

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE:
3 ZYPREXA LITIGATION,

4 MDL 04 1596
5 United States Courthouse
6 Brooklyn, New York

6 -----x

7 January 17, 2007
8 11:00 a.m.

TRANSCRIPT OF HEARING

9 Before: HON. JACK B. WEINSTEIN, District Judge

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11 Proceedings recorded by mechanical stenography, transcript
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1 THE CLERK: Civil cause for hearing: In Re Zyprexa
2 Litigation.

3 THE COURT: Appearances on the phone.

4 THE CLERK: On the telephone, would you note your
5 appearances please, slowly and spell your name so that the
6 court reporter can get it.

7 MR. CHABASINSKI: I'm Ted Chabasinski,
8 C-H-A-B-A-S-I-N-S-K-I and I'm representing MindFreedom
9 International.

10 Judy Chamberlain and Robert Whitiker.

11 If you need any of those names spelled, I'll be glad
12 to do so but I think they are already on the record.

13 THE CLERK: Next.

14 MR. OAKS: This is David Oaks. I'm director of
15 MindFreedom. Oaks is spelled O-A-K-S. I'm director of
16 MindFreedom International.

17 THE CLERK: Next.

18 MR. LEIFER: Larry Leifer. I represent Adrian
19 Harvard in a tag-along case against Eli Lilly. I'm from
20 Maplewood, New Jersey.

21 I spell my last name L-E-I-F-E-R.

22 THE CLERK: Next.

23 (No verbal response.)

24 THE CLERK: Everyone on the telephone noted their
25 appearances. I think we are ready.

1 THE COURT: Mr. Leifer.

2 MR. LEIFER: Yes, your Honor.

3 THE COURT: What is your interest in these
4 proceedings?

5 MR. LEIFER: Well, I wrote your Honor a brief
6 letter. I represent a woman named Adrian Harvard who took
7 Zyprexa for a period of a couple of months just before the
8 dear doctor letter, the first letter went out by Eli Lilly and
9 essentially ever since then she has had Type 2 diabetes. I
10 had mailed you an expert's report from a Ph.D. pharmacologist
11 named Jack Rosenberg.

12 THE COURT: You understand that this is on a
13 mandatory injunction?

14 MR. LEIFER: Then I have the wrong time to call you.
15 I'll politely bow out and try to reschedule with your Honor.

16 THE COURT: Whatever the motion is, get in touch
17 with Ms. June Lowe and she will schedule it if it's needed.

18 MR. LEIFER: Thank you very much.

19 THE COURT: You are welcome.

20 (Mr. Leifer disconnects from the phone connection.)

21 THE COURT: Mr. Gottstein, you are still under oath.

22 THE WITNESS: Yes, your Honor.

23 MR. HAYES: May I examine?

24 THE COURT: Have you finished your examination?

25 MR. FAHEY: We did receive some documents from Mr.

1 Gottstein last evening so we want to just keep the record
2 clean.

3 I can continue.

4 THE COURT: Why don't you finish your direct.

5 MR. FAHEY: All right.

6 DIRECT EXAMINATION (Continued)

7 BY MR. FAHEY:

8 Q Mr. Gottstein, you produced some documents last evening,
9 correct?

10 A Yes.

11 Q And some of the documents that would otherwise be
12 responsive to the issues here today were not available to you,
13 correct?

14 A Yes, I produced some this morning as well.

15 Q I haven't seen those. But there were some documents that
16 were pieces of paper that were in Alaska that you were not
17 able to produce last night?

18 MR. McKAY: Your Honor, I don't know how we want to
19 proceed on this but Mr. Gottstein spent until I think after
20 10:00 and was willing to go further.

21 He produced more -- he produced everything that I
22 know of that is responsive. I think there are a couple of
23 documents which we can still continue to try to produce. And
24 I believe that the documents that he is referring to that I
25 know of may have been produced. For example, there was a

1 letter sent out by -- everything was done by E-mail pretty
2 much. There were one or two letters for people that he didn't
3 have E-mails for that he sent a letter saying please return
4 these documents.

5 I believe they have copies but I can't vouch for
6 that. That is the gist of it.

7 THE COURT: You have produced everything that you
8 have available?

9 MR. McKAY: Certainly everything that they talked
10 about and wanted last night, we produced. There were certain
11 things that he had to try and get on line and get from Alaska
12 which he did, he sent to them this morning.

13 Yes, your Honor.

14 MR. FAHEY: The reason I wanted to put that on the
15 record is there were discussions last night with Mr.
16 Gottstein's counsel that some things including phone records
17 were not available.

18 And so I'm not quarreling that we all worked pretty
19 late last night to try to get Mr. Gottstein's documents but
20 the clear indication that I got is that there might be more in
21 Alaska that they were not able to collect. I'll just put that
22 on the record and we can continue.

23 MR. McKAY: If you would like, on a break I can try
24 and get together with Mr. Fahey and there were some phone
25 logs. His secretary had written down from the message machine

1 who had called. I will make sure that Mr. Fahey is able to
2 see them. It's brief, eight or 10 lines of what called.

3 THE COURT: If they are handwritten, you can fax
4 them to my office.

5 MR. McKAY: They are electronic.

6 THE COURT: Or electronic, either.

7 MR. FAHEY: Thank you, your Honor.

8 Q Mr. Gottstein, yesterday you testified that your first
9 communication with Dr. Egilman was on November 28th, correct?

10 A I believe that is what I said, yes.

11 Q Was that a telephone communication or an E-mail
12 communication?

13 A Telephone.

14 Q Telephone?

15 A Telephone.

16 Q And can you tell us what Dr. Egilman told you about his
17 plan with respect to the Zyprexa documents that were produced
18 in the Zyprexa litigation?

19 MR. HAYES: Objection. That is assuming a fact I
20 think not in evidence about his plan.

21 THE COURT: Yes, reframe.

22 Q Could you tell me what Dr. Egilman told you about the
23 Zyprexa documents that were produced in the Zyprexa
24 litigation?

25 A He said that he had some documents and they -- he really

1 didn't describe them that much but that -- you know, that they
2 contained some alarming things in them. I don't really
3 remember the specifics of it or that he really told me very
4 much about them but I got the impression that they were what I
5 would consider hot or very -- they would be of great interest
6 to me.

7 Q Why didn't he just send them to you that day?

8 A Well, you're asking me why he didn't do things so I can't
9 really say why he didn't do anything.

10 Q Did you ask him to send you the documents immediately?

11 A No.

12 Q Why not?

13 A Because I understood they were under a protective order.

14 Q So what did he tell you about the documents to cause you
15 to understand that they were subject to a protective order?

16 A What did he tell me? He told me that there are a lot of
17 documents, that things like newspaper articles and press
18 releases were under this protective order. He told me -- I
19 think he probably told me about -- I don't know. Basically,
20 he suggested that I subpoena them, basically.

21 Q Why was that?

22 A I think because he thought they should become public.

23 Q And he understood that he could not send them directly to
24 you without a subpoena, correct? He conveyed that to you?

25 A Could you ask the question again?

1 Q Sure.

2 After the conversation with Dr. Egilman on
3 November 28, you understood that the only way you could access
4 the Zyprexa documents that were subject to a protective order
5 was to subpoena them from Dr. Egilman, correct?

6 A Yes.

7 Q He was not free to disclose them to you unless he
8 complied with the protective order at issue in the Zyprexa
9 litigation, correct?

10 A Yes.

11 Q And you understood that?

12 A Yes.

13 Q And he understood that?

14 A Well, that was my impression.

15 Q And so the plan after the call was for you to first find
16 a case that you could use to issue a subpoena, correct?

17 MR. HAYES: Objection again to the word the plan.
18 It implies he had -- it might be his plan, somebody else's
19 plan.

20 Objection.

21 MR. FAHEY: I'll rephrase.

22 Q Did you hang up the phone of November 28 expecting never
23 to talk to or communicate with Dr. Egilman again?

24 A No.

25 Q What were your intentions or did you discuss with Dr.

1 Egilman how he would proceed?

2 A In some ways. I said I needed to get an appropriate case
3 to do it.

4 Q Because you didn't have one on November 28th, correct?

5 A Correct.

6 Q And what else did you tell Dr. Egilman?

7 A Well, I think I've testified about some of it before.
8 I'm not sure what happened in what conversation but we talked
9 about this issue of timing and my typical case is very, very
10 quick as I testified yesterday. And so he said -- I get --
11 these happen in a matter of days and maybe a petition gets
12 filed in the morning and they want to do the hearing that
13 afternoon and he said I can't get them to you that fast, I
14 have to give them reasonable notice.

15 So we talked about that a little bit and as I said
16 yesterday, I said well, even though -- they normally are held
17 the same day or within -- basically the same day, that I
18 always ask for a continuance because I need to prepare. And I
19 said that is usually not more than three days. So that was
20 that and he wanted a week or 10 days basically.

21 Q Why did he want 10 days?

22 A Well, maybe it wasn't 10 days. He basically wanted more
23 time. He was pushing for more time and I was kind of pushing
24 that I wanted them quicker.

25 Q Okay.

1 I'm going to hand the witness a document and ask
2 that it be marked Petitioner 2.

3 THE COURT: So marked.

4 (So marked in evidence as Petitioner's Exhibit 2.)

5 Q Could you tell the Court what that document is?

6 A That is a copy of an E-mail that he sent to me I believe
7 after our conversation on the 28th.

8 Q That is an E-mail that you produced last night?

9 A Yes, I think so.

10 Q What is the subject line of that E-mail?

11 A SubTina.

12 Q And that is an E-mail from Dr. Egilman to you, correct?

13 A Right.

14 Q And so why was Dr. Egilman sending you his contact
15 information?

16 MR. MCKAY: Your Honor, this has all been covered
17 yesterday. This has been asked and answered is the objection.

18 THE COURT: Not in connection with the specific
19 document.

20 You may continue.

21 MR. FAHEY: Thank you, your Honor.

22 A It was just his contact information.

23 Q For what purpose were you getting his contact
24 information?

25 A To serve the subpoena on him. His E-mail and phone

1 numbers are on there as well.

2 Q And you told Dr. Egilman that once you had the documents
3 from the Zyprexa litigation, that you would be able to
4 disseminate them broadly, correct?

5 A Did I tell him that?

6 Q Yes.

7 A I'm not sure if I told him that. I -- I think that --
8 one way or another he knew that I intended to distribute them
9 once I felt that I had them free and clear of any
10 restrictions.

11 Q Now, after you sent the second subpoena that we talked
12 about yesterday, the subpoena that you issued on December 11th
13 that called for the production of documents quote as soon as
14 you can, close quote, did Dr. Egilman tell you that his
15 lawyers for the Lanier law firm had told him not to produce
16 documents?

17 A Absolutely not.

18 Q Did Dr. Egilman tell you that Lilly's lawyers had told
19 him not to produce documents?

20 A Absolutely not.

21 Q Did he ever tell you that he had ever been told by
22 anybody that he should not be producing documents pursuant to
23 your subpoena?

24 A Could you ask that question again. That is a really
25 broad -- I think the protective order itself says that he is

1 not to produce it so do you mean orally or written or what?

2 Q I'm just asking you whether Dr. Egilman ever communicated
3 to you that. I asked about Lilly's lawyers and about the
4 Lanier law firm. Now I'm broadening it to anyone.

5 A You mean after the subpoena was issued?

6 Q Yes.

7 A No.

8 Q Did you ever have any conversations with the Lanier law
9 firm?

10 A I don't believe so.

11 Q Do you know who Mark Lanier is?

12 A No. I mean maybe he is in -- did he write me a letter?
13 No, not really.

14 Q And maybe I can give you some context here.

15 Some of the documents you produced last night
16 related to a conversation about whether you should go to the
17 New York Times on Friday December 15 and tell them that you
18 had been instructed that the documents had been improperly
19 produced under the protective order?

20 MR. HAYES: December 15?

21 A That doesn't sound right to me.

22 Q Who is Ms. Salwin?

23 MR. McKAY: If there is a document that he is
24 referring to --

25 THE COURT: Is there a document referred to?

1 Who is this person?

2 Spell it.

3 MR. FAHEY: I think Mr. Gottstein could probably
4 spell it better than I can.

5 Is it S-A-L-W-I-N?

6 A S A L W I N.

7 MR. McKAY: It's a person who Mr. Gottstein had an
8 attorney/client relationship with.

9 MR. FAHEY: There were documents produced last night
10 relating to the Ms. Salwin in the Lanier law firm and the New
11 York Times.

12 MR. McKAY: I don't know what documents you are
13 referring to but I do know that you asked specifically if
14 there were any people for whom the attorney/client privilege
15 was asserted. We told you two people, myself and a woman that
16 Mr. Gottstein contacted before me. And Ms. Gussack said if
17 any documents were produced that related to that, that the
18 assumption would be that they would not be used since we were
19 trying to accommodate you by giving you everything possible.
20 So I don't know what this document is. I don't mean to be
21 arguing in the abstract.

22 MR. FAHEY: I'm not trying to discuss what he spoke
23 to with Ms. Salwin, I'm just trying to see if we can jog his
24 memory about the communications that he may or may not have
25 said from the Lanier law firm on December 15 relating to

1 whether he should communicate with the New York Times prior to
2 the publication of these documents on December 17.

3 MR. MCKAY: The answer to his question is that he
4 didn't know the man and he didn't have any conversations with
5 the man.

6 MR. FAHEY: I'm just simply trying to see whether --
7 A Not just for -- I'm very reluctant to talk about Ms.
8 Salwin at this point for reasons that I --

9 MR. MCKAY: Let's find out what the question is.

10 Q I'm talking about the Lanier law firm, not Ms. Salwin.

11 A What is the question?

12 Q Did you receive communications from either the Lanier
13 firm or Dr. Egilman after you had possession of the documents
14 but before they had been disseminated on December 17 in the
15 New York Times?

16 MR. MCKAY: Objection. The question is compound and
17 confusing.

18 Q I'll break it down.

19 Did you ever have any communications with Dr.
20 Egilman between the time that you received the documents and
21 December 17 when the New York Times published a portion?

22 A Did I have communications with Dr. Egilman?

23 Q Yes.

24 A Yes.

25 Q How many times did you talk to him?

1 A I don't know. I don't know.

2 Q 10 times?

3 A You know, maybe a range around that. So it might have
4 been five less or a few more.

5 Q What did you talk about?

6 A I think most of it was around the New York Times story
7 and their desire to have -- to break it.

8 Q What were the other parts?

9 THE COURT: You say their, who do you mean?

10 THE WITNESS: The New York Times desire to be able
11 to break the story.

12 Q What did Dr. Egilman say about that?

13 A That was basically it. I mean -- that was basically it.

14 Q 10 calls and I'm just trying to understand what those 10
15 calls involved, if it was just about the New York Times
16 breaking the story?

17 A It may not have been 10 -- I'm sorry for interrupting
18 you. Well, I -- for example -- I mean there were other news
19 outlets that I was going to send them to. And I ended up not
20 doing that.

21 Q Why?

22 A To accommodate the New York Times's desire to break the
23 story.

24 Q Who communicated that desire?

25 A Well, Alex Berenson called me about that.

1 Q What did he say?

2 A He said basically that if anybody else breaks it, they
3 are not going to run the story.

4 Q So what? Why was that important to you?

5 A Well, because I think the New York Times is maybe the
6 best place to have had this happen from my perspective.

7 Q And from Dr. Egilman's perspective also?

8 MR. HAYES: Objection. If he knows.

9 Q All these questions are if he knows.

10 A I think that Dr. Egilman thought it was a good place. I
11 don't know. My impression was that --

12 MR. HAYES: Objection to the witness speculating.
13 If he has a basis for it, fine but if he is speculating.

14 THE COURT: Overruled.

15 A I think he wanted the New York Times to be the first to
16 publish it.

17 Q Why do you think that?

18 A Because he wanted me to not send it to other news
19 outlets.

20 Q What did he tell you about why you shouldn't send it to
21 other news outlets?

22 A Basically, the same thing, that the New York Times
23 wouldn't run it if someone else broke it.

24 Q And you spoke to Dr. Egilman -- did you speak to him on
25 December 14? Do you remember? That was a Thursday.

1 A I don't know. I forwarded Mr. Jamison's fax to him, the
2 fax that Mr. Jamison sent to me that was I think even
3 addressed to Dr. Egilman but was not actually faxed to Dr.
4 Egilman. So I thought he should have that so I forwarded that
5 along to him. I don't know if we spoke on the 14th for sure
6 or not. I don't know.

7 Q Did you speak on the 15th which was a Friday?

8 A I don't believe so.

9 Q How about the 16th?

10 A It's possible. I'm more certain that we didn't on
11 the 16th.

12 Q Why is that?

13 A Because once, you know, Eli Lilly actually got moving on
14 this, then we didn't talk anymore.

15 Q Why is that?

16 A Well, it didn't seem like, you know, there was any
17 reason. I think that -- I'm trying to remember what the
18 Lanier's law firm's letter said about it. He may have been
19 instructed not to talk about it at that point.

20 Q It was clear to you at least by the time that you
21 received the Lanier law firm letter that they believed the
22 documents had not been produced properly pursuant to the
23 subpoena?

24 A The Lanier firm?

25 Q Yes.

1 A Well, there is something in there about -- I'm not sure
2 that was really clear to me. I'd have to look at the letter
3 again. I knew that they were upset about it. I remember they
4 said that they had advised Eli Lilly to immediately object to
5 it. That part, I remember, because --

6 THE COURT: Do you want to look at the letter?

7 MR. FAHEY: I'm going to get a copy of the letter.

8 THE WITNESS: Yes, your Honor.

9 THE COURT: You can get it.

10 MR. VON LOHMANN: Is that the December 15th letter?

11 MR. FAHEY: Yes.

12 MR. VON LOHMANN: I have that right here from your
13 exhibit.

14 THE COURT: Mark it if you are going to show it. Do
15 you want Petitioner's 2 in evidence?

16 MR. FAHEY: Yes, your Honor.

17 THE COURT: Admitted.

18 (So marked.)

19 MR. HAYES: Let's check to make sure we have the
20 right letter.

21 THE WITNESS: Do you want to give him your copy, Mr.
22 Von Lohmann?

23 MR. VON LOHMANN: I trust that I'll get it back.
24 This was already submitted as an exhibit to a prior Eli Lilly
25 file.

1 MR. FAHEY: We're going to mark that as Petitioner
2 Exhibit 4.

3 THE COURT: 3.
4 Admitted.

5 (So marked in evidence as Petitioner's Exhibit 3.)

6 Q Could you tell me when you are done reading, sir.

7 A Yes.

8 (Pause.)

9 Okay.

10 Q And you received a copy of this letter, correct?

11 A Yes.

12 Q If you turn to the second page.

13 A Yes.

14 Q The paragraph: Please further note that by providing a
15 copy of this letter to Mr. Gottstein, do you see that
16 paragraph?

17 A Yes.

18 Q Is this the only communication you received from the
19 Lanier firm relating to the Zyprexa documents?

20 A I think so but I'm not positive.

21 Q What is in your mind that is making you hesitate?

22 A You raised this question with Ms. Salwin but that wasn't
23 from them. I think it is.

24 Q Let me just ask you --

25 A I don't remember.

1 Q Let me ask you just a simple question.

2 Were you ever asked by the Lanier firm to call the
3 New York Times and convey to them that the documents had not
4 been produced properly pursuant to the protective order?

5 A I don't think so.

6 Q Did Dr. Egilman tell you that he ever spoke to a person
7 named Rick Meadow?

8 A He mentioned that he spoke to someone. These names don't
9 really mean anything to me, so I don't necessarily focus on
10 them. I know that he spoke with someone at the Lanier firm or
11 he told me that he had.

12 Q What did he tell you that the Lanier firm had said?

13 A I don't remember. Something other than in this --
14 nothing that is I think inconsistent with that letter. So.

15 Q I'm not sure how you are reading this letter, so why
16 don't you just tell us what you remember Dr. Egilman telling
17 you about his conversation with the Lanier law firm?

18 A What I'm saying is that I don't really remember the
19 specifics about it. One thing, I get so many -- it's not that
20 this isn't important but I get so many calls and E-mails that
21 it's almost unimaginable and I just don't remember everything.
22 So I don't remember what he said about his conversation.

23 Q Was it that the Lanier firm thought that you should
24 produce the document?

25 MR. McKAY: Objection to foundation. Can we

1 establish when we are talking about. Was it after the
2 documents had already been sent out by Mr. Gottstein?

3 MR. FAHEY: Mr. Gottstein hasn't told us when the
4 documents were sent out.

5 MR. McKAY: Ask.

6 MR. FAHEY: I have asked.

7 A So what is the question?

8 Q I'm trying to narrow down the possibilities of the things
9 that Dr. Egilman might have told you about his conversation
10 with Rick Meadow or the Lanier law firm.

11 A It might help me to remember if you ask specifically did
12 he say this or did he say that. That might help me remember.

13 Q Did he tell you that the Lanier firm had told him not to
14 produce the documents and that you should not either?

15 A Certainly not before I had gotten them and had already
16 distributed them.

17 Q But before the December 17th publication in the New York
18 Times?

19 A I don't know if he told me that on the phone. That's
20 what I meant -- he didn't tell me anything inconsistent with
21 the letter because the letter of the 15th is pretty clear on
22 not produce part. He may have told me that but I understood
23 that.

24 Q You understood that both the Lanier firm and Lilly
25 believed that the documents had not been produced pursuant to

1 the protective order before they published in the New York
2 Times?

3 A I don't know what they believed but I know that's what
4 they said.

5 Q Let's ask it that way.

6 You were told by the Lilly lawyers that they
7 believed prior to the publication of the December 17th New
8 York Times article that you had obtained those documents in
9 violation of a protective order in this case, correct?

10 A I got two threatening letters from Eli Lilly on the 15th.
11 So I think that's probably right but I would want to look at
12 them again to see what it was that they put in those letters.

13 Q One of the letters was from me?

14 A Yes, I guess it was, yes.

15 Q And the other letter that you received was from the
16 Lanier law firm saying that the documents were not produced
17 pursuant to the protective order and that was before the New
18 York Times publication of the documents on December 17,
19 correct?

20 A Can I look at that letter again?

21 Q Sure.

22 A That is not clear to me that they said that --

23 MR. HAYES: I object. The letter is whatever it
24 is. He is characterizing it.

25 THE COURT: The witness is refreshing his

1 recollection. He may.

2 A I mean I'm just skimming it again. It says that Lilly's
3 position was that it was provided in violation.

4 Q Did you understand the Lanier firm to disagree with that
5 position?

6 A You know, how can I comment -- they didn't say they
7 disagreed. They didn't say they agreed.

8 Q Did Dr. Egilman tell you that he had spoken with Rick
9 Meadow on December 13 and that Rick Meadow had told him not to
10 produce documents pursuant to the subpoena?

11 A I don't remember him saying that.

12 Q Did Dr. Egilman tell you that on December 13 he told Rick
13 Meadow that he would not produce documents pursuant to the
14 subpoena?

15 A He did not tell me that.

16 Q I want to talk to you a little bit about the people that
17 you distributed the documents to once you received them. And
18 yesterday I believe you said you spoke with Mr. Whitiker
19 before he received the documents?

