, at best, and contains language disparaging to someone and also should not be made public for that reason when its relevance and probity is limited, if not nil. The "dodge" language came from Ms. Ziegler paraphrasing what an attorney had told her and does not express her own thoughts or reasons.

¶102. Object to the use of the word "unlawfully." Contrary to Lilly's factual assertion, Mr. Whittington promptly returned the documents once he received them. *See*, Exhibit 4. With respect to Lilly's "conduit of information" allegation, in mid-December, due to the excessive amount of junk e-mail, known as "spam," Mr. Gottstein had his longstanding e-mail address forwarded to Mr. Whittington, who had just been hired as PsychRights' first Executive Director, for

screening.[14] The e-mail from Pat Risser was such a one.[15] **This e-mail was to Eli Lilly's lawyer Sean Fahey** with Special Discovery Master Woodin and Evan Janush, a member of the Lanier law firm, shown as receiving copies, and Mr. Gottstein apparently receiving a blind copy.[16] The e-mail from Eric Whalen that Lilly complains about was actually posted on an internet e-mail list, often called a "listserv," by the name of ActMad and was sent to Mr. Gottstein's old e-mail address, which Mr. Whittington then sent along to Mr. Gottstein. That e-mail was not even directed at Mr. Gottstein, but instead to a listserv of an unknown, but not small, number of people. (Herein Verification). The e-mail from Larry Plumlee[17] was similarly an e-mail sent to Mr. Gottstein's old address and redirected to him by Mr. Whittington. (Herein Verification).

¶103. Object to the use of the word "secret." Mr. Gottstein explained why he didn't believe anyone besides Lilly had reason to care about the amended subpoena and that he had advised Dr. Egilman to notify Lilly of it. The e-mail

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[14] *See*, e.g., Petitioners' Exhibit No. 7, 184,

[15] Petitioner's Exhibit 7, 858.

[16] Attached hereto as Exhibit 5, is a copy of the e-mail as Lilly attached it. Attached as Exhibit 6, is a forward of the e-mail as received by Mr. Whittington. Mr. Gottstein had asked Mr. Whittington to "redirect" his e-mails rather than "forward" them so that Mr. Gottstein could just "reply" to them and they would therefore go to the original sender without Mr. Gottstein having to enter the original sender's e-mail address into the "To" field. (Herein Verification). The version of the e-mail attached by Lilly notes it was also accompanied by a file with the name "Header233.txt," which includes the Internet "header" information that the body of the e-mail didn't, including showing the same information about the original e-mail being sent to Mr. Fahey, Lilly's counsel with a copy to Special Master Woodin and Lanier Lawyer, Evan Janush. A copy of this file is attached hereto as Exhibit 7 and has the same information. (Herein Verification).

[17] Petitioner's Exhibit 7, 626.

from Mr. Gottstein's wife Terrie (not "Terri") was inadvertently produced and subject to a claim of privilege. There is no evidence Ms. Gottstein "has been involved with Mr. Gottstein's efforts to disseminate the Zyprexa documents from the beginning" as asserted by Lilly. The cited portion of the transcript does not support this allegation, nor for that matter, does the privileged e-mail. With respect to Lilly's statement that Ms. Gottstein "may have been the only other individual" with prior knowledge of the amended subpoena, Mr. Gottstein was merely speculating that he might have told his wife about it.

¶104. The e-mail from Mr. Gottstein's wife was inadvertently produced and subject to a claim of privilege and was used over the objection of Mr. Gottstein's counsel.

The heading on page 30 is inaccurate.

¶106. The first sentence is argument. The second sentence is untrue. Mr. Oaks testified that thousands of people have downloaded them. In addition, as indicated in the response to ¶88, the Electronic Freedom Foundation submitted a declaration and other evidence of their easy availability. In addition, as set forth in the response to ¶89, they are currently easily available on at least two websites located outside of the United States.

¶109. The e-mail from and to Dr. Plumlee were on December 22nd, which was before the documents started showing up on the Internet. With respect to Exhibit 25, all they show is that the documents were available on sites within the United States from around December 25th until after the Temporary Mandatory

Injunction issued on December 29th and Lilly began harassing the operators of those websites to take them down. Once the January 3rd amendment to the Temporary Mandatory Injunction was issued, MindFreedom and the others were enjoined from "facilitating dissemination," which they interpreted as meaning they couldn't give any indication of where they were available on the Internet. As set forth previously, they are now available at locations outside the geographic area of the United States, but in compliance with the amended Temporary Mandatory Injunction, the enjoined parties are not linking to them or otherwise indicating where they can be found.

Dated: February 9, 2007 Respectfully submitted,

/s/ D. John Mckay

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VERIFICATION

I declare under penalty of perjury under the laws of the United States of America that I have reviewed the foregoing document and to the best of my knowledge and belief all of the factual statements made therein are true and correct and that this verification is made and executed by me in Anchorage, Alaska, on this 9th day of February, 2007.

James B. Gottstein, Esq.

Digitally signed by James B. Gottstein, Esq.
DN: cn=James B. Gottstein, Esq., o=Law Project for Psychiatric Rights, Inc., ou, email=jim.gottstein@psychrights.org, c=US
Date: 2007.02.09 17:06:12 -09'00'

James B. Gottstein, Esq.