20 A Yes.

21 MR. MILSTEINN: The he being Mr. Whitiker or Mr.
22 Gottstein?

23 THE WITNESS: It's before Mr. Whitiker received
24 them.

25 Q What did you tell him?

1 A That I had gotten these documents pursuant to a subpoena
2 and that I was sending them to him.

3 Q What did he say?

4 A Thank you. I don't know exactly, but thank you, I think
5 he indicated he would be interested in them.

6 Q And you understood that he would disseminate them to
7 others?

8 A No.

9 Q You didn't?

10 A No.

11 Q What did you think he was going to do with them?

12 A He is an expert on the treatment of schizophrenia. He
13 wrote a book that I think is the best book in the last 50
14 years on the subject called Mad In America, Bad Science, Bad
15 Medicine and the Enduring Mistreatment of the Mentally Ill.
16 And so he is the one that got the FOIA documents, Freedom of
17 Information Act documents on the approval that showed what I
18 would consider kind of the way that the studies were kind of
19 misrepresented or cooked or something that resulted in the
20 approval of Zyprexa. And he -- and that was part of, it was
21 in the book and anyway so he was an expert.

22 Q Let me bring you back to my question.

23 What did you think he was going to do with the
24 documents that you were going to send him? That was my
25 question.

1 A I thought he would be very interested in them and he very
2 well might write an article. He has a continuing interest in
3 this as an author and journalist so I thought he would be
4 interested in them.

5 Q You thought he would publish the documents, right?

6 A I didn't know if he would -- that he might.

7 Q And he might communicate them to others?

8 A Well, I didn't think that he would. I didn't think that
9 he would do that but I don't know.

10 Q So let me understand this.

11 You were sending documents to a person who had
12 published information about Zyprexa in the past and you're
13 telling us today that you thought you were going to send those
14 documents to him and that he was just going to leave them in a
15 desk in his office and not communicate them to anyone?

16 MR. MCKAY: Objection.

17 A I didn't say that.

18 THE COURT: He didn't say that.

19 Can't you move ahead.

20 Are we going to go through each person?

21 MR. FAHEY: I'd like to just understand what his
22 communications were just with the people that he communicated
23 with prior to sending the documents.

24 Q Did you communicate with anyone else prior to sending the
25 documents?

1 A I think I gave you a list.

2 Do you recall who I said yesterday? There is Alex
3 Berenson. There was Steve Cha, Vera Sharav, Will Hall. If I
4 could look at the list again, I might be able to -- there may
5 have been someone else. There were people that I talked to
6 that I was going to but I ended up not sending them to.

7 Q At least for the people you have identified so far, you
8 called them or E-mailed them or somehow communicated with them
9 to let them know that Zyprexa documents were on the way,
10 right?

11 A Yes.

12 Q For each of those individuals, you expected them to
13 further disseminate the materials, correct?

14 A I don't think each -- not each of them.

15 Q The majority of them you expected to further disseminate
16 the documents, right?

17 A Who are we talking about? We are talking about Cha and
18 Sharav and Hall and Berenson. Wasn't there one other one?
19 Oh, Whitiker. A majority, yes.

20 Q That is a yes?

21 A Yes.

22 Q Okay.

23 Now, you started speaking, one of the E-mails you
24 produced last night was relating to a communication with Alex
25 Berenson prior to the time that you received the documents.

1 I'm not asking you about that document but I just wanted to
2 know when was the first time you started to talk to Alex
3 Berenson about Zyprexa?

4 A I don't know exactly. You probably know better than I do
5 because you have those E-mails and I haven't had a chance to
6 look at them. I may even have had -- I think I produced all
7 of the communications I ever had with Berenson or -- well, my
8 E-mail program crashed so if there was some before June, they
9 wouldn't be there. So I may have spoken to him before this,
10 unrelated to it but probably not. I don't remember. You
11 might have something that might help me refresh my
12 recollection.

13 Q I'm just trying to get a general understanding of how
14 soon -- let me ask you this one.

15 Before you talked to Dr. Egilman on November 28, did
16 you have any discussions with Alex Benson about the Zyprexa
17 documents in this litigation?

18 A No.

19 Q After that conversation with Dr. Egilman on
20 November 28th, how soon after that conversation did you start
21 to have communications with Alex Berenson about the Zyprexa
22 documents?

23 A Within a few days, I think.

24 Q How did that communication start? Did you call him or
25 did he call you?

1 A I believe he called me.

2 Q And how did he get your name, do you know?

3 A I don't know for sure but -- I don't know for sure.

4 Should I speculate?

5 MR. HAYES: Objection.

6 Q Do you think Dr. Egilman gave them to him?

7 A Do I think.

8 THE COURT: Sustained.

9 Q Do you know how he got them?

10 MR. McKAY: Just asked and answered.

11 THE COURT: Overruled.

12 A Do I know how? I think that he was independently aware

13 of what I was doing.

14 Q How do you think he became independently aware of what

15 you were doing?

16 A I believe that I had E-mailed him before.

17 Q Before what?

18 A Maybe earlier in the year or a couple of years ago

19 sometime because I had been trying to get publicity about this

20 stuff for years really. So I made contacts with a lot of

21 reporters and things and I believe that I had contacted

22 Mr. Berenson before.

23 Q What caused him to call you three days after your

24 conversation with Dr. Egilman?

25 A This would be around what? The second of December or

1 something?

2 Q Early December.

3 A What caused him to call me?

4 MR. HAYES: Objection. First, he has to establish
5 that he knows he talked to him.

6 Objection.

7 THE COURT: Overruled.

8 A I think he was working on a story on this.

9 Q Why did he call you? What did he tell you when he called
10 you?

11 A He told me that he had given Dr. Egilman my name.

12 Q Alex Berenson had given Dr. Egilman your name?

13 A Yes.

14 Q Is that how Dr. Egilman came to contact you on
15 November 28.

16 A I think so.

17 Q And you said that he had told you that he had given Dr.
18 Egilman your name.

19 Help me understand that.

20 What did he say?

21 A He said that Dr. Egilman had some documents that he
22 wanted to get to the New York Times and that he had, you know,
23 thought that I might be someone who would subpoena them.

24 Q You could help get Dr. Egilman to have the documents
25 or -- strike that.

1 Alex Berenson told you that Dr. Egilman thought you
2 would be someone who would help him, meaning Dr. Egilman, get
3 the Zyprexa documents to the New York Times, right?

4 A Well, I don't -- I wouldn't -- what I said was that he
5 thought I was someone who might subpoena the documents.

6 Q And so how -- so Alex Berenson gives Dr. Egilman your
7 name, correct, that's what he said?

8 A That's what he said.

9 Q Then Dr. Egilman calls you on November 28 and says I have
10 some documents you might want to subpoena, right?

11 A Did he say that exactly? I think that's the import of
12 it.

13 Q And did the two of you when you were talking on
14 November 28 talk about this relationship you both had with
15 Alex Berenson?

16 A I may have mentioned that I tried to contact him before,
17 that I might have tried to contact him before.

18 THE COURT: Him is who?

19 THE WITNESS: Mr. Berenson.

20 Q Did you tell Dr. Egilman that you had spoken with Alex
21 and that you understood that he had given Dr. Egilman your
22 name?

23 A Yes, I think at some point that was communicated one way
24 or another.

25 Q So in fact the call was not as you said in your letter

1 out of the blue, right?

2 A It was out of the blue.

3 Q But you knew it was coming?

4 A No, no, Dr. Egilman called me first. That was out of the
5 blue.

6 Q Okay. That is a fair point.

7 But after the November 28 letter you learned that it
8 was not out of the blue, it was actually orchestrated by Dr.
9 Egilman and Alex Berenson, right?

10 A Well, I don't know how that is inconsistent with what I
11 wrote in my letter. It was out of the blue.

12 Q It was out of the blue for you, right?

13 A Yes.

14 Q But it was not out of the blue for Dr. Egilman or Alex
15 Berenson?

16 MR. MILSTEINN: Objection, your Honor.

17 The question is just argument at this point.

18 THE COURT: I don't believe it is.

19 A So I mean out of the blue -- I mean -- it seemed that --
20 it's like I said, what Alex Berenson told me was that he had
21 told Dr. Egilman that I might be someone who would subpoena
22 the documents so I don't know where out of the blue comes into
23 that.

24 THE COURT: Move to something else.

25 Q After the conversation that you had with Dr. Egilman on

1 November 28, you agreed to subpoena the documents, correct?

2 A Yes.

3 Well, to at least try to. To try and find a case to
4 do that.

5 Q Okay.

6 And you continued to communicate with Alex Berenson
7 prior to your receipt of the documents relating to the
8 articles that he was planning or hoping to write about
9 Zyprexa, correct?

10 A Prior to?

11 Q Yes.

12 A There may have been some.

13 Q And you spoke to him on a number of occasions as well?

14 A I'm not sure about prior to.

15 Q Okay.

16 Do you remember sending Alex Berenson an E-mail on
17 December 8th saying it was nice chatting with you, if you
18 called again, I would make what I think is an important
19 clarification to a critique that you had been both discussing?

20 A A critique?

21 Q A criticism.

22 A I don't remember that. It sounds unrelated. Because I
23 was trying to -- I had other stories that I wanted Alex
24 Berenson, that I wanted Alex Berenson to write about.

25 Q Now, once you received the order from Special Master

1 Woodin on December 15th, what action did you take to comply
2 with that order?

3 A Well, what I did was I didn't believe that I was subject
4 to Special Master Woodin's directives, that I wasn't a party
5 or anything like that, so I tried to clarify that immediately
6 with Special Master Woodin and I sent them an initial E-mail
7 kind of indicating that and that I would send something
8 further later, which I did.

9 Q But you took no further action to actually comply with
10 the order after you received it on December 15th, you sought
11 to clarify but did you take any steps to comply with the order
12 in the midst of your attempting to clarify?

13 A By complying, you mean get them back? No.

14 Q For example, did you call Alex Berenson and say I just
15 got an order that says these documents were improperly
16 disseminated, I think that might be something you might want
17 to know?

18 A I think I probably did communicate the order -- I may
19 have communicated the order to him, yes.

20 Q Did you try to get the documents back?

21 A No.

22 Q From anybody?

23 A No. Well -- no.

24 Q That is a no?

25 MR. McKAY: I object, lack of foundation. If he is

1 talking about in the hours that he was writing the letter to
2 Special Master Woodin, which I understand is the subject of
3 questioning.

4 THE COURT: Try to fix the date that you are talking
5 about.

6 Q Between December 15 when you received Special Master
7 Woodin's order and December 18th when you got on a phone call
8 with Magistrate Judge Mann to discuss your compliance with
9 that order, aside from your attempts to clarify what the order
10 meant, did you take any steps to comply with it?

11 A Well, I didn't further disseminate them for sure and I
12 had actually ceased doing that even before the order -- before
13 the special master's order. I did not try and get them back
14 at that point.

15 Q From anyone, right?

16 A I think so. I mean it's possible I would have gotten
17 them back from my wife but I don't think so.

18 Q Then after receipt of Judge Cogan's order on
19 December 18th which was the mandatory injunction entered
20 against you requiring you to seek the return of all the
21 documents you had disseminated, what actions did you take
22 aside from the E-mails that we have seen before, what other
23 actions other than that one E-mail to each recipient, what
24 steps did you take to seek the return of the documents?

25 A It's pretty much laid out in my compliance certificate.

1 I asked my wife to give it back and she gave it back. I asked
2 the office person Jerry Winchester that had asked for them in
3 the next door office to give it back and he gave it back. I
4 actually -- I called Alex Berenson and asked him to give them
5 back. I'm not sure when I wrote -- I don't think I recall Ms.
6 Prakash at that point, that I had given them to her, so I
7 don't think I had written her.

8 Basically I had sent an E-mail or communicated
9 personally with everybody that I remembered sending them to
10 pretty immediately after and it was an oral order and we
11 didn't actually get a copy of the signed one until the 19th
12 but I didn't wait for that. I did it immediately.

13 Q Aside from the one E-mail that you sent to each of the
14 recipients, what other steps did you take when you realized
15 that the recipients had not returned the documents to you
16 promptly?

17 A I did not ask them to return them to me. I asked them to
18 return them to Special Master Woodin and I didn't know that --
19 to say that they hadn't returned them, most of them hadn't
20 received them yet.

21 Q Who had received them?

22 A I don't really know.

23 Q Why do you say most had not?

24 A Because they later had E-mailed me that they hadn't
25 gotten -- or E-mailed me or told me. They were put in just

1 regular mail and it was the Christmas season and it took a
2 while and some of them I didn't really have good addresses.
3 So I think it may have taken up to two weeks for some of them
4 to get them.

5 Q And so that is a full two weeks after the Court order as
6 well or at least seven days after the Court order requiring
7 the return, correct?

8 A For what? That they didn't get them?

9 Q Right.

10 MR. VON LOHMANN: Objection. It's my understanding
11 that these people themselves -- could you clarify who is being
12 required by the order to do something here?

13 THE COURT: Excuse me, I see that Special Master
14 Woodin is in the courtroom. Does anybody plan to call him as
15 a witness?

16 MR. MILSTEINN: No, your Honor.

17 THE COURT: Are there any other witnesses in the
18 courtroom?

19 MR. FAHEY: Your Honor, we intend to call Rick
20 Meadow from the Lanier law firm. He is currently I think
21 arguing motions in limine in a Vioxx trial but we are prepared
22 to have him participate by phone.

23 MR. CHABASINSKI: I also plan to call -- this is Ted
24 Chabasinski representing Judith Chamberlain, Robert Whitiker
25 and MindFreedom International.

1 THE COURT: Who are you calling who is in the
2 courtroom?

3 MR. CHABASINSKI: None in the courtroom. We have
4 them waiting on call.

5 THE COURT: What are their names?
6 A Judy Chamberlain, Robert Whitiker and David Oaks and at
7 some appropriate time we plan on calling them.

8 THE COURT: Okay. I just wanted to clear the
9 courtroom of any possible witnesses.

10 MR. FAHEY: Your Honor, the only other possible
11 witnesses we might call are Vera Sharav who I believe is here.

12 THE COURT: In the courtroom?

13 MR. FAHEY: I believe so.

14 THE COURT: Does anybody want her excluded?

15 MR. HAYES: No, I don't.

16 THE COURT: Then you can remain.

17 Does anybody else?

18 MR. FAHEY: We believe John Doe was here yesterday
19 and we are not sure if he is going to return but if he does
20 return, we'd like to call him.

21 MR. HAYES: John Doe?

22 MR. FAHEY: Yes.

23 THE COURT: He is not in the courtroom today as far
24 as you know?

25 MR. FAHEY: He is not here today.

1 THE COURT: Go ahead.

2 Q Maybe I can just simplify this a little bit. Regardless
3 of when people received the documents or didn't receive the
4 documents, other than a single E-mail to each of the
5 recipient, you took no further steps to seek the return of the
6 documents consistent with Judge Cogan's order?

7 A I thought that was sufficient. As I said, I called, I
8 talked to Alex Berenson and he -- and asked him if I talked to
9 anybody that was on that list. At that time I asked them to
10 return the documents.

11 Q I'm going to show you the next document which I believe
12 is Petitioner's 4?

13 THE COURT: Yes.

14 (So marked in evidence Petitioner's Exhibit 4.)

15 A Okay.

16 Q Have you read the document, sir?

17 A Yes, I've looked at it.

18 Q That is a document you produced to us last night,
19 correct?

20 A Yes.

21 Q Can you just describe the document for the record.

22 A It's a forward -- it's an E-mail. It appears to be an
23 E-mail from Will Hall forwarding an E-mail that he had
24 received.

25 Q What does the E-mail relate to?

1 A It's got -- the only thing it has is a website.

2 Q Can you read the website into the record?

3 A [Http://cyber.law.harvard.edu/briefings/dvb/](http://cyber.law.harvard.edu/briefings/dvb/).

4 Q What is the re line of the E-mail or the title?

5 A Subject?

6 Q Diebold versus?

7 A Versus the Bloggers.

8 Q And the date of that -- let me back up.

9 Will Hall is one of the recipients of documents from

10 you, correct?

11 A Yes.

12 Q And Will Hall sent this E-mail to you on what date

13 December 13, right?

14 A The one down below says December 13 which is when he got

15 it but I'm not sure when it was forwarded to me. It looks

16 like December 13th but it's pretty confusing.

17 Q I agree that the format it was produced in is confusing.

18 We'll stipulate to that but at the top it says received?

19 A Yes, okay.

20 Q Okay, December 13?

21 A That's what it looks like.

22 Q And the issue of the Diebold case is that document had

23 been leaked on the internet and the argument was that they

24 were so broadly disseminated that they should not be subject

25 to any further protection, correct?

1 A I don't know. I'm not sure I clicked on that link. I
2 don't know that I clicked on that link. That's all I can say.

3 Q Regardless whether you clicked on the link, you
4 understand what the Diebold case is all about?

5 A Not necessarily, no.

6 Q What does not necessarily mean?

7 A I'm not that good on case names so I don't really know.

8 Q You didn't understand the E-mail when you got it?

9 A Well, there is a link and I understood that there was a
10 link. I get a lot of E-mails and I just can't read them all.
11 So -- and to click on something, I don't necessarily click on
12 all the links. So I don't remember clicking on this link.

13 Q Did Will Hall provide any message to you or -- what did
14 he say in his E-mail?

15 A He didn't say anything.

16 Q So he just gave you this link?

17 A Yes.

18 Q And the link again is related to Diebold versus what?

19 A The subject line if I can find it here is basically the
20 original message that he forwarded, the subject line yes, the
21 subject line is forward Diebold versus the Bloggers. And the
22 only thing in there is a forwarded message that has a link.

23 Q That was on December 13, correct, that you received that
24 link?

25 A It appears to be.

1 THE COURT: Do you want that in evidence too?

2 MR. FAHEY: Yes. And if I have not already asked
3 for P3 to be in evidence, I would ask for that as well.

4 THE COURT: Admitted.

5 How long is this going to take?

6 (So marked in evidence as Petitioner's Exhibit 3.)

7 MR. FAHEY: I think I only have one more document,
8 your Honor.

9 Q The last document is P-5.

10 (Pause.)

11 Are you ready now?

12 A I don't even have it yet.

13 (Pause.)

14 Yes, I'm familiar with this one.

15 Q Can you describe for the Court what that document is?

16 A It's a kind of an E-mail news letter that I sent out.
17 When was it? January 1st, maybe. It seems like it went out
18 earlier than that. It looks like January 1st.

19 Q Okay.

20 A Oh, actually it's -- I think it was sent out before that
21 but this is something that was on -- it's a forward of an
22 E-mail that I sent out previously that was sent to
23 MindFreedom's -- one of MindFreedom's list services.

24 Q How many people are on that list service?

25 A On MindFreedom's list service? I don't know.

1 Q Thousands?

2 A This one, I don't believe that is true.

3 Q What is different about this one?

4 A Well, I mean -- I guess Mr. Oaks -- anyway, what is
5 different, MindFreedom has different E-mail lists. This is
6 what they called the MindFreedom USA one. It's not the
7 largest one that they have.

8 Q So the MindFreedom USA list service, based on your
9 understanding, would include anybody who signed up for the
10 MindFreedom list service in the United States?

11 A It's people who signed up for this list service.

12 Q And you don't have any way of putting a number on that?

13 A I don't know how many people are on that.

14 MR. FAHEY: Your Honor, may I approach the witness
15 to point out?

16 THE COURT: Yes.

17 I'd ask that you read into the record the paragraph
18 beginning with "in terms of" on page 3 of the documents.

19 A Just that paragraph?

20 Q Yes.

21 A "In terms of where things go from here, Eli Lilly is
22 fully capable of crushing me with legal actions but I hope
23 they will realize they have bigger problems and that doing so
24 will give them a huge public relations nightmare (I hope).
25 They have threatened me with criminal and civil contempt

1 sanctions. It has already cost Psych Rights \$15,000 in
2 attorney's fees to deal with the aftermath. This, of course,
3 is very cheap considering what was accomplished but has
4 significantly reduced Psych Rights' bank account. Any and all
5 contributions to help will be appreciated."

6 Q That is actually the next paragraph but I understand the
7 quote.

8 A I don't think that it is the next paragraph.

9 Q I'm fine.

10 I have no further questions at this time.

11 THE COURT: Are you offering that?

12 MR. FAHEY: Yes, your Honor.

13 THE COURT: Admitted.

14 (So marked in evidence Petitioner's Exhibit 5.)

15 MR. HAYES: I have no cross.

16 THE COURT: It's now 25 to 1:00.

17 Do you want to break for lunch? You may want to
18 confer with the other attorneys so that we don't have a lot of
19 repetition.

20 MR. HAYES: I'm only going to be about 15 minutes.
21 That way, we can get rid of it.

22 MR. MILSTEIN: I have about five minutes.

23 THE COURT: Do the 15, then break?

24 MR. MILSTEIN: Why don't we finish this witness, get
25 him off the stand.

1 THE COURT: Fine.

2 Before you can get into that, there has been a
3 reference to a large number of documents. When the witness is
4 released, I assume he is going to go back to Alaska.

5 Do you want any of those documents authenticated
6 before we finish with the witness? Think of it over the lunch
7 hour because I don't want a mass of documents floating around
8 with no authentication.

9 MR. FAHEY: Thank you.

10 THE COURT: So mark them if you want them
11 authenticated, then have the witness authenticate them with
12 everyone present and then we can let him go.

13 Proceed.

14 MR. FAHEY: Actually, there is one other
15 housekeeping matter before Mr. Hayes starts.

16 There was a document we referenced yesterday which
17 was a certification that Mr. Gottstein filed with the Court
18 yesterday morning and since we referenced it, I'd like to mark
19 that as next in order and offer it for admission.

20 THE COURT: P6?

21 MR. FAHEY: Yes.

22 THE COURT: That is the certification?

23 MR. FAHEY: Yes, your Honor.

24 THE COURT: Dated yesterday?

25 MR. FAHEY: Correct?

1 THE WITNESS: I don't think there was a
2 certification yesterday.

3 MR. FAHEY: There was a certification filed
4 yesterday with the Court.

5 THE COURT: Filed at 1:16.

6 MR. FAHEY: I believe it was attached to the order
7 to show cause.

8 THE WITNESS: I believe it was a declaration.

9 MR. FAHEY: Declaration. Excuse me.

10 THE COURT: Mark it as 6. It's in evidence.

11 (So marked in evidence Petitioner's Exhibit 6.)

12 THE COURT: You better look at it.

13 CROSS-EXAMINATION

14 BY MR. HAYES:

15 Q Sir, you came down here without a subpoena, is that
16 correct?

17 A Yes.

18 Q Are you bearing your own costs to come down here, paying
19 your own expenses, legal fees?

20 A Well, Psych Rights is.

21 Q Has there been any discussion that you are aware of
22 between your counsel or between you or any representative of
23 Eli Lilly about what your testimony was going to be here
24 today?

25 A I don't think so, no.

1 Q And has there been any discussion to the best of your
2 knowledge between you or a representative of yours about
3 making any kind of settlement with Eli Lilly in return for
4 your testimony?

5 A No.

6 Q Now, I gather that you have made your life's work the
7 protection of the rights of the mentally ill, is that correct?

8 A Yes, people who are diagnosed with mental illness.

9 Q And one of the things you have had before this came up at
10 the end of November, you had had a prior interest in Psych
11 Rights, is that correct?

12 A Absolutely.

13 Q Were you the person that FOIAed the FDA to get their
14 records on Psych Rights?

15 A No.

16 Q Who did that?

17 A There were two separate FOIA requests that I posted on
18 the internet. One was the internal -- correspondence with Eli
19 Lilly with the FDA about the approval of Zyprexa and the other
20 was the adverse events -- it wasn't a database actually, I put
21 it into a database, that Ellen Liversitch whose son was killed
22 by Zyprexa had FOIAed for all of what they call the atypical
23 neuroleptics.

24 MR. FAHEY: I would object to the characterization
25 of somebody dying from Zyprexa. There has been no evidence of

1 that.

2 THE COURT: Strike it.

3 Q In any case, you put this information on your website?

4 A Yes.

5 Q And the website is really the website of Psych Rights?

6 A Correct.

7 Q So if you were going to run a web search for Zyprexa,
8 FDA, FDA approval process, your website would come up, is that
9 correct?

10 A I think so.

11 Q And it's also true, isn't it, to the best of your
12 knowledge that your website had one of the best -- was one of
13 the best sources of documents in regard to the FDA approval of
14 Zyprexa?

15 A Well, maybe the best, certainly these documents.

16 Q So it was -- so really in terms of a resource on the FDA
17 actions in regard to Zyprexa, your website was either the best
18 or close to the best in terms of having documents from FDA?

19 A I don't know about really the FDA process. I think for
20 generally Zyprexa and generally these medications, I think
21 it's a very good resource. That is its intent.

22 Q Prior to November 28 of 2006, were you aware that there
23 had been litigation, substantial litigation begun against Eli
24 Lilly with regard to Zyprexa?

25 A Yes.

1 Q Were you aware of essentially the allegations of that
2 litigation?

3 A Well, I mean, I guess yes.

4 Q And so therefore when you talked to Dr. Egilman on the
5 phone, he told you that he was serving as an expert witness on
6 behalf of the lawyers who were litigating at least some of
7 these Zyprexa cases?

8 A Yes.

9 Q So it didn't shock you since you knew you had one of the
10 best sources for information on Zyprexa that Dr. Egilman would
11 want to talk to you about that?

12 A A lot of people give me information, whistle blowers and
13 that kind of thing.

14 Q And before you talked to Dr. Egilman, you were aware of
15 the fact that there had been controversy about Zyprexa?

16 A Oh, yes.

17 MR. FAHEY: Objection to the term controversy. I
18 don't know what that means.

19 THE COURT: Overruled. I'll allow it.

20 Q Furthermore, you had represented many people in the past
21 -- first of all, you had gone to court on many occasions in
22 regard to protecting the rights of the mentally ill, is that
23 correct or the alleged mentally ill?

24 A I don't know about many. I try to do it strategically.
25 So a number of them.

1 Q Now, therefore had you ever been to court in which one of
2 the issues -- withdrawn.

3 Forget about going to court. Had you ever raised
4 the issue of medicating someone with Zyprexa prior to
5 November 28th of 2006?

6 A Oh, yes, in fact, that's what the Meyers case involved.

7 Q So you were already somebody that was interested in the
8 use of Zyprexa and whether it had potential dangers, is that
9 right?

10 A Absolutely.

11 Q And is it also fair to say that one of the efforts that
12 you have devoted yourself to is that the consumer public and
13 that the doctors have as much information as possible as to
14 the effects of various drugs, is that fair to say?

15 A Absolutely.

16 Q Is it also one of your concerns that sometimes the FDA
17 does not do a proper job in investigating the effects of
18 certain drugs?

19 A Yes.

20 Q Is it also part of your concerns that some of the drug
21 companies do not properly or honestly present information to
22 the FDA about the drugs they want approved?

23 A Yes.

24 Q And when you first talked to Dr. Egilman -- withdrawn.

25 You had a friend named Whitiker who you respected

1 and thought was a good journalist, is that right?

2 A Yes.

3 Q You had already by November 28th of 2006 knew that
4 Whitiker had written that the Zyprexa trials that were
5 submitted to the FDA were not correctly done, is that correct?

6 A Yes.

7 Q And was it also your -- was it either your opinion or
8 your suspicion or you had no opinion at all at the end of
9 November 2006 that Eli Lilly had withheld from the FDA certain
10 information that was relevant to Zyprexa?

11 A Yes.

12 MR. FAHEY: Objection, your Honor. He is in no
13 position to determine what was or was not withheld from the
14 FDA.

15 THE COURT: Well, we have that impression. That is
16 enough.

17 Q Was it also -- by the way, had you seen at that point in
18 time at the end of November of 2006 individuals that had been
19 medicated with Zyprexa?

20 A Oh, yes.

21 Q And had you ever had the opinion in your mind that
22 Zyprexa had had negative side effects on these people?

23 A Oh, yes.

24 Q Now, you posted all these documents on your website, is
25 that right, many of them from the FDA?

1 A Well, all these documents, I'm not sure which documents
2 you are referring to.

3 Q Let me show you one document.

4 I gave copies to everybody else.

5 Let me show you this one. This is something signed
6 by -- if you recognize that, is that one of the documents that
7 were on your website?

8 MR. LEHNER: Can we have a point of clarification.
9 When he refers to all these documents, he is referred to
10 documents obtained through the FOIA?

11 MR. HAYES: Actually his friend obtained them, then
12 he put them on his website.

13 A I know Bob Whitiker, actually do think he is a friend.
14 So yes, I believe this is posted on our website. It doesn't
15 appear to have been printed from our website.

16 THE COURT: Mark it, please.

17 A This looks like one that is on the website but --

18 THE COURT: In evidence.

19 (So marked in evidence Petitioner's Exhibit 7.)

20 Q Did there come a time that you led -- how many documents
21 are on this website in regard to Zyprexa? Can you give me
22 some idea of the number of pages?

23 MR. FAHEY: Are we still talking about the FOIA
24 documents?

25 Q Any documents on your website relating to Zyprexa.

- 1 A At least thousands.
- 2 Q Did there come a time that you led or told Egilman about
3 documents that you had on your website that related to
4 Zyprexa?
- 5 A Yes.
- 6 Q Did he ask you about documents that related to the FDA
7 approval process of Zyprexa?
- 8 A Yes.
- 9 Q Did you refer him to certain documents on your website
10 with regard to that?
- 11 A Yes.
- 12 Q Did you form the opinion after listening to Dr. Egilman
13 that before he talked to you and got these documents from you
14 or from your website, that he didn't know they existed?
- 15 MR. FAHEY: Objection. I'm not sure --
- 16 MR. HAYES: If he doesn't understand, I'll rephrase.
- 17 A Maybe you could rephrase.
- 18 Q Egilman calls you, he asks you for certain information
19 about the FDA approval process for Zyprexa and you give it to
20 him?
- 21 A Yes, he asked for -- yes.
- 22 Q You told him about certain documents you had on the
23 website that related to the FDA approval process?
- 24 A Yes.
- 25 Q And you formed the opinion that he had not seen those

1 documents before you referred them to him?

2 A Yes.

3 Q So that in fact when he called you up, he told you that
4 he was being an expert witness for the plaintiffs' lawyers in
5 a lawsuit, a large lawsuit against Eli Lilly involving
6 Zyprexa?

7 A Yes.

8 Q And one of the things he was doing was doing research,
9 right, as is his job as an expert witness?

10 A Yes.

11 Q And he told you that he had certain documents that were
12 covered by a sealing order in a discovery process from Eli
13 Lilly?

14 A Yes.

15 Q Which you didn't have?

16 A Correct.

17 Q And that you had had on your website certain documents
18 from the FDA approval process that he didn't have?

19 A Yes.

20 Q Your documents were public records?

21 A Yes.

22 Q His were covered by a sealing order, is that right?

23 A Yes.

24 Q Was there ever a discussion between you about him just
25 making a DVD of these documents, sending them to you in the

1 dark of night and just not telling anybody about it?

2 A No.

3 Q From the first conversation, he wouldn't tell you the
4 substance of the documents and he said he wouldn't give them
5 to you unless you subpoenaed them, is that right?

6 A He didn't tell me about the substance of them and yes, he
7 wouldn't give them.

8 Q So then at some point before you got the documents you
9 asked him to and he did read you the provisions of the sealing
10 order in regard to notice, is that right?

11 A Yes.

12 Q The sealing order doesn't say that you never ever get to
13 look at these documents, it just says that you have to give
14 somebody notice, is that right?

15 A Yes.

16 Q To the best of your knowledge, this was a sealing order
17 that was not written and created by the judge, it was a
18 sealing order that was written, created and agreed to by the
19 parties and then signed by the judge, is that right?

20 MR. FAHEY: Objection, your Honor. Mr. Gottstein
21 has testified repeatedly that he never even saw the protective
22 order and I don't know whether Dr. Egilman's
23 characterization --

24 THE COURT: Sustained.

25 Q Now you begin to discuss with Dr. Egilman -- withdrawn.

1 You then say -- withdrawn.

2 Egilman says to you I'm not giving you those

3 documents. If you subpoena them, I'm going to give them

4 notice of the subpoena, right?

5 A Yes.

6 Q Now you go out and you get a case involving somebody

7 called BB?

8 A Yes.

9 Q Was BB a person that was allegedly mentally ill?

10 A Yes.

11 Q Was BB a person that could theoretically have been

12 forcibly medicated with Zyprexa?

13 A He was.

14 MR. FAHEY: Objection. He has testified there is no

15 evidence that the person has been or was on Zyprexa.

16 A Can you ask me the question again.

17 Q Was BB a person that either -- that had been forcibly

18 medicated with Zyprexa?

19 A I don't know if he had been.

20 Q Was it your opinion that BB could have been forcibly

21 medicated with Zyprexa?

22 A Yes.

23 Q Did you consider then the possibility that Zyprexa could

24 have adverse side effects on BB?

25 A Yes.

1 MR. FAHEY: Objection, your Honor. We're moving
2 about four or five strains beyond the hypothetical here.

3 THE COURT: I'll allow it.

4 Q BB -- describe BB to us. Who is BB? Not give us the
5 name but give us an age, a health situation, their mental
6 capacity.

7 A He is probably in his 50s. He has been in and out of the
8 psychiatric hospital many times. He is currently under a full
9 guardianship order that allows the guardian basically complete
10 control. They said that he couldn't even authorize me to look
11 at his records because only the guardian could do that. He
12 also has been subjected to numerous Court ordered involuntary
13 psychiatric druggings.

14 Q Now, do you know anything about the other issues with
15 regard to BB's health? Was he an overweight man or an obese
16 man?

17 A No.

18 Q Do you know if he suffered from diabetes or suffered from
19 high blood sugar?

20 A No, I never saw his record.

21 Q You have not seen his health records?

22 A Correct.

23 Q But you do know that he had been the subject of
24 involuntary druggings?

25 A Yes.

1 Q Do you know what his diagnosis was in terms of his mental
2 illness?

3 A It's one of the serious ones.

4 Q Besides Dr. Egilman, you said you issued three other
5 subpoenas. Were they to other people that were experts in the
6 kind of issues that would also involve Zyprexa medication,
7 mental health, so forth?

8 A One of them was.

9 Q Who was that person?

10 A Dr. Grace E. Jackson.

11 Q And in your mind, when you saw -- how did you get the BB
12 case?

13 A That is a whole story and I posted that on --

14 Q How did you get it?

15 A I was looking for a case, an appropriate case, and it's
16 not easy because these are confidential proceedings. So I
17 went to rather extraordinary lengths, I would say, to get it.

18 Q In any case, you go to extraordinary lengths, you get the
19 BB case, you then fill out four subpoenas, one of whom is for
20 Dr. Egilman?

21 A Right, I mean that was after I had -- in connection with
22 filing other appropriate pleadings in that case.

23 Q You then served the subpoena correctly according to the
24 laws of the Court in Alaska on Dr. Egilman, is that correct?

25 A I think there is some dispute over that.

1 Q You felt you did?

2 A Well, yes, I did at the time.

3 Q This is on or about December 6th that he gets the
4 subpoena?

5 A He got it by E-mail and fax that day and it took a few
6 days for the actual process server to get it to him.

7 Q When he got it by fax, the subpoena has the date
8 returnable, who is the lawyer issuing the subpoena, the court,
9 the judge that it's returnable to?

10 A Yes.

11 Q He faxed it that day during the ordinary business day to
12 the general counsel of Eli Lilly is that right?

13 A Yes.

14 MR. FAHEY: Objection. There has been no foundation
15 that Mr. Gottstein was the lawyer then.

16 Q Are you aware of that?

17 A Yes.

18 Q You are aware of the magnitude of the sales of Zyprexa
19 compared to the total sales of Eli Lilly, is that right?

20 A I believe so.

21 Q And you are also -- and you've got an opinion in your
22 mind that Zyprexa litigations would be an important matter to
23 the Eli Lilly general counsel, is that right?

24 A I would think so, yes.

25 MR. FAHEY: Objection, your Honor. I just wanted --

1 there is no foundation that he knows anything about what is in
2 the general counsel's mind at Eli Lilly. It's just pure
3 speculation.

4 Q Now on the 6th, it's faxed to the Eli Lilly general
5 counsel, right?

6 A Yes.

7 Q You then have a discussion with him as to -- you want him
8 to give you these documents as quickly as possible?

9 A Yes.

10 Q By the way, at that time did you have an opinion in your
11 mind that if the consumers and the doctors knew more about
12 Zyprexa, that this was a public health issue?

13 A Yes.

14 MR. FAHEY: Objection, your Honor. He has already
15 testified that he didn't look at the documents at that time
16 and according to Mr. Hayes had not been communicated any
17 portion of the documents from Dr. Egilman. So there is no
18 basis for him to conclude what, if anything, was in those
19 documents.

20 THE COURT: I'll allow it.

21 Q Now, you wanted --

22 A I don't think I answered that question. Is this the same
23 question again?

24 Q No. Keep going if I interpreted you.

25 A Can you ask it again?

1 Q At the time that you issued the subpoena to Dr. Egilman,
2 was it your opinion that the public interest would be served
3 and public health interest by these documents being disclosed
4 to the public and to doctors?

5 A Yes.

6 Q Why?

7 A Just from the fact that Dr. Egilman thought they were
8 that important, I thought they probably were too.

9 Q Also at the time you were aware of the fact that there
10 was a lot -- your friend Whitiker had written extensively on
11 Zyprexa, is that correct?

12 A Yes.

13 Q And he had written critically about Zyprexa?

14 A Yes.

15 Q And you were aware that there was large scale litigation
16 involving Zyprexa?

17 A Yes.

18 Q So now Wednesday they get a fax, Dr. Egilman won't give
19 them to you on Thursday, right?

20 A Right.

21 Q Won't give them to you on Friday?

22 A Right.

23 Q Won't give them to you on Saturday?

24 A Right.

25 Q Won't give them to you on Sunday?

1 A Right.

2 Q Monday you set up this FTP so you can get these documents
3 more quickly?

4 A Yes.

5 Q But he doesn't give them to you quickly?

6 A Right.

7 Q The first time he starts transmitting documents to you is
8 after the close of business on Tuesday?

9 A Right.

10 MR. FAHEY: Objection. To the extent that they are
11 suggesting that these documents were produced pursuant to the
12 December 6 subpoena, Mr. Gottstein has testified that they
13 were not.

14 THE COURT: He is just moving on a temporal scale.
15 I'll allow it.

16 Q Now, by the way, you had no interest whatsoever in any
17 trade secrets of Eli Lilly, did you?

18 A No.

19 Q Have you ever had a trade secret case in your life?

20 A No.

21 Q Do you really even know what a trade secret is?

22 A I have some passing knowledge of it, maybe more than
23 vaguely.

24 Q In any case, now what happens is that after the close of
25 business Tuesday, you start getting these documents, is that

1 right?

2 A Yes.

3 Q You had never -- the fax to the general counsel for Eli
4 Lilly had given all the information necessary to contact you
5 for the previous week, is that right?

6 A Yes.

7 Q Not contacted in the slightest, is that right?

8 A Correct.

9 Q And when you had heard and discussed with Dr. Egilman
10 complying with the protective order, the primary, in your
11 mind, the primary requirement of the protective order was
12 notice, is that right?

13 A Yes.

14 Q Now, furthermore, you were aware that he -- have you ever
15 had occasion to try to learn about some of these large class
16 action litigations involving pharmaceuticals?

17 A Some.

18 Q Would it be fair for me to state that at that time you
19 also had the opinion that one of the things that a defendant
20 might want to pay a premium for in these kinds of cases was
21 secrecy?

22 A Yes.

23 MR. FAHEY: Your Honor, I'm not sure what the
24 relevance of all of this is.

25 THE COURT: I'll permit it as bearing on the

1 witness' state of mind.

2 Q In this particular case involving Zyprexa, at the time
3 you subpoenaed Dr. Egilman, had you the impression that Eli
4 Lilly had deliberately withheld from the public and from
5 physicians adverse side effects of Zyprexa?

6 A Absolutely.

7 MR. FAHEY: Objection, foundation.

8 THE COURT: I'll allow it.

9 Q Now, one of the -- did you have occasion after you got
10 the Eli Lilly documents to look at the -- any of the Eli Lilly
11 documents?

12 A Some of them, not very many.

13 Q Did you also have occasion -- you said you talked to
14 Mr. Berenson on the phone a phone number of times?

15 A Yes.

16 Q He is a young investigative reporter for the New York
17 Times, is that correct?

18 A I don't know how old he is. I never met him personally.

19 Q Or from his voice?

20 A I don't know.

21 Q In any way did he strike you as a bright, hard working
22 guy?

23 A Yes.

24 Q And you didn't think you were Alex Berenson's only
25 source, is that correct?

1 A He.

2 Q You didn't think you were his only source about Zyprexa?

3 A No.

4 Q You had many conversations throughout your career with
5 reporters?

6 A More than a few.

7 Q Okay.

8 Did you think -- did you have the opinion that at
9 the time you talked to Mr. Berenson that he had done a great
10 deal of research on Zyprexa and Eli Lilly?

11 A Yes.

12 Q And that he had many sources of information both as to
13 the FDA's handling of this matter, right, and of what facts
14 Eli Lilly had and kept to themselves?

15 A Yes.

16 Q Did he know things when you first started talking to him
17 that you didn't know?

18 A I don't know that he really told me much about that.

19 Q He didn't tell you much when you first talked to him.

20 Okay.

21 Now did you also discuss with Mr. Berenson or did
22 you discuss with anyone -- withdrawn.

23 Did you discuss with anyone whether or not political
24 forces would affect the approval of a drug?

25 A In connection with this or generally?

1 Q First generally.

2 A Yes.

3 Q So secondly, one of the things that you were concerned
4 about was whether or not the FDA provided enough scrutiny to
5 drugs before they released them to the general public, is that
6 right?

7 A Yes.

8 Q In particular the report that I introduced into evidence
9 is from a man who is apparently the director of the division
10 of neuro pharmacological drug products, right, a man named
11 Paul Lieber?

12 A Yes.

13 Q And he talks in general terms about the political forces
14 on the FDA, is that correct?

15 A I think, yes, political and economic, I think actually.

16 Q One of the things he says is that the Eli Lilly tests on
17 this matter were only given for six weeks, is that right?

18 A Yes.

19 Q And another thing he says is that one of the best
20 protections that the public has is market forces, in other
21 words, their competitors are out there examining or whoever is
22 looking at this drug, to see whether it works or has adverse
23 side effects, is that right?

24 A Yes.

25 Q Did you have the opinion at that time, was it one of the

1 reasons that you wanted to put this on the internet for
2 everyone to have access to is you can't really have control by
3 market forces if people don't know?

4 A The truth.

5 Q The truth, is that right?

6 A Yes.

7 MR. FAHEY: I object to it. At this point he is
8 just going over the same ground.

9 THE COURT: I'll allow it.

10 Q In regard to dealing with Dr. Egilman, you never
11 contemplated once asking him to give you these documents or
12 tell you what was in these documents except in response to a
13 subpoena?

14 A Correct.

15 Q It was absolutely clear from your talking to Dr. Egilman
16 that he would not give you the documents without a legitimate
17 subpoena?

18 A Yes.

19 Q And you in fact you and he discussed what would
20 constitute sufficient notice under the protective order, is
21 that correct, how many days?

22 A It was discussed.

23 Q Now, one of the factors that was raised is the protective
24 order says for instance if there is a subpoena from a
25 competitor, that three days notice is sufficient, is that

1 correct?

2 A Yes.

3 Q And in this case essentially there were seven days, five
4 working days, is that right?

5 A I think that is accurate.

6 MR. HAYES: I have nothing further, judge.

7 THE COURT: Anybody else?

8 MR. MILSTEIN: Yes, I will.

9 CROSS-EXAMINATION

10 BY MR. MILSTEIN:

11 Q I represent Vera Sharav. Again it was your impression
12 there were thousands of cases involving harm to people from
13 Zyprexa, is that right?

14 A Yes.

15 Q And that Lilly was in the process of settling those
16 cases?

17 A Yes.

18 Q So why is it that you wanted these documents out there?

19 A To protect people from this drug.

20 MR. MILSTEIN: That's all I have.

21 MR. CHABASINSKI: Your Honor, this is Ted
22 Chabasinski. I want to question the witness.

23 THE COURT: Is there anybody here in the courtroom
24 that wants to question first?

25 MR. McKAY: I do but I would be happy to go after

1 Mr. Chabasinski.

2 THE COURT: I'll let you go first.

3 MR. FAHEY: Your Honor, can we take a three minute
4 break?

5 THE COURT: It's five after 1:00 and I think we
6 ought to break for lunch. Then you can get the documents
7 squared away when everybody is here.

8 MR. CHABASINSKI: When will the court reconvene?

9 THE COURT: It's five after 1:00. We'll reconvene
10 at 2:15 .

11 MR. CHABASINSKI: Thank you, your Honor.

12 (Whereupon, there was a luncheon recess.)

13 (Continued on next page.)

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1 (Whereupon, the afternoon session began at
2 2:15 p.m.)

3 THE COURT: While we're waiting for the witness to
4 appear, have you arranged for the authentication of documents?

5 MR. FAHEY: We have, your Honor.

6 THE COURT: Do you want to make a record, please?

7 MR. FAHEY: Yes, Mr. Gottstein produced materials to
8 us last night and Mr. McKay, Mr. Gottstein's counsel, E-mailed
9 us some additional material today and I believe we are in
10 agreement that there is a stipulation as to the authenticity
11 of all of the documents.

12 THE COURT: Do the other attorneys here or the
13 attorneys on the phone want the opportunity to look at the
14 documents before they are accepted in evidence?

15 MR. CHABASINSKI: I'll pass on that, your Honor. I
16 think it would be almost impossible to arrange anyway.

17 MR. MCKAY: Just so we're clear, we produced as
18 described by Mr. Fahey documents and I understand that -- you
19 gave me the opportunity to read these. I can tell you there
20 is no physical way to have done that. We're not talking about
21 anything other than authentication. So we have no problem
22 with objecting that these were the documents that were
23 produced from Mr. Gottstein authenticating that they came from
24 his computer.

25 So if that is the only issue here.

1 THE COURT: Are those in the Redwell folders, those
2 constitute the documents?

3 MR. FAHEY: Yes, your Honor.

4 THE COURT: May I have them.

5 MR. McKAY: I think they have a copy for you,
6 your Honor. These may include them. There are other things
7 as well.

8 THE COURT: I just want the documents themselves.
9 That is one red file? Put those in the red file. Mark the
10 red file which is about 6 inches thick as Petitioner's 7.

11 (So marked in evidence Petitioner's Exhibit 7.)

12 MR. McKAY: I understand that the only documents
13 admitted at this hearing are the ones that were introduced.

14 THE COURT: I'm going to admit them all subject to a
15 motion to strike.

16 Is that acceptable?

17 MR. HAYES: Yes.

18 THE COURT: Subject to a motion to strike.

19 You may examine.

20 MR. CHABASINSKI: Who, your Honor?

21 THE COURT: Somebody in the courtroom first.

22 MR. McKAY: Thank you, your Honor.

23 CROSS-EXAMINATION

24 BY MR. McKAY:

25 Q This is John McKay.

1 Mr. Gottstein, you were asked about the BB case in
2 which you represent the client in the Superior Court in the
3 State of Alaska. The Superior Court in Alaska is the trial
4 court, is that correct?

5 A Yes.

6 Q It's been suggested in the filings and the
7 representations to the Court that this is -- you've undertaken
8 this case as some sort of subterfuge or a ruse. Is this an
9 actual case in which you are representing a client who has
10 significant legal interests at stake?

11 A Yes.

12 Q This is an ongoing case that you would be representing,
13 taking a considerable part of your professional time in the
14 coming months and years?

15 A I don't know about years but yes.

16 Q And your intention as to -- these documents and Dr.
17 Egilman are as of this time a witness in that case, is that
18 correct?

19 A He is still subject to a subpoena for a deposition, yes.

20 Q Dr. Egilman was told by you according to your testimony,
21 to be certain that he -- when he received the subpoena from
22 you, to immediately transmit it to Eli Lilly, is that correct?

23 A Yes.

24 Q You were not a party to this multi-district litigation,
25 are you?

1 A No, I'm not.

2 Q Do you represent the -- you indicated you have
3 considerable knowledge about Zyprexa and other similar drugs.
4 Do you represent clients who are injured by Zyprexa or other
5 similar drugs in litigation for monetary damages?

6 A No.

7 Q So your interest is in protecting their interests as
8 patients of the mental system rather than pursuing monetary
9 gain, is that correct?

10 A The focus of Psych Rights and my focus is fighting
11 unwarranted court ordered forced psychiatric drugging but of
12 course when you represent a client, you get all of their
13 interests. So there may be other interests that go along with
14 that. So I represent my clients to the best of my ability.

15 Q But you are not pursuing tort claims for monetary damages
16 concerning Zyprexa?

17 A No.

18 Q When you served Dr. Egilman with the subpoena in this
19 case, are you aware of whether he complied with the obligation
20 that he had told you that he had under the protective order to
21 give written notice to Eli Lilly?

22 A Yes.

23 Q And Lilly's counsel questioned whether you were aware
24 that Lilly had received this and you indicated that you were.

25 Did Lilly in fact provide you with a copy of Dr.

1 Egilman's transmittal letter to Lilly showing that it was
2 receipt stamped by the general counsel for Eli Lilly?

3 A Yes, it was referred to in Brewster Jamison's letter but
4 wasn't attached and I got it finally after I think asking for
5 it three times.

6 Q But you have it?

7 A Yes.

8 Q In fact have you submitted it to the Court as an exhibit
9 to your declaration that was filed yesterday?

10 A I believe it is, yes.

11 MR. McKAY: I believe it's 62 in the exhibits to the
12 declaration.

13 Q Specifically that copy shows the receipt stamped by the
14 general counsel, is that correct?

15 A The last page of that particular document.

16 Q That was on December 6th?

17 A It shows that it was received December 6.

18 Q That is Wednesday December 6, that is the day, the very
19 same day that you served Dr. Egilman with the subpoena?

20 A Correct.

21 Q It shows, there is also a fax line on that document
22 showing that Dr. Egilman transmitted it the same day to
23 general counsel for Lilly?

24 A Yes.

25 Q If you don't know from memory, I will give you a copy but

1 I think everyone is somewhat familiar with this document.

2 Does it lay out in detail all of the things that
3 were required by the protective order in terms of notice to
4 Lilly?

5 A I believe that it does.

6 Q Beyond that, did it also specifically include Dr.
7 Egilman's address?

8 A Yes.

9 Q Did it include a phone number for Dr. Egilman?

10 A I believe it did.

11 Q Did it include his cell phone number?

12 A I think it did.

13 Q In addition to his office number?

14 A Yes.

15 Q Did it include his E-mail address?

16 A Yes.

17 Q If Dr. Egilman -- did Dr. Egilman tell you that he had
18 received any word from Eli Lilly in response saying don't send
19 this out, don't send these documents out?

20 A In what timeframe?

21 Q Good question.

22 Obviously, not after all of this came up. Let's
23 start at December 6, the day that they received it.

24 A No.

25 Q Did they call him back and say don't send this out?

- 1 A He didn't tell me that, no.
- 2 Q The next day?
- 3 A No.
- 4 Q The following day on Friday, did he do that?
- 5 A No.
- 6 Q We know from this case they work Saturday, Sunday, around
7 the clock but anything on the weekend?
- 8 A No.
- 9 Q Monday?
- 10 A No.
- 11 Q So at least after more than three full business days had
12 passed, he had not received any word, they didn't pick up the
13 phone, say don't send these out or wait until you hear from us
14 or anything?
- 15 A He didn't tell me of anything like that.
- 16 Q Was it your understanding that the protective order
17 requires reasonable time to object?
- 18 A Yes.
- 19 Q It doesn't require them to get a Court order keeping
20 somebody from sending it out, it requires that they be given
21 time to object?
- 22 A Yes.
- 23 Q If Lilly, anybody from Lilly had called Dr. Egilman
24 during this period and said don't do anything until you hear
25 from us or we object or anything of that nature, would you

1 have taken the documents from Dr. Egilman had he given them to
2 you?

3 A Not if I was aware of that.

4 Q And I've already asked you if you were a party to the
5 multi-district litigation. Before this, were you familiar
6 with who the counsel were in this case or specifically did you
7 have -- had you had dealings with any of the plaintiffs' or
8 defendant's law firms regarding this matter?

9 A No.

10 Q But your information also was supplied on the subpoena
11 and the notice of deposition that was attached to Dr.
12 Egilman's December 6 letter and transmitted to Lilly, is that
13 correct?

14 A Yes.

15 Q And they didn't call you on Wednesday or Thursday or
16 Friday or Saturday or Sunday or Monday?

17 A Correct.

18 Q The following week you after the documents were
19 transmitted to you by Dr. Egilman and you sent them out,
20 you've described the circumstances of that you were contacted,
21 I believe you received a letter that you received on the 15th
22 from Brewster Jamison representing Lilly, is that correct?

23 A Yes.

24 Q Did he indicate to you an objection to distributing or
25 using these documents?

1 A Yes, I mean I didn't think it was really a proper way to
2 do it but yes, he did.

3 THE COURT: What day are you talking about?

4 THE WITNESS: It was faxed to me I think after
5 business hours the 14th but I didn't get it until the 15th.

6 MR. FAHEY: I think we have a copy of that if you
7 want to enter it into evidence.

8 THE WITNESS: I think it's an attachment to my
9 declaration, too.

10 Q It was faxed to you after the close of business and you
11 received it the follow morning on December 14 -- you received
12 it December 15th?

13 A Yes.

14 MR. FAHEY: Can I put an objection. I think the
15 document when it was faxed speaks for itself. I think that
16 it's P1 or P2 already in evidence.

17 THE COURT: Let me look at the document.

18 MR. McKAY: I don't have the exhibit.

19 Do you have it, Mr. Gottstein?

20 THE WITNESS: I think it's here.

21 MR. HAYES: If it's Petitioner --

22 MR. FAHEY: Petitioner.

23 MR. McKAY: I think that you questioned about it
24 yesterday.

25 MR. FAHEY: Not specifically about this document but

1 in general.

2 THE COURT: This is Elaine Powell's letterhead?

3 THE WITNESS: Yes.

4 THE COURT: Dated December 14, 2006?

5 THE WITNESS: Yes.

6 MR. FAHEY: Yes, your Honor.

7 THE COURT: And that was faxed to you?

8 THE WITNESS: Yes, I believe it was Chanukah and I
9 went home earlier than I normally do.

10 MR. FAHEY: The time on it just for the record, the
11 time on the fax strip is 18:05.

12 THE COURT: 18:05 of what?

13 MR. FAHEY: On the 14th.

14 THE COURT: Of what time zone?

15 MR. FAHEY: Alaska time.

16 MR. McKAY: So if I -- I realize that New York hours
17 and Anchorage hours, to say the close of business was not
18 meant to be a legal conclusion. When I said after the close
19 of business, I thought that was a fair characterization of
20 after 6:00.

21 THE COURT: It arrived at your office at 6:05 and
22 you saw it the next morning?

23 THE WITNESS: Yes.

24 THE COURT: What time?

25 THE WITNESS: A little after midnight. I should

1 explain, right?

2 When I -- we now have a fax machine that
3 automatically scans E-mail stuff to me. So I happened to wake
4 up and check my E-mail and I saw it.

5 Q When this letter came from Eli Lilly's counsel, first of
6 all, that was the first time that they had either told you by
7 phone or by letter we do not want you to send these documents
8 out, is that correct?

9 A Yes.

10 Q At that time, whether they knew it or, not the documents
11 had already been not only provided to you but sent out by you?

12 A Yes.

13 Q And you've described yesterday that you felt that you
14 were proper in doing. That I'm not going to go over that now
15 again. At that time was the history the documents were
16 already out?

17 A Yes.

18 Q But you still had other people asking you for the
19 documents?

20 A Yes.

21 Q You said when I first asked you the question, you
22 qualified your answer saying you weren't sure that the way
23 they requested it was proper, yes or no?

24 A Yes.

25 Q Shortly after this you got a request, just as an example,

1 from Senator Grassley's office for copies of these documents,
2 is that correct?

3 A Yes.

4 Q Did you decline to give those to Senator Grassley's
5 office because Lilly had at that time asked you not to even
6 though you say you question whether that was an appropriate
7 request at that time?

8 A Yes.

9 Q And in fact, once Lilly communicated to you that it
10 didn't want these documents out, without waiting for a Court
11 order and without challenging this further until this was
12 resolved, you made no further distribution of these documents,
13 is that correct?

14 A That's correct.

15 Q In fact, since that time you have not assisted or tried
16 to get these documents out to other people, is that correct?

17 A Correct.

18 Q There was a question raised about an E-mail. When you
19 sent the E-mail out to people telling them to send these back
20 after the court, Judge Cogan, had ordered this, there is a
21 question raised about some language that you sent that said
22 that you had serious objection to. So we're clear on this,
23 was that objection to specific language or to the entire
24 order?

25 A Just to specific language.

1 Q And did what you send have a link that they would press
2 on and see very specifically what you were talking about?

3 A Yes.

4 Q Was that the language that said that you had willfully?

5 A Knowingly aided and abetted, I think.

6 Q So you made it very clear your objection was to that
7 specific language and underlining that language?

8 A I believe so. I'd have to look.

9 Q And it said I object to this language?

10 A On the page on the internet, absolutely, yes.

11 Q And other than pointing out that particular language, you
12 clearly told people that you expected them to comply with the
13 Court order, is that correct?

14 A Yes.

15 Q So that the reason I asked you, BB is initials for a case
16 that it's inappropriate to disclose the identity of the
17 petitioner.

18 If Lilly had timely objected to the release of these
19 documents pursuant to your subpoena, was it your expectation
20 that you would be instead of sitting here, sitting in the
21 Superior Court in Anchorage addressing these same things or at
22 least addressing the questions of these documents being
23 released to the public?

24 A Release to the public?

25 Q Release, in other words, when you filed your subpoena

1 with Dr. Egilman, it was likely one scenario is they did what
2 the protective order said and objected within a reasonable
3 time the other is that they didn't?

4 A Yes.

5 Q As it turns out, you feel that they didn't and you got
6 the documents. If they hadn't objected in a reasonable time,
7 that doesn't mean the documents wouldn't have become public
8 anyway, is that correct?

9 A Correct.

10 Q Your intention was, if they objected in a timely fashion,
11 to then present that matter to the trial Court where the
12 subpoena was issued, is that correct?

13 A Yes.

14 Q Then as you told the judge yesterday, I think, you had,
15 because you undertook this litigation in part because this was
16 an opportunity to -- I apologize. If I can back up for just a
17 minute.

18 We have submitted a declaration so I'm not going
19 into all of this.

20 You had written about your psychiatric rights law
21 project for psychiatric rights public interest law firm and
22 submitted articles that, presentations that you have made
23 concerning that to the Court as part of your declaration, is
24 that right?

25 A Yes.

1 Q Is this case an example kind of strategic litigation you
2 would undertake for purposes of advancing the missions of the
3 law project for psychiatric rights?

4 A Yes.

5 Q One important goal that you hope to accomplish in
6 addition particular litigation in addition to representing
7 some interest specific to BB was that important documents
8 concerning Zyprexa and other things that might come out in
9 this case would be made available to the public and to
10 researchers and doctors, is that correct?

11 A Yes.

12 Q So that had we not bypassed that stuff because Lilly
13 hadn't timely objected to the release, you would still be here
14 asking for these documents in Superior Court anyway?

15 A Here being in the case in Alaska.

16 Q And it -- as I understand it, it was your intention as
17 soon as the Court there if it were necessary to go that far
18 ordered those documents to be provided, you would have then
19 made them then publicly available as soon as you could?

20 A Yes.

21 MR. McKAY: Your Honor, I'm tempted to ask the
22 witness about his desire to protect the public safety and
23 health and I honestly in the interest of time, it has been
24 covered. I think that it's fairly on the record and I think
25 in the interest of time, his reasons for doing that have been

1 stated and I don't think I have any further questions at this
2 time.

3 THE COURT: Thank you.

4 Anybody else in the courtroom?

5 MR. HAYES: No.

6 MR. MILSTEIN: No.

7 THE COURT: Anybody on the telephone?

8 Give your name and you may ask questions.

9 MR. CHABASINSKI: My name is Ted Chabasinski and I
10 represent MindFreedom, Robert Whitiker and Judy Chamberlain.

11 CROSS-EXAMINATION

12 BY MR. CHABASINSKI:

13 Q Before you began your effort to obtain these documents,
14 did you discuss your plan with David Oaks or anyone else
15 connected with MindFreedom?

16 A No.

17 Q Did you discuss your plans with Judy Chamberlain?

18 A No.

19 Q Did you discuss your plans with Bob Whitiker?

20 A No.

21 Q I'm having trouble hearing you.

22 While you were in the process of obtaining these
23 documents, did you discuss your activity along these lines
24 with David Oaks or anyone else from MindFreedom?

25 A No.

1 Q Did you discuss it with Judy Chamberlain?

2 A No.

3 Q Did you discuss it with Robert Whitiker?

4 A No.

5 Q After you obtained the documents, I think you've already
6 said that you sent them to Judy Chamberlain and Robert
7 Whitiker. Did you send copies of these document to
8 MindFreedom?

9 A No.

10 Q At the time that you sent these documents or didn't send
11 these -- let's try it one at a time.

12 When you sent these documents to Robert Whitiker,
13 did you tell him or discuss with him exactly what you wanted
14 him to do with them?

15 A No.

16 Q Did you have that kind of discussion with Judy
17 Chamberlain?

18 A No.

19 Q Did you have any discussion with David Oaks or any other
20 official or board member of MindFreedom as to what you thought
21 should be done with the documents which you had incidentally
22 not sent them anyway, did you have that sort of discussion?

23 A No.

24 MR. CHABASINSKI: That's all I have, your Honor.

25 THE COURT: Thank you.

1 Any cross-examination or redirect I should say?

2 MR. FAHEY: Very brief redirect, your Honor.

3 REDIRECT EXAMINATION

4 BY MR. FAHEY:

5 Q Mr. Gottstein, I'm a little confused about two points.

6 One, yesterday you testified that Dr. Egilman told
7 you enough about the documents to know that they were in your
8 words hot, right?

9 A I'm not sure that I said that he told me enough about
10 them.

11 Q You knew before you had the documents that they were
12 "hot", you said that yesterday, right?

13 A I'll take it that I did.

14 Q And then --

15 A But he didn't really tell me very much really about the
16 documents if anything really.

17 Q Enough to know that they were quote hot"?

18 A I knew that he had documents that I was interested in.

19 Q Because they were "hot"?

20 A Yeah.

21 Q And then Mr. Chabasinski just asked you about your
22 communications with members of MindFreedom prior to your
23 sending them documents.

24 You testified for a portion --

25 MR. CHABASINSKI: Objection. He testified that he

1 didn't send them documents.

2 MR. FAHEY: That's what I'm trying to clear up.

3 Q You testified yesterday that you did speak with Mr.
4 Whitiker before you sent him the documents?

5 A No, I don't think I spoke with Mr. Whitiker before I sent
6 him the document.

7 MR. FAHEY: We'll look at the transcript.

8 A Whatever it said, I believe that I talked to him after
9 they were already in the mail to him.

10 Q But before he had received them?

11 A Yes.

12 Q Okay.

13 So that is the distinction you were drawing with
14 respect to all the things that Mr. Chabasinski was asking, you
15 were drawing a distinction between whether you had sent them
16 and whether they had received them, correct?

17 A I don't know. I was responding to his specific
18 questions.

19 Q Now you said you issued four subpoenas in your Alaska
20 case, correct?

21 A Yes.

22 Q Dr. Egilman was one?

23 A Yes.

24 Q Dr. Grace Jackson was another?

25 A Yes.

1 Q Who were the other two people?

2 A Ron Adler and Steve Young.

3 Q And Dr. Grace Jackson's deposition has been canceled by

4 you?

5 A Yes.

6 Q That was on December 13, the day after you received the

7 Zyprexa documents, correct?

8 A If that's what the documents show.

9 Q And the other two were canceled as well?

10 A No.

11 Q But they haven't been taken, correct?

12 A Correct, they have been postponed.

13 Q Indefinitely, you don't have a date for those two

14 depositions as you sit here today, do you?

15 A There is a big kind of brouhaha about all this now so

16 it's going to be resolved by the Superior Court. There has

17 been an objection to the taking of these depositions so we're

18 going to go back not very long from now. I have a deadline of

19 the 2nd of February I believe to respond to all of the pending

20 issues in that case.

21 Q And they haven't been taken yet?

22 A Correct.

23 Q And the subpoena you were talking about with Mr. McKay --

24 A May I add one other thing which is part of that is that

25 at your counsel's insistence.

1 Q The question wasn't whether it was at my counsel's
2 insistence and we are not going to debate that. We want to
3 know whether or not you have taken those two depositions and
4 your answer was no, correct?

5 A Correct.

6 Q And the subpoena that you were talking to Mr. McKay
7 about, the one that was sent by Dr. Egilman to Lilly's general
8 counsel, that, as you now have seen, that letter said that the
9 documents will be produced on December 20, right?

10 A The letter said that?

11 Is it here?

12 I'm not sure what it did say about that.

13 Q Yes.

14 A Do I have that one?

15 Q P2, I believe.?

16 MR. MILSTEIN: He doesn't have it in front of him.

17 Q It's your December 17 letter. Do you have that in front
18 of you?

19 A No.

20 MR. MCKAY: Can we know what the question is?

21 THE COURT: Would you repeat the question.

22 Q Sure.

23 Dr. Egilman when he communicated with Mr. --
24 withdrawn.

25 When Dr. Egilman communicated with Lilly's general

1 counsel, he told him that documents would be produced on
2 December 20, correct?

3 MR. MILSTEINN: Are you asking him to look at a
4 letter that he wrote or a letter that Dr. Egilman wrote?

5 A I took it to mean the one that Dr. Egilman wrote.

6 MR. HAYES: That is in evidence.

7 THE COURT: Let him look at it.

8 A I'm trying to find it.

9 (Pause.)

10 I don't see that letter in here.

11 Q If you look at the mended subpoena, we agree that Dr.
12 Egilman sent Lilly's general counsel the December 6 subpoena,
13 correct?

14 A Yes.

15 Q And that called for the production of documents on
16 December 20th, correct?

17 A Yes.

18 Q And then on December 11th you issued an amended subpoena,
19 correct?

20 A The Court issued. I requested it, yes.

21 Q And then Dr. Egilman began producing documents the next
22 business day?

23 MR. HAYES: Objection, not the next business day.

24 Q It is the next business day, isn't it, sir?

25 A I think it was two business days. It was after the close

1 of the next business day, I believe.

2 Q Your certification says that Dr. Egilman began producing
3 documents on December 12, correct?

4 A Yes, but after the business day.

5 Q You start -- you were shipping documents out to your
6 recipients on December 12, correct?

7 A Yes, after the business day.

8 Q Well, regardless of when you sent them out, you had
9 documents from Dr. Egilman on December 12, one business day
10 after your amended subpoena, correct?

11 A It was after the business day.

12 Q On December 12th, correct?

13 A After the end of the business day on December 12th, yes.

14 MR. FAHEY: I have nothing further, your Honor.

15 THE COURT: Is there any reason why we shouldn't
16 release this witness?

17 MR. HAYES: None that I know of.

18 MR. MILSTEIN: One thing. Counsel for Lilly
19 represented that for one, that letter is in Petitioner's 1.
20 It's not.

21 He also -- I think he represented that the letter
22 that he is talking about from David Egilman to general counsel
23 of Lilly represented that the documents would be produced on
24 the 20th. That was your representation.

25 MR. FAHEY: That was his testimony.

1 MR. MILSTEIN: That was your representation.

2 The letter doesn't say that. If you want to read
3 the letter into the record.

4 MR. FAHEY: I'll stipulate that the letter speaks
5 for itself and the subpoena and the amended subpoena speaks
6 for itself.

7 MR. MILSTEIN: The letter does not say that the
8 documents are going to be produced on the 20th.

9 MR. FAHEY: It called for a production date on
10 December 20th.

11 MR. MILSTEIN: The letter doesn't say that.

12 MR. McKAY: It's in the declaration.

13 MR. FAHEY: It's attached to Mr. Gottstein's
14 declaration which I think is P7.

15 MR. MILSTEIN: Let me read the letter in the record.

16 "I am a consulting witness in the Zyprexa litigation
17 and have access to over 500,000 documents and depositions
18 which Lilly claims are confidential discovery materials.
19 Lilly defines these as "any information that the producing
20 party in good-faith believes properly protected under federal
21 Rule of Civil Procedure 26(c)(7). Lilly has claimed that
22 newspaper articles and press releases fit this definition. I
23 have received a subpoena attached that calls for the
24 production of all of these documents and depositions in
25 compliance with the protective order. I am supplying a

1 complete copy of the subpoena which notifies you of all of the
2 following: 1, the discovery materials that are requested for
3 production in the subpoena; two, the date on which compliance
4 with the subpoena is requested; three, the location at which
5 compliance with the subpoena is requested; four, the identity
6 of the party serving the subpoena; and five, the case name,
7 jurisdiction and index, docket, complaint, charge, civil
8 action or other identification number or other designation
9 identifying the litigation, administrative proceeding or other
10 proceeding in which the subpoena or other process has been
11 issued. Signed David Egilman, MD, 8 North Main Street, suite
12 404, Attelboro, Massachusetts 02703, and then lists his E-mail
13 address, his phone number and his cell number.

14 MR. FAHEY: And we will stipulate that's what the
15 letter says and if you want me to ask Mr. Gottstein, I think
16 it's already clear but I can ask him if there is any other
17 date other than December 20th on the subpoena that is attached
18 to that letter.

19 MR. McKAY: I think the record is clear.

20 MR. FAHEY: I think that it's clear as well. I'm
21 not sure why we are going through this exercise.

22 MR. McKAY: Because you misstated what is in the
23 letter.

24 THE COURT: As I understand it, the attached
25 document is December 20th.

1 MR. HAYES: Right.

2 THE COURT: I think it's reasonable to read the
3 letter plus the attachment as indicating December 20th as the
4 date for supplying the exhibits.

5 MR. McKAY: Your Honor --

6 THE COURT: Do you want to ask anything?

7 MR. McKAY: No, your Honor. I think that it's
8 really argumentative. It's the date of the deposition and we
9 agree with that.

10 THE COURT: Then I'm prepared to release the
11 witness.

12 MR. HAYES: Yes.

13 THE COURT: Have a good trip back to Alaska, sir?

14 THE WITNESS: Thank you, your Honor.

15 (Witness excused.)

16 THE COURT: Next witness.

17 MR. LEHNER: At this time we would call Vera Sharav
18 who is still in the courtroom, I believe.

19 VERA SHARAV, having been called as a
20 witness, first being duly sworn, was examined and
21 testified as follows:

22 THE CLERK: Could you please spell your name for the
23 court reporter.

24 THE WITNESS: Vera Sharav, V-E-R-A S-H-A-R-A-V.

25 DIRECT EXAMINATION

1 BY MR. LEHNER:

2 Q Good afternoon, Mr. Sharav.

3 My name is George Lehner and I represent Lilly in
4 this proceeding.

5 Can you tell us when you first met Mr. Gottstein,
6 under what circumstances?

7 A That's hard to tell because I don't really remember.
8 Face-to-face when did I meet him?

9 Q When did you first become acquainted with him?

10 A I became acquainted with his work with Psych Rights Law
11 Project.

12 Q When was that?

13 A That might have been two years ago. I don't have an
14 exact.

15 Q 20?

16 A 2 years ago perhaps.

17 Q And over the last two years, what kind of contact have
18 you had with Mr. Gottstein?

19 A All kinds of contact. We have similar goals in certain
20 ways and we sometimes collaborate and I spoke, gave a
21 presentation at a conference that he held on November 17th for
22 the National Association For Rights Advocacy. I forgot the
23 last name but it's NAPA. It's an organization for psychiatric
24 patients' rights.

25 Q So it's fair to say over the last two years you've had

1 regular contact with Mr. Gottstein, is that correct?

2 A As I do with very many advocates.

3 Q And the conference that you mentioned on November 17,
4 that was, you were with Mr. Gottstein at that particular
5 conference?

6 A He organized it. I was invited as a speaker and went to
7 Baltimore and presented to them, yes.

8 Q At that conference did you and Mr. Gottstein have an
9 occasion to talk about Zyprexa and the litigation that was
10 ongoing at the time?

11 A No.

12 Q And if you let me finish my question, it will make it a
13 lot easier for the court reporter and I'll try not to
14 interrupt your answer as well.

15 My question was, and I think if I understood, your
16 answer was that you did not have any occasion to discuss
17 Zyprexa with Mr. Gottstein when you were with him on
18 November 17?

19 A I was actually together with my husband so I didn't have
20 these private conversations. It was a conference as I said.

21 Q Let me ask you, and you've been in the courtroom and
22 you've heard testimony about the documents that Mr. Gottstein
23 received from Dr. Egilman.

24 When did you first receive a copy of the documents
25 that we've been talking about here today, those documents that

1 Dr. Egilman produced to Mr. Gottstein?

2 A I believe it was on the 18th. I have the document with
3 me. The stamp was the 14th. In other words, it left Alaska
4 on the 14th. I didn't get it before the 18th. It was a
5 weekend.

6 Q They were mailed to you?

7 A Yes.

8 Q You said you had the documents with you?

9 A Yes.

10 Q Is that a DVD version?

11 A Yes.

12 Q It's the only copy you were provided?

13 A What I have is what I was provided.

14 Q Had you been alerted that these documents were going to
15 be sent to you before the time they actually arrived when they
16 arrived at your home?

17 A I had received word that the documents had been posted
18 and I was given the website and I tried to open it and I
19 couldn't. So I sent Jim an E-mail and said I can't open it.

20 Q Let take that apart a little bit.

21 You had received word. Who had you received word
22 from?

23 A I believe it was -- I think it was Bob Whitiker. I'm not
24 sure but this was -- you have to understand that when those
25 documents evidently went up, I was in Washington at an FDA

1 hearing where I had to conduct a press briefing about
2 antidepressants and suicidality so I was quite out of it and
3 came back on 14th at which time I had a barrage of E-mails
4 from different people about the Zyprexa documents being up on
5 the web.

6 Q So you came back from a conference in Washington or a
7 meeting in Washington?

8 A A hearing, an FDA advisory hearing.

9 Q On the 14th?

10 A Yes. I was there the 12th and 13th.

11 Q Which was a Thursday?

12 A I guess.

13 Q At that point you had a barrage of E-mails alerting you
14 that the documents that had been provided by Dr. Egilman to
15 Mr. Gottstein were on a website?

16 A That's not exactly how it was put, but what was said was
17 that the Zyprexa documents were up on the website, yes.

18 Q And do you recall from whom you received --

19 A As I said, there were many. There is a network, people,
20 and you get actually lots of duplicates.

21 Q I'm going to ask you again, please don't interrupt me and
22 I won't interrupt you.

23 My question was: Do you recall some of the people
24 who sent you that E-mail? I understand it was a barrage but
25 from whom did you receive the E-mail?

1 A Actually from far and wide. There are advocate in the
2 U.K., Australia, Canada. Word travels on the internet and
3 that is in fact the big connecting factor for people who don't
4 have great many resources and who don't have many lawyers.
5 The internet is the way that there is a constant interchange
6 and that is how it happens.

7 Q Do you still have your computer on which you received the
8 barrage of E-mails?

9 A Probably some have probably been deleted but some I still
10 have.

11 Q Do you still maintain the same computer on which they
12 were received?

13 A Yes.

14 Q Did you have any conversations with anybody after you
15 received these E-mails and before you actually received the
16 physical package containing the disc containing the documents?

17 A No, I just --

18 Q Did you have any conversation with anybody about what
19 these documents may be that were in the mail on their way to
20 you between the 14th and the time they arrived at your home?

21 A I think you have to understand that many of us were quite
22 aware that the documents had first been obtained in what is
23 now referred to as the Zyprexa 1 trial, the one in which there
24 were 8,000 plaintiffs and Lilly paid some \$690 million which
25 we regard as money to keep the documents out of the public

1 domain.

2 And so there was guessing as to what was in them.

3 We also know from documents from the FDA and from pre-clinical
4 -- before the drug was approved as to some of the problems and
5 the fact that diabetes is now an epidemic --

6 Q What I want to really focus on are the conversations that
7 you had about how you learned what was in these documents.

8 You said you became aware even before the time the documents
9 were on their way to you what was in those documents.

10 How did you become aware of that?

11 A As I just explained, the adverse events that have been
12 observed in clinical practice --

13 Q So --

14 A I would also like not to be interrupted.

15 Q The first time I did it and I apologize.

16 A The fact that patients are getting diabetes,
17 cardiovascular dysfunction, hyperglycemia, that people are
18 dying, this is what is really the issue here. People are
19 dying from this drug. So getting documents that validate the
20 clinical evidence is very important to us.

21 Q Let me focus a little bit more on what you did when you
22 actually received the documents than on the weekend after you
23 got back.

24 The 18th was on a Monday?

25 A It could not have been before Monday and I get mail in

1 the afternoon.

2 Q The documents arrived in the mail, what did you do at
3 that point with this disc? It's a computer disc?

4 A I had it. I didn't do anything with it but I got some
5 calls.

6 Q Did you load it up on your own computer?

7 A Yes.

8 Q And you tried to open it?

9 A Yes.

10 Q And were you able to open it?

11 A Yes, I was.

12 Q Did you print up any of those documents?

13 A Yes.

14 Q And did you then distribute the documents that you
15 printed to anybody or give them to anybody?

16 A I read the documents or some of them.

17 Q Did you give them to anybody else?

18 A I had calls from a couple of press people and two came,
19 borrowed the disks, made copies and returned them. I didn't
20 do it.

21 Q Who were these people?

22 A Wall Street Journal, Bloomberg News.

23 Q That was done on the afternoon of the 19th or the 18th?

24 A The 18th I think -- 18th and 19th, morning.

25 Q Were you aware when you received these documents that

1 they had been the subject of what has been described here and
2 you've heard the testimony of a protective order that had been
3 entered into this case?

4 A I don't know about a protective order about the case.
5 What I was given to understand is that the documents were
6 obtained legally, that certain legal procedures were
7 undertaken and that's it and I accepted that. And of course
8 by the time I got them, they had been in the New York Times so
9 I figured that is the public domain.

10 Q Who had given you the understanding that they had been
11 obtained legally? Who told you that they had been obtained
12 legally? You said you had been given an understanding?

13 A That would be Jim Gottstein.

14 Q So you spoke to Jim Gottstein over the weekend?

15 A I spoke to him when I couldn't open the link. Remember.
16 I couldn't, in other words, download it myself so I said can
17 you send me it.

18 Q So you called Mr. Gottstein, said I'm trying to download
19 these documents from a link I have, I'm not able for open them
20 and you had a conversation with Mr. Gottstein at that time?

21 A Yes.

22 Q During that conversation you were led to believe that
23 these documents had been obtained legally?

24 A Yes.

25 Q And that understanding was provided to you by Mr.

1 Gottstein, is that correct?

2 A It was validated in my mind when they appeared on Sunday
3 in the New York Times front page, then again on Monday on the
4 front page. Then of course the editorial calling for
5 congressional hearings about the content of the documents and
6 that is really my interest. My interest is the content
7 because the documents document the fact that Eli Lilly knew
8 that the -- that Zyprexa causes diabetes. They knew it from a
9 group of doctors that they hired who told them you have to
10 come clean. That was in 2000. And instead of warning doctors
11 who are widely prescribing the drug, Eli Lilly set about in an
12 aggressive marketing campaign to primary doctors. Little
13 children are being given this drug. Little children are being
14 exposed to horrific diseases that end their lives shorter.

15 Now, I consider that a major crime and to continue
16 to conceal these facts from the public is I think really not
17 in the public interest. This is a safety issue.

18 MR. LEHNER: I move to strike as being nonresponsive
19 to my last question and I would like to ask the court reporter
20 if he is able to -- I think I remember my last question. I'll
21 repeat my last question. Nonetheless, I'll make a motion to
22 strike the last answer.

23 THE COURT: Denied.

24 Q My question was was it Mr. Gottstein who conveyed to you
25 the impression that you formed in your mind that these

1 documents had been obtained legally?

2 A Yes.

3 Q So the answer to that is yes?

4 A Yes.

5 Q Thank you very much.

6 Now, when he conveyed to you that the documents had
7 been obtained legally, did he tell you that they had been in
8 his view subject to a protective order at one point in time?

9 A By this time I don't know any more about protective. The
10 next thing that came were an E-mail like I think from one of
11 your lawyers.

12 Q So at some point you learned that these documents were
13 subject to a protective order and were in fact considered by
14 Eli Lilly to be confidential documents, is that correct?

15 A I realized that there was contention around it. I did
16 not accept necessarily what Eli Lilly's interpretation is.

17 Q I'm not asking you that.

18 You understood that there was at least a belief by
19 Eli Lilly and perhaps others that these documents were still
20 subject to the protection of the Court under the protective
21 order?

22 A No, I don't really -- I have to admit, protective order
23 pro se does not mean the same thing to me as it does to you.

24 Q You understand that they were designed to be kept
25 confidential?

1 A Except that they were open in the New York Times. That
2 signalled that they were open to the public.

3 Q Were there any documents that were actually reprinted in
4 the New York Times or was it actually a story?

5 A There were quotes from documents.

6 Q No whole pages or whole documents in the New York Times?

7 A No, but there were quotes from extensive documents.

8 Q Did you ever consult or consider consulting a lawyer to
9 determine the fact of whether you received this does put you
10 in any type of legal jeopardy?

11 MR. MILSTEIN: That would be attorney/client
12 privilege.

13 MR. LEHNER: I'm not asking whether she consulted a
14 lawyer.

15 THE COURT: Address your remarks to me. She is just
16 being asked about whether she consulted. That is not
17 privilege.

18 A I did not think I had any reason to.

19 Q Did you ever consider whether or not there was any
20 opportunity to contact Eli Lilly or to contact Mr. Gottstein
21 or any of the attorneys that you had become aware were
22 involved in this controversy and determine whether or not
23 there was a procedure that had been set up to determine
24 whether or not these documents should be kept confidential?

25 A I'm afraid that after they appeared in the New York

1 Times, I did not think that it was my obligation to go hunting
2 for what Eli Lilly considered or didn't consider. That really
3 is not my purview.

4 Q Now, I'll ask that this be marked as Petitioner's
5 number 7, please -- 8.

6 THE COURT: You are offering it in evidence?

7 MR. LEHNER: I am, your Honor.

8 THE COURT: Admitted.

9 (So marked in evidence Petitioner's Exhibit 8.)

10 Q Have you had an opportunity to review what has been
11 marked as Petitioner's 8?

12 A Yes.

13 Q And if I'm correct, this is an E-mail that was sent from
14 Mr. Jim Gottstein to Veracare. Is that your E-mail address?

15 A Yes.

16 Q And it was sent on Tuesday December 19th?

17 A Yes.

18 Q And it's copied to Mr. Gottstein and Mr. McKay and Mr.
19 Woodin, somebody at the Lanier law firm, an address
20 emj@lanierlawfirm, an address rdm at the Lanier law firm,
21 gentleman at the law firm of Elaine Powell?

22 A These weren't familiar to me, of course.

23 Q The only name that is familiar on there I take it is Mr.
24 Gottstein?

25 A Yes.

1 Q He sent you this E-mail on December 19 and if you would
2 read the first two lines of the E-mail.

3 A "I mailed you two DVDs with some documents on them
4 pertaining to Zyprexa and have been orally ordered to have
5 them returned too."

6 Q Now you indicated earlier on that you received one DVD.
7 Did you receive one or in fact receive two?

8 A 2.

9 Q So you received two DVDs?

10 A Yes.

11 Q Have you brought both of these DVDs with you here today?

12 A Yes.

13 Q You brought both of them here with you today?

14 A Yes.

15 Q My questions earlier on about opening the documents
16 loading them on your computer, my understanding was we were
17 talking about one DVD but did you in fact open up both DVDs
18 and copy both DVDs onto your computer?

19 A I did one. I assumed they were duplicates.

20 Q Did you look at the second DVD to determine if it was a
21 duplicate?

22 A No, I didn't have time. This is very laborious.

23 Q Was there something in the package to indicate to you
24 that these were duplicates of one DVD?

25 Was there anything in the packet itself that

1 suggested that these were duplicates of the same DVD?

2 A No, I had asked for two copies.

3 Q Who did you ask for two copies?

4 A From Jim.

5 Q So you had a communication with Jim?

6 A That was the same communication that I referred to
7 earlier. When I couldn't open it and download it myself, I
8 indicated that to him.

9 Q And what was your interest in having two copies?

10 A I wanted to take one to the New York State Attorney
11 General.

12 Q Now, this E-mail goes on and gives the address to whom
13 Mr. Gottstein has been asked to send these DVDs back. And it
14 gives a link to the proposed order in the case.

15 Did you open up that link and read the order?

16 A No, I didn't, actually because I noticed that he said he
17 was orally ordered and I didn't think that orally ordered was
18 a Court order and I wanted to hear that there would be a
19 hearing or some sort of thing in court and then I would of
20 course follow that. But when it says I've been orally
21 ordered, that sounded peculiar to me. It didn't sound like an
22 order from the Court.

23 MR. CHABASINSKI: Your Honor, I cannot hear the
24 witness at all.

25 THE WITNESS: Can you hear now?

1 MR. CHABASINSKI: Yes, thank you.

2 Q Would you go on and read the rest of the E-mail after the
3 address. The address -- we'll stipulate the document says to
4 Mr. Peter Woodin. Then it gives a website, but if you would
5 read that paragraph that begins starting with a copy.

6 A "A copy of the proposed written order is posted at Psych
7 Rights -- that is the organization and so forth -- with a
8 comment about certain language which I strenuously disagree
9 with and we are trying to get eliminated from the signed
10 order.

11 Q Would you read the next paragraph?

12 A "Regardless, please return the DVD, hard copies and other
13 copies to Special Master Woodin immediately. If you have not
14 yet received it, please return it to Special Master Woodin
15 when you do receive it. In addition, please insure that no
16 copies exist on your computer or any other computer equipment
17 or in any other format, websites or FTP sites or otherwise on
18 the internet. There is a question in my mind that the Court
19 actually has jurisdiction over me to issue the order. I
20 believe I came into the documents completely legally but the
21 consequences to me if I am wrong about the jurisdiction issue
22 are severe so I would very much appreciate your compliance
23 with this request."

24 Q I take it that you did not return the DVD to Mr.
25 Gottstein or to Special Master Woodin, is that correct?

1 A That's correct.

2 Q And you did not return the hard copies or any copies of
3 the hard copies that you made to Special Master Woodin, is
4 that correct?

5 A That's correct.

6 Q And I take it that you did not check your computer to
7 make sure that no copies of the documents once you had opened
8 them on your computer existed, is that correct?

9 A That's correct.

10 Q Why not?

11 A In the meantime, I also had word that there would be a
12 hearing.

13 Q When did you first get word that there would be a
14 hearing?

15 A I don't know the exact date but this was very much in
16 tandem because the first thing I heard, I think the first
17 communication was from your cocounsel --

18 What's his name?

19 It's not listed here. Fahey.

20 So that there were cross-signals going on and I did
21 see that there would be a Court hearing and I decided to wait
22 for that.

23 Q Was there anything in the notice that you received about
24 the court hearing that suggested that the order that had been
25 given here to return these documents was somehow being

1 withdrawn?

2 A As I say, this is coming to me not from the Court, it's
3 coming from James saying that he was ordered orally and
4 telling it to me. That is not direct instruction from the
5 Court.

6 Q But the same time as you testified, you didn't feel it
7 was necessary to even push on the link here where you could
8 read the order yourself, that was your testimony?

9 A It's --

10 Q That was your testimony, isn't that correct?

11 A Jim posted many documents during this time. I did not go
12 to each one because I was busy also with other things. The
13 Zyprexa thing, as important as it is, was not the only thing
14 that I had to deal with during this period.

15 So no, I did not go and download each of the
16 documents. They were coming fast and furious.

17 Q Let's go back and look at the website address to see
18 whether that might have heightened your concern about what
19 this particular document was.

20 That website address reads
21 [http://PsychRights.org/states/Alaska/caseXX/Eli Lilly/proposed](http://PsychRights.org/states/Alaska/caseXX/Eli_Lilly/proposed)
22 order.

23 Is that correct?

24 A Proposed order.

25 Q And you read that?

1 A Proposed order. It's not a definite thing. I did not
2 take that as a definite. It says proposed order.

3 Q So you reread that in this E-mail and decided I don't
4 need to open this?

5 A That's right.

6 Q Do you recall receiving the order dated December 29 from
7 this Court which was I think transmitted to you by Mr. Fahey
8 among others?

9 A I do and I took that one seriously.

10 Q Did you return the documents as a result of receiving
11 that particular order?

12 A We weren't told to return them, the Court did not order
13 us to return them.

14 Q But did the Court order you to do that at that time, do
15 you recall?

16 A I don't know.

17 Q You took that order seriously enough so that you posted
18 it on your website, is that correct?

19 A Yes.

20 MR. MILSTEIN: Can you show the witness the order.

21 MR. LEHNER: Just so it's in the record, I would
22 like to mark it.

23 THE COURT: Petitioner's 9, order of Judge Cogan
24 filed December 29th.

25 Do you have a copy, ma'am?

1 THE WITNESS: Not yet.

2 MR. LEHNER: Just for housekeeping, I think we did
3 move the admission of Petitioner's 8.

4 MR. MILSTEIN: I have no objection to the admission
5 of the order. I object to his characterization. He
6 characterized the order as saying it required the return of
7 the documents. The order requires no such thing.

8 THE COURT: That is true but for the sake of the
9 clarity of the record, I'll introduce it as Petitioner's 9
10 even though obviously it's a part of the record.

11 (So marked in evidence Petitioner's Exhibit 9.)

12 Q You have that order in front of you?

13 A Yes, I do.

14 Q Is that the order that you posted on your website?

15 A That may be. I have a blogger.

16 MR. LEHNER: Can we mark as the next exhibit
17 Petitioner's 10.

18 THE COURT: Mark it in evidence Petitioner's 10.

19 (So marked in evidence Petitioner's Exhibit 10.)

20 THE COURT: Should you want a recess at any time,
21 just ask for it.

22 THE WITNESS: Thank you.

23 MR. LEHNER: May I approach the witness for a
24 minute?

25 THE COURT: Yes.

1 MR. LEHNER: Can I make sure they are in the right
2 order. They might have gotten -- yes, that is fine.

3 (Pause.)

4 MR. MILSTEIN: Do you have a question?

5 Q Yes.

6 Have you had a chance to read that?

7 A I'm familiar with this, this is on our blogger.

8 MR. MILSTEIN: Just wait for the question.

9 MR. LEHNER: Your Honor, if I can hand her
10 Exhibit 8.

11 Q You said this is a blog that you maintained?

12 A Actually, it's maintained by a scientist in the U.K.

13 Q This is a blog to which you post information, is that
14 correct?

15 A Yes.

16 Q And the particular information that is included on this
17 particular document that appeared on the website was posted by
18 you, is that correct?

19 A Not physically. It's posted by the scientist.

20 Q It's your content that you provided to somebody who
21 puts --

22 A Except for the first line, your esteemed author. I don't
23 do that.

24 Q Other than that, these are your words that you wrote?

25 A Yes.

1 Q And had somebody put on the website, is that correct?

2 A Yes.

3 Q And the -- I'll turn your attention to the paragraph that
4 begins: "See the court injunction several of us received
5 below."

6 Do you see that particular paragraph?

7 A Yes.

8 Q The -- why don't you just read that paragraph through to
9 the end, please.

10 A "See the court injunction several of us received below
11 but the internet is an uncontrolled information highway. You
12 never know where and when the court's suppressed documents
13 might surface. The documents appear to be downloadable at --
14 and it provides two websites that I'm unfamiliar with. Do you
15 want me to read them?

16 Q No, that is all right. We'll note there are two websites
17 here in the documents but these are website addresses that you
18 wrote put in this document that directs people to go to the
19 documents, is that correct?

20 A If they chose, yes.

21 Q And you were aware, however, that the order that you put
22 on the -- and posted in this blog and had copied in there
23 suggested that those -- suggested or not or ordered that the
24 temporary mandatory injunction requires the removal of any
25 such documents posted at the website?

- 1 A We did not have them at our website.
- 2 Q You read the order, is that correct?
- 3 A Yes.
- 4 Q And you understood that the order itself required that
5 the mandatory injunction required the removal of any such
6 documents posted at any website?
- 7 A Yes, but I have no control over what people put on their
8 websites.
- 9 Q But you did feel that you had not only the opportunity
10 but I guess you felt you had the obligation to direct people
11 the toward websites where you believed at least they could
12 find these documents which the Court had ordered to be removed
13 pursuant to the order of December 29th, is that correct?
- 14 A That's correct.
- 15 Q Let me just ask one final question.
- 16 You mentioned that the group that you are associated
17 with the Alliance For Human Resource?
18 A Protection.
- 19 MR. MILSTEIN: Research.
- 20 A Research, Alliance For Human Research Protection.
- 21 Q That is a group?
- 22 A I am the president and founder.
- 23 Q Is that group affiliated with MindFreedom in any way?
- 24 A No.
- 25 Q Is it affiliated with NAPA in any way?

1 A No, we are strictly independent in every way, no funding
2 from industry.

3 MR. LEHNER: One more document to make sure that the
4 record is complete here.

5 THE COURT: Petitioner's 11.

6 (Pause.)

7 Q Have you had an opportunity to review what has been
8 marked as Petitioner's 11?

9 A Yes, I have.

10 MR. LEHNER: We move that into evidence, your Honor.

11 THE COURT: Yes.

12 (So marked in evidence Petitioner's Exhibit 11.)

13 Q Why don't you just tell us the dates on which this E-mail
14 was sent and received?

15 A It was sent on Sunday December 17th, the day that the
16 first article on the front page of the New York Times appeared
17 and I wrote a note to Jim: "Hope I get the copies." I still
18 hadn't had the copies. "I intend to call New York State
19 Attorney General Andrew Cuomo tomorrow to deliver, then will
20 send to other attorneys general. I think that is
21 ground-breaking. Lilly is finally haven't a PT disaster. I'd
22 like to coordinate with you when you write up the summary of
23 threats, et cetera. Forward so that I can incorporate into
24 infomail and then P.S. your portrait is a third of the page."

25 Q After you talked to Mr. Gottstein, you had asked him to

1 send you the DVDs because you had not been able to download
2 them from the link, is that correct?

3 A Yes.

4 Q And you signalled to him your intention then that it was
5 your desire to disseminate and spread this information as
6 broadly as you could at this point?

7 A In particular to the New York State Attorney General
8 after I read in the Times what was in the content of the
9 documents.

10 Q Before you read The Times, other than what you testified
11 to earlier about your suppositions of what might be in these
12 documents, did you have any other information that led you
13 specifically to believe -- that led you to a specific belief
14 about what was in those documents?

15 A As I explained, there have been --

16 Q Let me strike that question and ask more particularly.

17 Did you and Mr. Gottstein when you talked to him
18 that day discuss the content of the documents?

19 A No.

20 MR. LEHNER: I have no further questions at this
21 time.

22 MR. HAYES: Nothing, judge.

23 MR. McKAY: Nothing.

24 CROSS-EXAMINATION

25 BY MR. MILSTEIN:

1 Q Ms. Sharav, can you tell the Court what the Alliance For
2 Human Research Protection is?

3 A We're a group of professionals and lay people and our
4 mission is to protect the rights of human subjects in medical
5 research and to inform about concealed adverse drug events.

6 Q And if you can tell the Court something about your
7 background. Have you been asked the to testify or serve on
8 various government committees?

9 A Yes, I have. I've served, I have testified at various
10 government agencies including the FDA, the Institute of
11 Medicine, I presented at the National Academy of Science. I
12 was on the Children's Committee of the -- what was it called
13 then? The National Bioethics Advisory Committee and I've
14 presented before various bodies before the military, Columbia
15 University, Cornell University of Texas, primarily about both
16 unethical experiments and about the epidemic adverse effects
17 of drugs, particularly the psychotropic drugs but not
18 exclusively. Our organization focuses more generally but
19 there is a great deal in this area because vulnerable people
20 such as children and the elderly and disabled people are being
21 targeted to take drugs that are doing them more harm than
22 there is any evidence of benefit.

23 So that is why there is such a focus on this.

24 Q And in that experience that you've had, I take it you've
25 done a lot of research into the way drug companies market

1 their drugs?

2 A Yes, I have.

3 Q And the way they conduct research on their drugs?

4 A Yes, I have.

5 Q And I take it you consider it your life's calling to
6 inform the public about unethical practices of pharmaceutical
7 companies like Eli Lilly?

8 A Absolutely.

9 Q Now, with respect to the conversations you had with Mr.
10 Gottstein, you did not receive the documents before the New
11 York Times published it's front page article, is that right?

12 A That's correct.

13 Q Mr. Gottstein didn't tell you what the documents
14 contained?

15 A No, he did not.

16 Q Then you read the New York Times article?

17 A Yes, I did.

18 Q And after that, you received the documents by DVD from
19 Mr. Gottstein?

20 A Yes.

21 Q And did you have occasion to look at and read the
22 document?

23 A Yes, I have.

24 Q And what did the documents show with respect to the
25 practices of Eli Lilly?

1 MR. LEHNER: Objection, your Honor.

2 THE COURT: I'll allow it.

3 A In my opinion, this is about the worst that I have seen.
4 It borders on indifference to human life. Eli Lilly knew that
5 Zyprexa causes hypoglycemia, diabetes, cardiovascular damage
6 and they set about both to market it unlawfully for off label
7 uses to primary care physicians and they even set about to
8 teach these physicians who were not used to prescribing these
9 kind of drugs to, they taught them to interpret adverse
10 effects from their drug Prozac and the other antidepressants
11 which induce mania and that is on the drug's labels. They
12 taught them that if a patient presented with mania after
13 having been on antidepressants, that that was an indication
14 for prescribing Zyprexa for bipolar which is manic depression.
15 That is absolutely outrageous and that is one of the reasons
16 that I felt that this should involve the Attorney General.

17 Q What else did the documents say about the way Lilly
18 marketed its products?

19 A They marketed it, as I said, for off label uses which is
20 against the law. They told doctors -- they essentially
21 concealed the vital information that they knew from the
22 prescribing doctors and covered it over, sugar coated it which
23 you can see the sales. The sales of a drug that was approved
24 for very limited indications, for schizophrenia and for
25 bipolar. Each one of these is about one to 2 percent of the

1 population. But the reason the drug became a four and a half
2 billion dollar seller in the United States is because they
3 encouraged the prescription for children, for the elderly, for
4 all sorts of reasons. The drug is being prescribed
5 irresponsibly because doctors have not been told the truth and
6 major study by the National Institute of Mental Health
7 validates this. It's called the Catie study. It has been
8 published and they corroborate to such a degree the harm that
9 this drug is doing and the other so-called atypical
10 antipsychotics that leading psychiatrists who had been fans of
11 these drugs are now saying we were fooled, we didn't realize.
12 It isn't just weight gain. They are blowing up and it is
13 calling what is called metabolic syndrome, which is a cluster
14 of life-threatening conditions this drug is lethal and many
15 doctors now say it should be banned.

16 MR. LEHNER: Let me move to strike the testimony
17 again as being nonresponsive to the question that was being
18 asked.

19 THE COURT: It shows her state of mind.

20 Q In addition, are you familiar with a video recently
21 posted of a Lilly salesperson who talked about the way Lilly
22 markets the drugs?

23 A Yes.

24 Q Did that also mirror what these documents show?

25 A Absolutely. It appeared on U-Tube and we disseminated

1 that and in there the former Zyprexa salesman tells exactly
2 what they were taught and how they were taught to defuse
3 doctors's concerns who saw their patients as he put it blow
4 up.

5 Q When you reviewed the documents, was there anything in
6 those documents that you viewed as trade secrets or
7 confidential information the way that phrase is usually
8 construed?

9 A Absolutely not.

10 MR. FAHEY: Objection.

11 A What it showed me was why they were willing to pay so
12 much money to keep them concealed.

13 MR. LEHNER: Same objection, no foundation for which
14 she could answer that question.

15 THE COURT: I'll allow it. It shows state of mind.

16 Q After you received the notice from Mr. Gottstein, did you
17 disseminate the documents?

18 A No.

19 MR. MILSTEIN: That's all I have, your Honor.

20 THE COURT: Anybody on the phone wish to examine?

21 MR. CHABASINSKI: No, your Honor.

22 THE COURT: Any redirect?

23 MR. LEHNER: No, your Honor, not at this time. The
24 only thing I ask is that the documents she brought with her be
25 returned to Mr. Woodin as they have been by the others in the

1 court.

2 THE COURT: Any objection?

3 MR. HAYES: No.

4 MR. MILSTEIN: We have an objection. That is what
5 this hearing is about, whether or not this Court will issue a
6 preliminary injunction ordering a person who did not act in
7 concert with nor did she aid or abet the distribution of these
8 documents by Dr. Egilman, whether this Court can order this
9 witness to return these documents.

10 MR. VON LOHMANN: Let me also just note for the
11 record, your Honor, none of the non-parties have been ordered
12 by this Court or any other Court to return these documents.

13 The January 4th order that your Honor signed also
14 asks simply that they not further disseminate the documents.
15 There is nothing in the January 4th order just as there was
16 nothing in the December 29 order suggesting that the Court is
17 ordering the return of those documents.

18 So what counsel here is asking for is not the
19 enforcement of a prior ruling, what counsel is asking here is
20 something entirely new.

21 MR. LEHNER: This Court asked Mr. Gottstein to
22 retrieve the documents and return them to Mr. Woodin, have
23 people return them directly to Mr. Woodin. That request was
24 based particularly with respect to the first order. She says
25 she has them. Other people felt compelled to comply with that

1 request.

2 MR. MILSTEIN: It's a temporary restraining order
3 that was issued. If the court issues a preliminary injunction
4 order then Ms. Sharav is prepared to give the documents or the
5 DVDs to the special master.

6 If the Court dissolves the confidentiality order
7 with respect to the documents, as we have requested, or
8 decides not to issue a preliminary injunction, then she can
9 continue to hold on to these document and she can post them on
10 her website and distribute them to the public which needs to
11 see them to prevent further harm.

12 THE COURT: The order of December 18 from Judge
13 Cogan orders them returned, I believe.

14 MR. VON LOHMANN: I believe that order orders Mr.
15 Gottstein to request their return but especially considering
16 none of the parties are named in the order, I think it's
17 certainly -- I can't speak for -- none of these non-parties
18 even had seen this particular order at the time.

19 MR. MILSTEIN: And they did not request the New York
20 Times return the documents.

21 THE COURT: We don't have the New York Times here.
22 We have your client.

23 MR. MILSTEIN: I understand that.

24 THE COURT: Unless you want to represent the New
25 York Times --

1 MR. MILSTEIN: The New York Times.

2 THE COURT: -- and expand the orders to include it.
3 We can talk about the witness before us.

4 MR. MILSTEIN: The New York Times is noticeably
5 absent from the request of Eli Lilly to be ordered to return
6 these documents.

7 THE COURT: I understand.

8 Well, the order of December 18th requires Mr.
9 Gottstein to attempt to recover the documents.

10 MR. MILSTEIN: To request and she has refused Mr.
11 Gottstein. It doesn't order her. It orders Mr. Gottstein to
12 ask her and she says no, I'm going to wait until the Court
13 orders me if the court can order me.

14 MR. McKAY: And Mr. Gottstein complied with respect
15 to that order.

16 THE COURT: He is here in court.

17 Paragraph 4 says: "Mr. Gottstein shall immediately
18 take steps to retrieve any documents subject to this order
19 regardless of their current location and return all such
20 documents to Special Master Woodin. "

21 Come forward, sir.

22 Did you ask the witness to return the documents?

23 MR. GOTTSTEIN: Are you asking me if I did?

24 THE COURT: Yes.

25 MR. GOTTSTEIN: Would you return the documents?

1 THE WITNESS: I will return them if the Court orders
2 it.

3 THE COURT: You refuse to turn them over at his
4 request?

5 THE WITNESS: Yes.

6 THE COURT: I'm ordering you to turn them over to
7 your attorney to hold them in escrow.

8 MR. MILSTEIN: I'll do that, your Honor.

9 THE COURT: Give the envelope to the attorney.
10 Are those all of the documents you have?

11 THE WITNESS: Yes.

12 THE COURT: You can seal it. Sign it. We'll hold
13 them in escrow subject to -- you'll hold them in escrow
14 subject to the order of the Court.

15 MR. MILSTEIN: I'll do that, your Honor.

16 THE COURT: Any reason why the witness should not
17 now be excused?

18 MR. HAYES: No, your Honor.

19 THE COURT: You are excused?

20 THE WITNESS: Thank you.

21 (Witness excused.)

22 MR. FAHEY: Your Honor, if we take a short break, we
23 can -- if we can take a short break, we can have Mr. Meadow on
24 the phone who we believe will be a short witness.

25 THE COURT: It's 10 to 4:00 we'll break until 4:00.

1 (Recess.)

2 THE COURT: Proceed with your next witness, please.

3 MR. CHABASINSKI: Your Honor, before we proceed,
4 please excuse my naivete but I'm somewhat confused about where
5 we are procedurally.

6 Are we getting evidence here about whether there
7 should be a preliminary injunction? Because I'll point out to
8 you the TRO expired yesterday.

9 THE COURT: No, it did not expire yesterday. I
10 issued an order last night extending it until I decided this
11 motion.

12 MR. CHABASINSKI: All right, your Honor, I wasn't
13 aware of that.

14 THE COURT: It should have been sent to you.

15 MR. CHABASINSKI: It wasn't.

16 MR. HAYES: They are about to call Rick Meadow as a
17 witness. My understanding is that he gave an affidavit to
18 them. He was an attorney that works for Mark Lanier who is
19 the attorney of record on the underlying litigation.

20 So there are two questions I have. One is when
21 Egilman was talking to Meadow, he thought he was talking to
22 his attorney in regard to the issues in regard to the
23 confidentiality agreement but even if he wasn't, that is
24 wrong. He certainly was talking to a man under valid work
25 product issues.

1 You are always right on these matters, but --

2 THE COURT: I don't understand your point.

3 MR. HAYES: They are calling Rick Meadow to testify
4 as to conversations with Egilman. Well, Egilman thinks that
5 Meadow is his lawyer and Meadow is working for Lanier who is
6 clearly the lawyer for the class and the work that Egilman is
7 doing for Lanier and Meadow is clearly covered by the work
8 product.

9 THE COURT: Your client is not represented by anyone
10 so far as I know except you. The fact that he was retained by
11 an attorney's firm to give expert opinion does not make the
12 firm his personal lawyer when he commits some kind of delict,
13 if I understand your position.

14 MR. HAYES: My position is if he then goes back to
15 him -- I have two questions. The first -- let's take the
16 first one first, which is that now he goes to the lawyer and
17 they discuss something in regard to the underlying case not
18 what he did but the issuance of the confidentiality order.
19 Isn't that covered by the -- wouldn't that be covered by the
20 work product exception?

21 THE COURT: It's not up to him to raise the issue,
22 it's up to the law firm. The law firm, as I understand it, is
23 in opposition to your client.

24 MR. HAYES: So unless Lanier exercises that.

25 THE COURT: They haven't. If they did, I'd have to

1 answer the question. I don't have to because I don't see that
2 the work product belongs to your client, just to the retained
3 expert.

4 Anything further?

5 MR. HAYES: No, your Honor.

6 THE COURT: But I'm not sure I understand the issue
7 fully and I invite you to submit a brief.

8 MR. HAYES: Thanks, judge.

9 THE COURT: Call your witness, please.

10 MS. GUSSACK: We call Richard D. Meadow.

11 MR. MEADOW: I'm on the telephone. Thank you for
12 hearing me by phone. I'm in Atlantic City on trial.

13 THE COURT: Swear the witness.

14 RICHARD D. MEADOW, having been called as a
15 witness, first being duly sworn, was examined and
16 testified as follows:

17 THE CLERK: Please restate your name.

18 THE WITNESS: Richard D. Meadow, M-E-A-D-O-W.

19 THE CLERK: Thank you.

20 DIRECT EXAMINATION

21 BY MR. FAHEY:

22 Q Mr. Meadow, this is Sean Fahey on behalf of Eli Lilly and
23 Company.

24 Good afternoon.

25 A Good afternoon, Mr. Fahey.

1 Q You're an attorney in the State of New York?

2 A Correct.

3 Q And you are the managing attorney of the Lanier law firm?

4 A In New York City, yes.

5 Q And the Lanier law firm is one of the members of the

6 Zyprexa 2 plaintiffs steering committee?

7 A At the moment, yes.

8 Q And did you prepare an affirmation with respect to your

9 knowledge of the facts relating to the issues that bring us

10 here today?

11 A Yes, I did.

12 Q I'd like to have that marked as Petitioner's 12.

13 THE COURT: Without objection, so marked.

14 MR. FAHEY: And move it into evidence also.

15 THE COURT: In evidence.

16 (So marked in evidence Petitioner's Exhibit 12.)

17 THE WITNESS: Unfortunately, judge, I do not have a

18 copy in front of me now.

19 THE COURT: We'll try to assist you as far as

20 possible. If you find that you need a copy and reading parts

21 you are interested in does not help you, we can adjourn, but

22 let's see how we proceed.

23 THE WITNESS: Thank you, judge.

24 Q You prepared that affirmation based on your personal

25 knowledge, correct?

1 A Correct.

2 Q And everything in the affirmation is true to the best of
3 your knowledge?

4 A Correct.

5 Q And you swore that -- you affirmed under penalty of
6 perjury that the information was true and correct?

7 A Correct.

8 Q You spoke to Dr. Egilman on December 13, correct?

9 A Without looking at it, I believe so, yes.

10 Q That was the Wednesday, December 13?

11 A Yes.

12 Q And you told him not to produce documents requested in
13 this subpoena that had been issued from the State of Alaska?

14 A I said don't do anything with the subpoena until you hear
15 from me.

16 Q And you did that because you knew there was a process
17 that was being followed under the protective order and that
18 Lilly had already started that process, correct?

19 A I had received a phone call from Andy Rogoff and I told
20 him that I would reach out to Dr. Egilman and tell him not to
21 do anything.

22 Q And Andy Rogoff was an attorney for Lilly?

23 A Correct.

24 Q And he said -- what did Dr. Egilman say to you?

25 A He just said yes, Rick.

1 Q And you -- what did you understand that to mean?

2 A That he understood that I told him don't do anything. I
3 don't want to read into other than what he said to me.

4 Q And you later learned that he had lied to you and that he
5 had already begun to?

6 MR. HAYES: Objection.

7 THE COURT: Yes.

8 Q I'll rephrase it.

9 You later learned despite what he said to you on the
10 phone, he had already begun producing documents to Mr.
11 Gottstein?

12 MR. HAYES: I still object to what he said. It's a
13 characterization.

14 THE COURT: Yes.

15 Q Did you later learn that Mr. Gottstein -- I'm sorry.
16 Strike that.

17 Did you later learn that Dr. Egilman had already
18 begun transferring documents to Mr. Gottstein?

19 A Yes.

20 Q And after you learned what had happened in this case, you
21 terminated Dr. Egilman as a consultant in this matter?

22 A For Zyprexa, correct.

23 MR. FAHEY: Thank you. I have no further questions.

24 MR. HAYES: I do.

25 CROSS-EXAMINATION

1 BY MR. HAYES:

2 Q My name is Ed Hayes.

3 Mr. Meadow, I'm the lawyer for Dr. Egilman.

4 A Hi, Mr. Hayes.

5 Q You understand, by the way, before I begin, you
6 understand that I am personally friendly with Mark Lanier, is
7 that correct?

8 A Yes.

9 Q And I think you and I once had dinner, is that possible?

10 A I believe so, yes.

11 Q And now in this particular case there was an order, what
12 has been referred to as a confidentiality order, that was
13 drawn up and signed by the parties, is that correct?

14 A You mean Dr. Egilman?

15 Q No, something that was submitted to the judge, he signed
16 it and it's the case management order I think number 3 or
17 something, right?

18 A Yes.

19 Q Now, that was the order that covered the confidentiality
20 of certain documents that were turned over to the defense, is
21 that correct?

22 A Recovered by the defense, correct.

23 Q Turned over to the defense?

24 A You are talking about subsequent?

25 Q No, I'm talking about an order that was entered into

1 between the plaintiffs and Lilly which was signed by the judge
2 that governed the production of documents to the defense --
3 from the defense to the plaintiffs.

4 I'm getting confused.

5 A Yes, from Lilly to plaintiffs.

6 Q Now, was that order a subject of negotiation?

7 A I was not part of the original order.

8 Q Do you know why the order in paragraph -- in the
9 paragraph that refers to reasonable notice upon receipt of a
10 subpoena, do you know why there is no definition in that
11 paragraph for what constitutes reasonable notice?

12 A I did not negotiate that. That was negotiated actually
13 probably years before we got into the litigation.

14 Q Did you know -- do you know that in there, that order,
15 there are portions where it does give a definition of
16 reasonable notice, for instance, if they receive some subpoena
17 from a competitor?

18 A I don't recall but that sounds familiar.

19 Q Now, in this particular case you gave a document to Dr.
20 Egilman which is called endorsement of protective order, is
21 that right?

22 A Correct.

23 Q And you have seen the copy of the endorsement of
24 protective order that was signed by Dr. Egilman?

25 A Yes.

1 Q And is it fair to say that he crossed out some portion of
2 it and said and I agree to be bound by its terms as amended
3 below and then in the next paragraph which states originally:
4 "I further agree that I shall not disclose to others except in
5 accord with the order any confidential discovery materials in
6 any form whatsoever, and that such confidential discovery
7 materials and the information contained therein may be used
8 only for the purposes sustained by the order unless release is
9 needed to protect public health."

10 Is that correct?

11 A There were two endorsements, so you might be talking
12 about the first one.

13 Q That was certainly on -- that is certainly signed by him
14 and it certainly appeared on one of the endorsements he
15 signed, is that correct?

16 A I don't have it in front of me but I believe what you are
17 telling me.

18 MR. HAYES: I offer it in evidence.

19 THE COURT: As a separate document?

20 MR. HAYES: Yes.

21 THE COURT: That would be Respondent's 1 in
22 evidence.

23 (So marked in evidence as Respondent's Exhibit 1.)

24 THE COURT: This refers to the order of 11/10/2006.

25 Is that the order that you are relying on? It was

1 an order of 2004.

2 MR. FAHEY: CMO3 was entered in 2004, your Honor.

3 THE COURT: Did he agree in a separate document to
4 follow 2004?

5 MR. FAHEY: Yes, Mr. Meadow's affidavit refers to
6 the subsequent endorsement of another exhibit.

7 THE COURT: And this is within exhibit what?

8 MR. FAHEY: That is Exhibit C to Petitioner's 12.

9 THE COURT: Have you seen this endorsement?

10 MR. HAYES: Yes.

11 THE COURT: It says the only change here is
12 authorized by the order unless this conflicts with any other
13 sworn statements.

14 With respect to what is now Respondent's 2, it
15 refers to a protective order of 11/10/2006. Where is that
16 order?

17 MR. FAHEY: There is no such order, your Honor. I'm
18 not sure what that means.

19 THE COURT: I don't know of any such order.

20 MR. FAHEY: We're not aware of any.

21 THE COURT: Counsel, do you know what 11/10/2006 is?

22 MR. HAYES: I think that is a typo but I'm not sure.

23 THE COURT: 2004 is crossed out and 2006 is entered.

24 MR. HAYES: Right.

25 THE WITNESS: Maybe the day he signed it, judge.

1 THE COURT: When had the original order of 2004 been
2 entered?

3 MR. FAHEY: I believe August 3rd of 2004.

4 THE COURT: Not 11/10?

5 MR. FAHEY: No.

6 THE COURT: So I don't know what 11/10 --

7 MR. FAHEY: It appears that the order was signed by
8 Dr. Egilman on that date.

9 THE COURT: 11/14/06 is when he signs the order
10 relating to 2004 which is after the date he signed
11 Respondent's 2, correct?

12 MR. HAYES: Yes.

13 THE COURT: All right, let me read it.

14 (Pause.)

15 THE COURT: Here is 2.

16 Q Mr. Meadow, you receive the first endorsement of
17 protective order that says on it unless release is needed to
18 protect public health. You then call Dr. Egilman and you say
19 to him, you explain to him the reason why this protective
20 order is required and that he would need to reexecute another
21 protective order, is that right?

22 A Yes.

23 Q Now, you were working at that time for Mark Lanier on a
24 case known as Zyprexa 2, is that correct?

25 A I can't hear you.

1 Q You were working at that time for an attorney who was an
2 attorney of record in Zyprexa 2?

3 A Correct.

4 Q And you knew that Dr. Egilman had worked for Mark Lanier
5 on many other cases?

6 A Correct.

7 Q Did you know whether or not Dr. Egilman had ever signed a
8 confidentiality order in any other case?

9 A Yes.

10 Q You knew that he had?

11 A Yes. In other litigations you mean?

12 Q Yes.

13 A Yes.

14 Q But in those cases did he make an exception if it was
15 necessary to protect public health?

16 A I don't recall.

17 Q When you say you went back to him and he wanted to make
18 -- he is the -- he has been, is it fair for me to
19 characterize, a key witness for Mark Lanier in a number of
20 litigations, is that correct?

21 A Correct.

22 Q And he was in fact, he has been an expert witness for
23 Mark Lanier in the asbestos litigations?

24 A Correct.

25 Q He has been an expert witness for Mr. Lanier in the Vioxx

1 litigations?

2 A Correct.

3 Q And it's fair to characterize Mr. Lanier as having a very

4 high opinion of Dr. Egilman's ability?

5 A Correct.

6 Q Have you ever seen Dr. Egilman testify?

7 A Yes.

8 Q In your opinion, is he an excellent witness?

9 A Yes.

10 Q So it was your desire here to make, enter into an

11 agreement with Dr. Egilman that would enable you to keep using

12 him as a witness in this case, is that right?

13 A Correct.

14 Q And the change that he made here, the changes that he

15 made on these two endorsements, one that said unless required

16 by public health and the other said unless in conflict with

17 other sworn statements, did you communicate those changes to

18 Eli Lilly's counsel in any way?

19 A No.

20 Q When he told you you have an -- you have had some prior

21 dealings with Dr. Egilman?

22 A Excuse me?

23 Q You have had dealings outside this case with Dr. Egilman?

24 A Yes.

25 Q And you have had -- and Mark Lanier has had a great deal

1 of dealings with him?

2 A Correct, as have I.

3 Q Would it be fair to say that you knew that Dr. Egilman
4 feels very strongly about these kind of public health issues?

5 A Yes.

6 Q Would it be fair to say that Dr. Egilman felt in this
7 case that the information presented by Eli Lilly from its
8 internal documents was vital to public health?

9 A I don't know what he thought. I imagine so.

10 Q Now, when he got this and you asked him to put a
11 different amendment or change on the second endorsed order and
12 he said unless this conflicts with any other sworn statements,
13 do you know whether or not he was referring to the oath he
14 took as a doctor?

15 A No, I don't know.

16 Q Did you ask him what were the circumstances that would
17 constitute a sworn statement so that he would feel entitled to
18 disclose these documents?

19 A I thought it was Congressional testimony.

20 Q In cases of Congressional testimony, would there be a
21 subpoena there?

22 A I would assume so. I don't know.

23 Q If there is a subpoena there, there is already a
24 provision in the agreement as to reasonable notice, isn't that
25 correct?

- 1 A Correct.
- 2 Q And you were aware of that order, isn't that correct?
- 3 A Correct.
- 4 Q And reasonable notice has no definition whatsoever, isn't
5 that correct?
- 6 A Like I said, I don't remember the order but I'll accept
7 your interpretation.
- 8 Q Now, did you discuss with Mr. Lanier whether or not you
9 should turn over either of these endorsements to Lilly?
- 10 A Did I discuss with Mr. Lanier?
- 11 No.
- 12 Q So you had a discussion with Egilman -- would you
13 describe Egilman as a -- withdrawn.
- 14 Egilman is -- would you characterize him as an
15 independent thinker?
- 16 A Absolutely.
- 17 Q Is he a man that you consider a captive of the Mark
18 Lanier law firm, that is, he takes cases and does whatever the
19 Lanier law firm tells them him to do?
- 20 A Do you mean is a juke box type of witness or he tells us
21 what he thinks?
- 22 Q He tells you what he thinks?
- 23 A He tells us what he thinks.
- 24 Q Does he ever disagree with you?
- 25 A All the time.

1 Q In this case he disagreed with you about what he was
2 willing to do in regard to the enforcement of the protective
3 order, is that correct?

4 A I'm not following your question.

5 Q You gave him a protective order, an endorsement of a
6 protective order. I assume you gave that endorsement to
7 everybody else?

8 A Correct.

9 Q Did anybody else make any changes in it besides Dr.
10 Egilman?

11 A No.

12 Q So you now know that he is a very important witness to
13 Mr. Lanier, that he is extremely strong-minded, that he will
14 tell you what he thinks and disagree with you whether you like
15 it or not. You get two documents from him. In both cases
16 there are changes and you don't tell Mr. Lanier and you don't
17 tell Lilly?

18 A Correct.

19 Q And at the time you got this --

20 A Hello.

21 Q I'm here. I'm reading. It takes me a little time
22 sometimes.

23 In paragraph 9 of your document you say on
24 December 13 you tell Dr. Egilman not to do anything, is that
25 correct?

- 1 A Correct.
- 2 Q And he says yes, Ricky, is that correct?
- 3 A Correct.
- 4 Q He does not say I have already done something, he just
5 says yes, Ricky?
- 6 A Correct.
- 7 Q Now, the -- do you remember what day of the week the 13th
8 was?
- 9 A I think it was a Wednesday.
- 10 Q You say on the 15th that you learned from Dr. Egilman's
11 own narrative that he had given the documents as of
12 December 12th, is that right?
- 13 A No, not exactly.
- 14 Q Withdrawn.
- 15 In Dr. Egilman's narrative that you read on
16 the 15th, he says I gave the documents to Mr. Gottstein on
17 the 12th, is that right?
- 18 A Correct.
- 19 Q When did he prepare that narrative?
- 20 A On the 15th, I think.
- 21 Q And he was asked to do so?
- 22 A From what I understand, yes.
- 23 Q He didn't try to keep it a secret from you, he put it
24 down in the narrative, is that correct?
- 25 A Correct.

1 Q Have you had occasion to -- did there come a time that
2 you became aware of certain documents that had been produced
3 by the FDA in regard to the testing of Zyprexa?

4 A You have to be more specific. Which documents are you
5 talking about? There are millions of documents.

6 Q Did there come a time that you learned that Dr. Egilman
7 had somehow gotten possession or learned about certain
8 internal FDA documents?

9 A Yes.

10 Q And he was -- one of the things that you would expect him
11 to do as an expert witness was to make that kind of
12 investigation, is that correct?

13 A Correct.

14 Q Now, the fact of the matter is that when you filed the
15 Zyprexa lawsuit, that complaint was a public record, is that
16 correct?

17 A Correct.

18 Q And part of the theory of the case was at the time that
19 Zyprexa was marketed, it was marketed quote unquote off label,
20 for uses that were not prescribed, is that right?

21 A Correct.

22 Q And is it also fair to say that the complaint made the
23 allegation that when Lilly brought the drug to the FDA and to
24 the market, that they had internal information that showed
25 that there were certain dangers in regard to the drug?

1 A Correct.

2 Q So way before, way before November of 2006 it was a
3 matter of public record, these two central allegations, is
4 that correct?

5 A The allegations, yes.

6 Q And the lawsuit was a matter of some public interest.
7 There were articles about it. There were newspaper stories.
8 There were other media that paid attention to it, is that
9 correct?

10 A Correct.

11 Q So when --

12 MR. HAYES: Nothing further, judge.

13 THE COURT: Any other person?

14 MR. MILSTEIN: I just have a few questions.

15 CROSS-EXAMINATION

16 BY MR. MILSTEIN:

17 Q This is Alan Milstein.

18 How many documents approximately did Lilly produce
19 in your litigation?

20 A Millions, I think.

21 Q And what percentage of the millions of documents that
22 they produced to the plaintiffs' attorneys in the litigation
23 did they mark confidential?

24 A I think all of them.

25 Q So you had entered?

1 A I didn't look at all of them so I'm not sure.

2 Q Let see if I have this right. The plaintiffs' attorneys
3 and Lilly's attorneys enter into a confidentiality order
4 during the course of the litigation, is that right?

5 MR. FAHEY: Objection, foundation. He already said
6 that it was already entered into before his involvement.

7 Q At some point in time, Lilly's attorneys and the
8 plaintiffs' attorneys enter into a confidentiality order,
9 correct?

10 A Yes.

11 Q And that confidentiality order allows Lilly on its own to
12 designate any document that it sees fit as confidential,
13 correct?

14 MR. FAHEY: Objection. The Court order speaks for
15 itself.

16 A I don't remember.

17 Q Nevertheless, you have seen hundreds of thousands of
18 documents produced by Lilly in the litigation, correct?

19 A Have I seen personally? Not that many but I've seen a
20 lot.

21 Q And virtually every document that you've seen produced by
22 Lilly in the litigation Lilly chose to mark as confidential,
23 correct?

24 MR. FAHEY: Objection, foundation.

25 THE COURT: If he knows. You may answer.

1 A Most of what I saw were.

2 Q You did have occasion, did you not, to read the New York
3 Times articles about the Zyprexa -- about Zyprexa which
4 discussed the documents which Dr. Egilman had turned over to
5 Mr. Gottstein, correct?

6 A Yes.

7 Q And the information in the New York Times articles was
8 consistent with the facts that you developed, you and your
9 firm developed during the course of the litigation, correct?

10 MR. FAHEY: Objection, foundation.

11 THE COURT: I'll allow it.

12 A I'm sorry, I didn't hear you, judge.

13 MR. MILSTEIN: He said you can answer the question.

14 A Yes.

15 Q It's your belief, is it not, sir, that at least some of
16 your clients suffered harm because they or their physicians
17 did not have access to the information in the documents that
18 Dr. Egilman produced to Mr. Gottstein?

19 Do you want me to repeat that?

20 A Yes, would you please.

21 Q It's your belief, isn't it, sir, that at least some of
22 your clients suffered harm because they did not have access to
23 the information in the documents produced by Dr. Egilman to
24 Mr. Gottstein?

25 MR. FAHEY: Objection, no testimony Mr. Meadow knows

1 which documents have been produced by Mr. Gottstein.

2 Q I'll rephrase.

3 It's your belief, sir, that some of your clients
4 suffered harm because either they or their physicians did not
5 have access to the information revealed in the New York Times
6 article?

7 A Possibly.

8 MR. MILSTEIN: That's all I have.

9 THE COURT: Any other person wish to examine?

10 MR. McKAY: Yes, your Honor.

11 CROSS-EXAMINATION

12 BY MR. McKAY:

13 Q Mr. Meadow, my name is John McKay and I represent James
14 Gottstein.

15 First of all, have you ever spoken with Mr.
16 Gottstein?

17 A No.

18 Q And when you make representations concerning what
19 communications were had with --

20 A I can't hear you.

21 Q Mr. Meadow, you've made certain representations in your
22 affidavit and in correspondence that has been cited before and
23 attached as an exhibit concerning communications with Dr.
24 Egilman about this matter. You have not spoken with Mr.
25 Gottstein so you are not claiming that Mr. Gottstein made any

1 representations about these documents to you?

2 A I never have spoken to written or communicated with Mr.
3 Gottstein. I don't know him.

4 Q And so you have not -- to your knowledge, did you or
5 anyone else communicate to Mr. Gottstein that he should not
6 release these documents before the time that he had actually
7 released these documents?

8 A I have never spoken to Mr. Gottstein.

9 Q To your knowledge -- you're familiar with -- one more
10 question along those lines.

11 You have said that and in the correspondence it's
12 been portrayed that your witness, Dr. Egilman, misrepresented
13 that he had not produced documents.

14 As I read your affidavit, you simply say that he --
15 you told him not to do anything after you talked to him and he
16 didn't do -- he had already produced those documents, isn't
17 that correct?

18 THE COURT: You are arguing with the witness.

19 A I don't understand your question.

20 THE COURT: We have that in evidence. You are
21 arguing.

22 MR. McKAY: Thank you. It wasn't my intention. I
23 apologize.

24 Q Mr. Meadow, are you familiar with the confidentiality
25 order CMO-3? Are you?

1 A Yes.

2 Q And you made some reference to this being before you got
3 in the case when you talked about some earlier documents.

4 How long have you been involved in this case?

5 A Since probably March or April of this year.

6 Q But you are familiar with the confidentiality order in
7 the case?

8 A Yes.

9 Q And this confidentiality order states that documents may
10 only be considered confidential if they are designated as such
11 in good-faith pursuant to the protective order, is that
12 correct?

13 A I don't have anything in front of me and I haven't read
14 it in a while.

15 Q You say you haven't read it?

16 A I haven't read it in a while.

17 Q If you don't know, we can either provide you with a copy
18 or read you the language.

19 A It sounds familiar. That is standard in a lot of these
20 orders.

21 Q It's your understanding that to not be in violation of
22 the protective order, documents would not be marked
23 confidential except in good-faith, a good-faith representation
24 that these are legitimately confidential documents?

25 A I'm not following you. I think I'm following you but I

1 don't know.

2 Q The protective order has certain requirements before a
3 document can be marked confidential, is that correct?

4 A Yes.

5 Q So you can't just willie-nilly mark things confidential?
6 There is an obligation to make a representation under the
7 protective order that these documents in fact qualify in good
8 faith for designation as a confidential document, isn't that
9 correct?

10 A I assume so, yes.

11 Q Are you familiar with a settlement of a portion of the
12 Zyprexa litigation?

13 MR. FAHEY: Objection to form.

14 I'm not sure which --

15 THE COURT: You can answer it.

16 Did you hear the question?

17 THE WITNESS: I think so, judge.

18 I know Zyprexa 1 settled. Zyprexa 2 settled but
19 that was subject to a confidentiality order.

20 Q I think you said, and I'm sorry we're having trouble
21 hearing, it's a bit garbled in the courtroom, but did you just
22 say that Zyprexa 2 has settled but it's subject to a
23 confidential order?

24 A With my client, yes.

25 Q That's what I was asking.

1 How recently did that occur?

2 A Do I have to answer these if I am subject to a
3 confidential order?

4 THE COURT: You do not.

5 Q And I apologize because I am not as familiar with the
6 litigation.

7 So the question I have and you can tell me if I'm
8 permitted to ask this given the confidentiality order, my
9 question is simply does whatever settlement that you have
10 entered into on behalf of your client contain a provision that
11 says that the documents that are at issue here may not be
12 released?

13 A Judge --

14 Q Do you have -- are you able to speak into --

15 THE COURT: I don't see the relevancy of this, so
16 I'll cut it off.

17 Do you have anything else?

18 MR. McKAY: No.

19 My question is whether the settlement agreement that
20 has been entered into has a provision that requires documents
21 at issue here to be maintained as confidential because it goes
22 to the question of settlements that -- whether they have
23 agreed to keep documents secret as a result of the settlement.

24 THE COURT: I don't see that it makes any
25 difference. They are not relying upon those original

1 agreements, they are relying upon CMO-3.

2 MR. McKAY: Then I have no further questions.

3 THE COURT: Anybody else in the courtroom?

4 MR. HAYES: No.

5 MR. VON LOHMANN: No.

6 MR. MILSTEIN: No.

7 THE COURT: Anybody on the telephone?

8 (No verbal response.)

9 MR. FAHEY: I want to clarify one issue.

10 REDIRECT EXAMINATION

11 BY MR. FAHEY:

12 Q This is Sean Fahey again.

13 Mr. Meadow, there were two protective orders
14 attached to your affidavit, one dated November 10, 2006 and
15 signed by Dr. Egilman on that date, the other signed by Dr.
16 Egilman four days later.

17 I'm going to read you paragraph 7 of your affidavit
18 which talks about that second affidavit and ask that you
19 respond to it when I am finished reading.

20 On November 14, 2004 -- I think that is actually
21 2006 -- November 14, 2006, Dr. Egilman executed another
22 protective order attached as Exhibit C. On this order Dr.
23 Egilman made one edit to the second paragraph of the form
24 protective order in which he represented that he would abide
25 by the protective order "unless this conflicts with any other

1 sworn statements". I inquired of Dr. Egilman as to why he
2 made this edit. Dr. Egilman explained that if he were to be
3 subpoenaed by the FDA or Congress, he wanted to insure that
4 the protective order would not preclude providing testimony
5 concerning Zyprexa. Since that explanation did not conflict
6 with my understanding of the purposes behind the protective
7 order, nor did it conflict with my understanding of the
8 protective order would not in any event have precluded such
9 testimony by Dr. Egilman, and because Dr. Egilman assured me
10 that he understood the protective order, I accepted this
11 protective order."

12 Is that true, Mr. Meadow?

13 A Yes.

14 MR. FAHEY: Thank you. No further questions.

15 MR. HAYES: I have two questions. Can I ask?

16 THE COURT: Yes.

17 RECROSS-EXAMINATION

18 BY MR. HAYES:

19 Q Mr. Meadow, you are familiar with CMO-3?

20 A I couldn't hear anything.

21 Q Mr. Meadow, you are familiar with the order that the
22 Court signed referred to as CMO-3, is that correct?

23 A Yes.

24 Q Did that order have in it anywhere something that said
25 service in regard to being -- receiving a subpoena, that you

1 had to notify you or your law firm or any of the plaintiffs's
2 law firms on receipt of a subpoena?

3 A No.

4 Q It only said that you had to give reasonable notice to
5 Eli Lilly, is that correct?

6 A Correct.

7 Q Did it give an address or a law firm that this reasonable
8 notice had to be given to?

9 A I don't think so.

10 MR. HAYES: Thank you.

11 Nothing further.

12 THE COURT: May I release the witness?

13 MR. HAYES: Yes.

14 MR. FAHEY: Yes.

15 MR. MCKAY: Yes.

16 MR. VON LOHMANN: Yes.

17 THE COURT: Thank you, Mr. Meadow. You are
18 released.

19 (Witness excused.)

20 THE COURT: Any other witness for the petitioner?

21 MR. LEHNER: My understanding was Mr. David Oaks was
22 on the phone earlier and if he is on the phone, we'd like to
23 call him as a witness.

24 THE COURT: Mr. Oaks, are you on the phone?

25 MR. OAKS: Yes, I am, your Honor.

1 THE COURT: What are you going to ask him?

2 MR. LEHNER: He was one of the people who --

3 MR. OAKS: Who is speaking?

4 MR. LEHNER: My name is George Lehner, on behalf a
5 Eli Lilly.

6 We would like to question him about posting
7 information on various websites that made documents available
8 that are subject to the protective order and were received.

9 THE COURT: Before you examine him, are the
10 respondents going to put on any evidence at all?

11 MR. OAKS: Do you mean the 3 people that I
12 represent?

13 THE COURT: You or any other respondent?

14 MR. CHABASINSKI: I have decided not to put on any
15 witness at this time after all.

16 THE COURT: Are you going to submit any documents?

17 MR. CHABASINSKI: Not at this time, I'm not planning
18 to, no, except I may submit some briefs indicating why I think
19 my client should not be subject to --

20 THE COURT: I'll permit a briefing schedule.

21 Is anybody else in court going to submit any witness
22 or evidence?

23 MR. VON LOHMANN: No, your Honor.

24 MR. HAYES: No, your Honor.

25 MR. MILSTEIN: No, your Honor.

1 THE COURT: So this is the last witness, correct?

2 MR. HAYES: Yes.

3 THE COURT: I'll allow you to finish tonight.

4 MR. CHABASINSKI: May I interject something here?

5 It seems there are two issues we're dealing with
6 here and I suspect that Mr. Oaks' testimony isn't going to
7 address either one of them.

8 THE COURT: We'll find out.

9 MR. CHABASINSKI: One is the alleged violation.

10 THE COURT: Excuse me. We'll find out.

11 MR. CHABASINSKI: I don't want to be making constant
12 objections which I am sure you will not appreciate.

13 THE COURT: No.

14 MR. CHABASINSKI: If I may be allowed to lay out my
15 position for a minute here, your Honor.

16 THE COURT: You may.

17 MR. CHABASINSKI: I think we're either looking at
18 anything going to whether there was a violation of the
19 protective order and who violated it or we're looking at
20 whether my clients aided and abetted that violation of the
21 protective order so that they would be subject to an
22 injunction.

23 Of course, we haven't heard Mr. Oaks' testimony yet
24 but I anticipate that it's not going to go to either of those
25 issues and I'm sure you don't want me to make constant

1 objections but I really have to in this case if that's the way
2 the testimony is going to go.

3 THE COURT: I have no desire to inhibit you in any
4 way in your lawyer-like activity. So if you find anything
5 objectionable, object and I'll rule.

6 Swear the witness, please.

7 DAVID OAKS, having been called as a
8 witness, first being duly sworn, was examined and
9 testified as follows:

10 THE CLERK: Give your name.

11 THE WITNESS: David William Oaks, O-A-K-S.

12 THE COURT: Try to be crisp.

13 DIRECT EXAMINATION

14 BY MR. LEHNER:

15 Q Mr. Oaks, my name is George Lehner and I represent Eli
16 Lilly.

17 Mr. Oaks, are you a director of an organization
18 known as MindFreedom?

19 A Yes, I am, MindFreedom International.

20 Q Would you briefly describe for the Court what MindFreedom
21 is and does?

22 A MindFreedom is a nonprofit 501(c)(3) that unites
23 thousands of folks and a hundred groups to work for human
24 rights of people in the mental health system.

25 Q Do you know and do you have a position in MindFreedom in

1 connection to being the director?

2 A I am only the director and that is it.

3 Q By director, that means you run the operations of
4 MindFreedom, is that correct?

5 A I'm the head of the staff here.

6 Q And as head of the staff of MindFreedom you served a copy
7 of the order that was issue on January 4th by the Honorable
8 Judge Weinstein, the order for a temporary mandatory
9 injunction which names MindFreedom, is that correct?

10 A Yes, sir, and we immediately complied and put a
11 disclaimer on our website to that effect.

12 Q Prior to receiving that, had you engaged in any activity
13 in which you had attempted to disseminate or make available to
14 or inform people how to obtain access to the documents that
15 had been discussed here today?

16 MR. CHABASINSKI: This is where I'm going to object,
17 your Honor. I don't see how that is relevant. MindFreedom
18 was not under any Court order and any activity of this sort
19 would be protected by the First Amendment and really doesn't
20 speak to any violation of the protective order or any
21 violation of an injunction.

22 THE COURT: Overruled.

23 You may answer.

24 A Well, your Honor, there are about three different
25 questions. I'll try to address them all.

1 I need to make it absolutely clear that we have
2 never received a copy of these documents from Jim Gottstein.
3 We have not received a DVD. We have not disseminated that in
4 any way and we have not posted those materials on our website.
5 Never have we done that in any way, shape or form.

6 What we have done is do what we always do, which is
7 put out a human rights alert similar to a journalist though
8 obviously with an interest in advocacy for a cause.

9 So we research and put out human rights alerts about
10 material that is extremely important to our members and the
11 public. And so to that extent when we did discover that this
12 information was posted by others on the internet, we did
13 report on that and some human rights alerts and got word out
14 to people but in no way, shape or form have we posted those
15 documents ourselves to the internet or disseminated them in
16 that way. We talked about them. We reported them, we used
17 our First Amendment rights and that's what we have done.

18 Q You said you never received a copy from Mr. Gottstein.
19 Did you ever receive a copy of these documents in any format
20 electronic, DVD from any other party?

21 A Our office has never received the DVD. When the -- when
22 it was stated on the internet that anonymous parties had
23 posted these links as they have throughout, and my
24 understanding is they are still there, we did click and
25 download but I haven't done absolutely anything with those

1 documents in any way. But like apparently thousands of
2 people, we did click and download.

3 Q And you said you did discover but you didn't say how
4 these documents were available for you to view, click and
5 download.

6 How did you discover that these documents were
7 available?

8 A We received anonymous alerts. We have never determined
9 the identity of individuals who created these alerts, that
10 stated that there were links available for download. And
11 that's how we found out about this and then we investigated
12 that, looked into it, tried to find out about the accuracy. I
13 did go on to the wicky, always publicly, never hiding my
14 identity in any way, never seeking to hide my identity.

15 I did go on to wicky about this subject and also an
16 E-mail list to ask questions to find out about accuracy. And
17 always all the information I received on the documents were
18 anonymous alerts that we got out on this. I guess an
19 exception would be apparently an individual acting on his own
20 Eric Whalen apparently posted a link but that was not done by
21 us and I never clicked on that link and never downloaded it.

22 So all the information we got was from anonymous
23 posts and then we reported on them and we never transmitted
24 the documents in any way, shape or form.

25 Q Let me ask you a little bit about what you just described

1 as the wicky and I believe you are talking about what has been
2 referred to as Zyprexa.pbwicky.com, is that what you are
3 referring to?

4 A Yes, that is a well publicized wicky which I understand
5 is represented here by Electronic Frontier Foundation.

6 Q Did you create the site Zyprexapbwicky.com?

7 A Absolutely not. We never created that cite or any
8 website ever, including the Zyprexakillsus, which Lilly
9 claimed in their filing that that was our website. That is
10 absolutely untrue. We never set up that website. We never
11 set up the wicky. We don't own it. We never have.

12 MR. FAHEY: Just for the record, just to clear up
13 any confusion, I don't think we ever claimed that MindFreedom
14 set up wicky.

15 A People collaborating with Mr. Gottstein, Mr. Oaks and MFI
16 have another website on reserve, Zyprexakills.us, zero
17 evidence about that, utterly untrue, very unprofessional.

18 Q So do you know who set up the zyprexapbwicky.com?

19 A Absolutely not. These are anonymous -- anonymously
20 created links up on the web and we have reported on that and
21 we have gotten that information out but these are anonymous
22 posts and we did not create them. We reported on it and I
23 guess that's why we're named here, because we are the visible
24 group, but we have done everything aboveboard as a human
25 rights activist group. We did not create or post -- we did

1 not create any website. We did not create any wicky.

2 Earlier in a filing by Eli Lilly, they said we
3 "transferred" documents on that wicky. That is utterly untrue
4 again with zero evidence, unprofessional. We never
5 transferred these documents anywhere, any way, shape or form.

6 Q Let me ask you one question, another question about the
7 wicky.

8 Do you know the identity of a person who has
9 identified I himself as Raphael raffi@phantomsynthetics.com?

10 A I do not have any evidence about who that identity is. I
11 could speculate but I don't want to be open to a deformation.
12 I don't know basically.

13 Q Let me ask you this. If you were to speculate, what
14 would be the basis of the speculation?

15 THE COURT: No, I don't want it.

16 Move to something else.

17 Q Have you communicated with this individual that I have
18 just identified?

19 THE COURT: Move to something else.

20 Q And as you said, you have not posted or made available
21 any information on Zyprexakills, is that correct, is that your
22 testimony?

23 A I couldn't hear your question, sir.

24 Q Was your testimony that you have not posted anything or
25 made any information available on a website that is identified

1 as Zyprexakills?

2 MR. CHABASINSKI: It's a little bit vague. At what
3 time? Because that goes to the fact that MindFreedom was
4 under an injunction. Before the injunction or after the
5 injunction?

6 MR. LEHNER: At any time.

7 A I have not posted -- I believe there is some confusion.
8 I have not posted in any way the Zyprexakills.us. I have not
9 posted. I have openly posted to Zyprexa.pbwicky.com but I
10 have not posted the Zyprexakillsus.

11 Q And have you had occasion and through some of your
12 postings on any website to direct anybody who might be
13 interested to go to the website Zyprexakills?

14 MR. CHABASINSKI: Once again, I think that it's very
15 important to indicate before or after the injunction.

16 MR. LEHNER: At any time.

17 A When we put out the alert, I put out any accurate
18 information I could about where the public could access these
19 files that we really considered extremely important.

20 My best recollection is that when I asked these
21 anonymous sources via their E-mail list and wicky, when I
22 asked them should I post this link Zyprexakills.us, I believe
23 they said that that was not an accurate link for this
24 information.

25 So to the best of my knowledge, I haven't but I

1 might have. But when I wrote these alerts, we tried to list
2 those links that were available for people if they wanted to
3 access these and apparently, yes, that is to the best of my
4 knowledge.

5 Q Mr. Oaks, let me refresh your recollection, and I am
6 looking at a document and I guess I better mark it for the
7 record so that it can be on the record here. And I'll ask
8 that the Court mark this as Petitioner's 13.

9 MR. CHABASINSKI: Your Honor, I'm under a great
10 disadvantage because I don't know what document he is marking
11 up.

12 Can it be read?

13 MR. LEHNER: I'm going to identify it as soon as the
14 judge marks it.

15 If you have our findings of fact in front out of
16 you, it's tab 32.

17 MR. CHABASINSKI: I don't.

18 MR. LEHNER: I'll identify it in a minute.

19 THE COURT: Mark it in evidence but I don't see any
20 point in questioning.

21 MR. LEHNER: I'll be very brief.

22 THE WITNESS: I think looking at my open notes here,
23 I think early on in the process on Christmas day I may have
24 posted that link as one of the several links and then took it
25 off because it didn't seem accurate based on trying to put the

1 links up there. But I'm not trying to hide anything. I tried
2 to post the links where people could obtain these documents
3 which I considered to be crucial for public health and in
4 public discussion about Eli Lilly --

5 MR. McKAY: Could we identify for other counsel what
6 this is.

7 MR. LEHNER: I'll identify it but I don't think I
8 need to ask any questions because I think Mr. Oaks answered
9 what I was going to ask, but I will identify this as an E-mail
10 that is from the individual I just previously identified
11 Rafael, and then I think the E-mail address is
12 Rafi@phantomsynthetics.com and it appears to be an E-mail
13 dated December 25th at 12:53. And within it there is a text
14 of an E-mail which David Oaks is quoted as having written and
15 I think that is the E-mail, Mr. Oaks, which you just
16 acknowledged that in fact you had posted some information on
17 this related to Zyprexakills, is that correct?

18 THE WITNESS: The source I interviewed on --

19 THE COURT: Excuse me. You have not been asked any
20 question. Don't volunteer.

21 That is end of this situation.

22 Move to something else and bring it to a close,
23 please.

24 MR. LEHNER: I think with Mr. Oaks' last statement,
25 I have no further questions at this time.

1 THE COURT: Anybody else have any questions?

2 MR. MILSTEIN: No.

3 MR. HAYES: No.

4 MR. VON LOHMANN: No.

5 MR. MILSTEIN: No.

6 THE COURT: You may cross-examine.

7 CROSS-EXAMINATION

8 BY MR. CHABASINSKI:

9 Q Mr. Oaks, all these links that you say you posted
10 information on the internet, were these all before MindFreedom
11 was enjoined from doing that?

12 A The moment we were enjoined, I took off all possible
13 links for download and also even when I visited the
14 Zyprexakills -- the zyprexakillspbwiki, I was the one who
15 removed them. There even though obviously we don't own that
16 website, as a public service I complied with the Court order.

17 Q I think that it's probably best that you take the judge's
18 advice and not offer --

19 A I removed all possible links I could remove the moment I
20 was aware of the Court order.

21 Q Did Jim Gottstein ever send MindFreedom a copy of the
22 documents in question?

23 A Absolutely not.

24 Q When did you first become aware that Mr. Gottstein had
25 obtained these documents?

1 A The New York Times five days or seven days in a row,
2 whatever it was, that's when I found out about this myself.

3 Q Did you ever have any discussion with Mr. Gottstein
4 before, during or after he obtained these documents as to what
5 should be done with them?

6 A Absolutely not.

7 Q Did you ever have a discussion with Mr. Gottstein about
8 MindFreedom's activities as to these documents?

9 A Absolutely not.

10 Q Did Mr. Gottstein indicate to you in any way that he was
11 -- before you heard about it in the New York Times, did you
12 have any clue from Mr. Gottstein that this was going to
13 happen?

14 A No, I received a couple of E-mails from him that just
15 referred to his website, didn't say anything about this matter
16 but I didn't even bother looking at his website so I didn't
17 even have a clue.

18 MR. CHABASINSKI: That's all I have, your Honor.

19 MR. LEHNER: I have one followup question.

20 THE COURT: Let me hear it.

21 BY MR. LEHNER:

22 Q Mr. Oaks, could you tell me who Judy Chamberlain is?

23 A Judy Chamberlain is a long time psychiatric survivor
24 human rights activist who is on our board of directors as well
25 as I counted nine boards of directors that she is on.

1 THE COURT: Thank you very much.
2 There is no reason why he shouldn't be released?
3 MR. LEHNER: No.
4 THE COURT: You are released, sir.
5 Is there any other evidence?
6 MR. LEHNER: No.
7 THE COURT: Then the evidentiary hearing is closed.
8 Do you want time to brief this matter.
9 MR. MILSTEIN: I assume they are resting. I'd like
10 to make a Rule 50 motion as to my client.
11 THE COURT: All right.
12 MR. MILSTEIN: This is Alan Milstein.
13 First, with respect to David Cohen, there is
14 absolutely no evidence that he aided and abetted Dr. Egilman
15 in allegedly violating the protective order. As to Vera
16 Sharav, there is no evidence that she aided and abetted Dr.
17 Egilman in violating the protective order. And as to the
18 Alliance For Human Research Protection, there is no evidence
19 that that organization aided and abetted Dr. Egilman in
20 violating the protective order.
21 Therefore, this Court cannot enjoin them since they
22 did not assist, aid or in any way are they complicit in the
23 violation of the protective order.
24 In addition, we'll rely on our brief with respect to
25 the other issues. I think the Court, the foundation of Eli

1 Lilly's motion for TRO and preliminary injunction is that
2 these documents are trade secrets and yet in all of the papers
3 they filed, all they do is say, without any kind of support,
4 that they are trade secrets. And the Court has had occasion
5 to look at the documents or at least has had occasion to read
6 the New York Times article. What is abundantly clear is that
7 they are not trade secrets. Lilly in no way fears
8 dissemination of these documents to their competitors, to
9 Merck or to Glaxo.

10 What Lilly wants to prevent is the public at large,
11 the consumers of its products, from seeing these documents and
12 learning the truth about the product that Lilly produces and
13 the way it markets it.

14 Documents like that are not confidential and should
15 not be marked confidential. You heard the testimony of the
16 plaintiffs' attorney who said to his knowledge, that virtually
17 every document produced by Lilly in this case is marked
18 confidential.

19 That is not the purpose of a confidentiality order
20 and it's not what is set forth in CMO-3 and so these documents
21 which are now in the public record and are critically
22 important to save human lives, to prevent human suffering,
23 these documents need to be released from this protective order
24 and this Court should in no way assist Lilly in keeping them
25 from the public.

1 And so for that reason we say that Lilly has
2 presented no evidence that would allow this Court to issue a
3 preliminary injunction.

4 THE COURT: As I understand your position, you are
5 not moving yourself or for any of your clients to be released
6 from CMO-3 for the reasons stated in CMO-3 that permit relief.

7 MR. MILSTEIN: We had filed a separate motion, your
8 Honor. What I have made here is a Rule 50 motion. In
9 addition, we have filed a separate motion as a third-party not
10 otherwise subject to CMO-3 to modify the protective order to
11 allow dissemination of these documents by the 3 clients that I
12 represent because it is in the public interest to do so and
13 they should not be sanctioned by this Court to be kept secret
14 from the consumers of these products because that can only
15 cause more and more harm.

16 THE COURT: There are two problems.

17 One, what should be done with respect to the
18 injunction as it relates to your clients?

19 That's what your Rule 50 motion is directed to,
20 correct?

21 MR. MILSTEIN: Correct. And with respect to that
22 question, it's my position that my clients are not and should
23 not be subject to any preliminary injunction because there is
24 no evidence that they aided or abetted or in any way were
25 complicit in the violation of that protective order.

1 THE COURT: I will rule on that. You may brief it
2 if you wish. We'll get a briefing schedule and I'll rule on
3 it in connection with the evidentiary hearing we have just
4 held.

5 Now, if in addition you want to proceed pursuant to
6 CMO-3 for the independent release of documents, you can do so,
7 but I don't consider sufficiently formal your papers in the
8 present procedures to raise those issues in the clear cut way
9 that they should be raised.

10 So I'm not ruling on that but if you intend to
11 proceed along those lines as for example was done in the Agent
12 Orange case where the Court issued an order unsealing, then I
13 suggest you do it in a formal way. I'm not satisfied to
14 approach such an important motion by the informal papers I
15 have now.

16 MR. MILSTEIN: I'll do that.

17 I think if the Court denies the preliminary
18 injunction as to my clients, then we can do what we want.

19 THE COURT: I don't care what you do. I'm just
20 telling you what your position is.

21 Does anybody wish time to brief this is what I'm
22 asking?

23 MR. LEHNER: Yes, your Honor.

24 THE COURT: How much time do you want?

25 I'd like to bring this to a head because as of

1 yesterday I extended the preliminary injunction until I decide
2 it and I prefer not to extend either a temporary restraining
3 order or a preliminary injunction more than is absolutely
4 necessary, although both of those orders are appealable. I
5 think it's best if an appeal is taken by anybody, it should be
6 taken on a full record. So I would like to get the case
7 decided on this record that we have now closed and I take it
8 Lilly is not putting in any further papers as evidence.

9 MR. LEHNER: Correct.

10 THE COURT: Nor is anybody else. So we have all the
11 evidence before us.

12 I want to know what the briefing schedule is so that
13 I can get out a memorandum, order, final judgment and either a
14 final injunction or no final injunction.

15 What do you want?

16 MR. LEHNER: We can brief this in two weeks,
17 your Honor. We have our motion ready but we can certainly
18 brief the issues and prepare the proposed findings of fact in
19 two weeks.

20 MR. CHABASINSKI: This is Ted Chabasinski. I think
21 two weeks would be adequate for the rather minimal showing I
22 have to make for my client.

23 THE COURT: January 31, all parties briefs.

24 MR. VON LOHMANN: I would just like to note on
25 behalf of John Doe for the reasons stated in our prior briefs,

1 I believe any further extension of the temporary mandatory
2 injunction constitutes a prior restraint, and more to the
3 point, I can't possibly see what could take two weeks based on
4 this evidence with respect to the non-parties.

5 Perhaps there can be a debate here about whether or
6 not Mr. Egilman -- Mr. Egilman obviously is subject to the CMO
7 if anything and with respect to Mr. Gottstein, there is
8 obviously evidence, but with respect to the non-parties, I can
9 dispose of the evidence on that matter in two days at most.

10 THE COURT: You don't have a transcript for one
11 thing.

12 MR. FAHEY: The substantial part of the record is
13 the Redwell which Mr. Gottstein provided today which even a
14 cursory review suggests that there is a lot of communications
15 among those parties.

16 THE COURT: I don't want you to throw in a lot of
17 documents. I want you to give the parties explicit notice on
18 which documents you relied upon and I am not going to read a
19 big Redwell full of documents.

20 I want you to be precise on which documents and I
21 also want you to tell me which of the documents that were
22 exposed are documents, one, that constitute trade secrets or
23 embarrassment or the other language under the rules and how
24 their release has harmed you.

25 So I want for you to be very specific. I don't want

1 to have a load of documents thrown at me.

2 MR. LEHNER: I was not suggesting that we would file
3 those as part of our pleadings but I think the evidence is in
4 those.

5 THE COURT: I know, but you have to give
6 everybody -- you better pick them out. And first of all, you
7 are going to give everybody a complete copy of what is in the
8 Redwell.

9 Secondly, you are going to as quickly as possible
10 tell them which of the specific documents in the Redwell you
11 are going to rely on and which of the documents released you
12 are going to specifically rely on, because I cannot, I
13 believe, deal with the case on the ground that I know that in
14 the millions of pages that we now have in our depository,
15 there are some documents that should not have been released.
16 So you'll have to be very specific.

17 MR. LEHNER: Your instructions are clear.

18 THE COURT: And as quickly as possible.

19 MR. HAYES: I am not going to contest on behalf of
20 Dr. Egilman whether he will be governed by the latest
21 injunction or he is not seeking to be relieved from the CMO-3.

22 Do I have to submit a brief at all?

23 THE COURT: How long have you been in practice now?
24 Have I ever directed you to do anything that you didn't want
25 to do?

1 You are free to do anything you want to do.

2 MR. HAYES: Thank you, judge.

3 MR. MILSTEIN: I would ask that we rather than file
4 a brief simultaneously, that we see whatever they are going to
5 file and then respond to that.

6 MR. McKAY: I agree, your Honor.

7 THE COURT: If they get their brief in January 31, a
8 week from that is February 7th.

9 Do you want until February 7th to submit your
10 briefs?

11 MR. MILSTEIN: Yes.

12 THE COURT: All respondents' briefs by February 7.
13 I don't want argument unless I ask for it.

14 MR. VON LOHMANN: I want to place on record that my
15 client John Doe here does not consent to a further now I think
16 three week extension of the temporary mandatory injunction and
17 just to make a record in the event we want to seek --

18 THE COURT: I don't know whether John Doe is under
19 any order. I don't remember mentioning a John Doe.

20 MR. VON LOHMANN: The John Doe that is subject here,
21 at least arguably subject --

22 THE COURT: Where is John Doe mentioned in the order
23 of mine?

24 MR. VON LOHMANN: In the January 4 order the Court's
25 order specifically enjoins anyone from posting information to

1 this wiki, anyone, and my client John Doe is a person who has
2 posted information to the wiki in the past and would like to
3 continue to do so.

4 The Court's order barring anyone from posting
5 information there runs against my client directly.

6 THE COURT: I understand.

7 Well, I believe the orders of Judge Cogan and my
8 orders are appealable under the Federal Rules.

9 MR. VON LOHMANN: Thank you, your Honor.

10 THE COURT: So if Mr. John Doe or Ms. John Doe want
11 to appeal, you are free to do so. I am not at this stage
12 going to disturb the status quo.

13 MR. VON LOHMANN: Thank you, your Honor.

14 THE COURT: But I would like quickly to dispose of
15 the whole issue.

16 MS. GUSSACK: Your Honor is aware, I believe, that
17 the deposition of Dr. Egilman has been postponed as a result
18 of the need to obtain E-mails that have been deleted from his
19 control. We are hoping to conduct that deposition next week
20 so that we would have that in advance.

21 THE COURT: When is that deposition going to be
22 conducted?

23 MS. GUSSACK: I think next Monday or at a time
24 agreed on next week.

25 MR. HAYES: I have told counsel for Lilly that

1 unless they are willing to commit themselves that they are not
2 going to proceed to seek criminal contempt, that my client may
3 take the Fifth Amendment at such a deposition.

4 MS. GUSSACK: Counsel for Lilly has shared with Dr.
5 Egilman's counsel the view that we are seeking to obtain a
6 factual record on which all sanctions that are appropriate can
7 be sought.

8 THE COURT: Are you going to proceed to seek
9 criminal contempt or civil contempt?

10 MS. GUSSACK: Your Honor, if the factual record
11 supports both civil and criminal sanctions, we will be
12 pursuing both.

13 THE COURT: Well, you are free to brief the point
14 and it is a very complex point, because all counsel know that
15 contempt is a quagmire in the federal courts as well as the
16 state courts; criminal, civil and all other kinds of
17 categories.

18 You don't have to do very much reading to determine
19 how difficult the procedures are.

20 Now, with respect to the question of whether your
21 client wishes to be deposed, he is going to be deposed or not
22 be deposed. I don't want a conditional order. You are aware,
23 of course, that in a civil litigation, the fact that he pleads
24 this privilege may be used against him.

25 MR. HAYES: I am, your Honor.

1 THE COURT: In connection with at least credibility,
2 correct?

3 MR. HAYES: That's correct, judge.

4 THE COURT: So you have to decide what you want to
5 do but I can't help you at this stage.

6 MR. HAYES: I understand, judge.

7 Fine.

8 THE COURT: Now, I suggest that the magistrate
9 judge, if it's possible, rather than Mr. Woodin, preside at
10 the deposition unless you want to proceed without anybody
11 presiding.

12 MR. HAYES: It doesn't matter to me, judge.

13 THE COURT: See if you can work it out without a
14 presiding officer, but if you need one, I think the magistrate
15 judge rather than Mr. Woodin should be in the position because
16 Mr. Woodin is a rather neutral assistant to all sides in
17 discovery matters and I don't want him involved in reducing in
18 any way his independent respected stature as a
19 non-participant.

20 But it is a difficult and perplexing series of
21 problems which had occurred to me with respect to your client.

22 MR. HAYES: Yes, I understand, your Honor.

23 THE COURT: And the deposition.

24 MR. HAYES: I don't think I'm really asking a
25 question but as it stands, they want to depose him to

1 determine whether or not they are going to bring a contempt
2 motion. If he takes the Fifth Amendment now --

3 THE COURT: I think the deposition should be
4 restricted to only the issues we have dealt with now, but of
5 course they are interrelated with a possible contempt motion.

6 MR. HAYES: Since we are not going to contest the
7 continuance not to disseminate, in other words, we are going
8 to say we are not going to disseminate it, we have given back
9 documents, we won't give them to anybody else, we won't talk
10 about them.

11 MS. GUSSACK: If I might remind the Court that our
12 order to show cause initially was sought to take the
13 deposition of Dr. Egilman and his documents to create the
14 factual record that would support the seeking of sanctions for
15 his willful violation of the protective order.

16 THE COURT: I really must say that we had a fairly
17 full revelation of what he did and said. I don't know what is
18 going to be added.

19 MS. GUSSACK: We hope to review the transcript from
20 today and yesterday's hearing and determining what additional
21 information needs to be sought. It may be a shorter
22 deposition but the documents he has produced and continues to
23 produce will provide additional questioning as well.

24 THE COURT: I'm not going to tell you how to conduct
25 the litigation. You are a very skilled attorney, but I have

1 again some reading and research, obviously, looking forward to
2 this hearing and possible subsequent hearings and I do find
3 them very perplexing for the reasons that Mr. Hayes has partly
4 alluded to.

5 So I suggest if that's what you want to do, set it
6 down for deposition and the proposed deponent will have to
7 decide what he wants to do.

8 MR. HAYES: Thank you, your Honor.

9 MR. VON LOHMANN: Your Honor, will that be the close
10 of evidence with respect to this issue?

11 THE COURT: I'll allow the deposition as well as any
12 documents taken from the Redwell to be submitted to supplement
13 the record we made today and yesterday.

14 MR. VON LOHMANN: And that will be it?

15 THE COURT: That will be the end.

16 MR. HAYES: This is a deposition with regard to this
17 proceeding solely?

18 THE COURT: Yes, but the difficulty, you understand,
19 is that what is at issue today might well bear on contempt.

20 MR. HAYES: I understand.

21 THE COURT: Not so much contempt of this Court's
22 order because there doesn't seem to be strong evidence of
23 contempt of this Court's orders but of the original CMO-3.
24 That is the contempt that is involved.

25 Yes.

1 MR. McKAY: I know we want to leave.

2 THE COURT: I'm perfectly willing. I have nothing
3 to do.

4 MR. McKAY: I would like to clarify one or two
5 things in the same vein and you directed Lilly a week or 10
6 days ago to specify their intentions with respect to pursuing
7 contempt sanctions and I would like at this point to know what
8 that is.

9 There were some preliminary indication last Friday
10 night but I think that it's fair to ask at this point.

11 THE COURT: I think you should let counsel know as
12 soon as possible and preferably Mr. Hayes because his client
13 hasn't testified.

14 I think Mr. McKay's client has testified fairly
15 fully and openly.

16 MR. HAYES: To make it simple, my client is going to
17 take the Fifth Amendment -- if they are going to say possibly
18 they are going to proceed with criminal contempt, my client is
19 going to take the Fifth Amendment.

20 THE COURT: I don't see any point in bringing him
21 forward and wasting a lot of time. I would think a letter to
22 that effect will have the equivalence of his taking the Fifth
23 for purposes of evidence.

24 MR. HAYES: Yes.

25 THE COURT: Do you concede that?

1 MR. HAYES: I do.

2 THE COURT: That will save us a lot of time if that
3 is the position.

4 When are you going to inform Mr. Hayes?

5 MS. GUSSACK: Your Honor, I believe the evidence
6 that we heard yesterday and today provide a basis for seeking
7 sanctions against Mr. Gottstein as well as against Dr.
8 Egilman.

9 THE COURT: He wants to know if you are going to
10 proceed with criminal contempt.

11 Actually, of course, the concept of criminal and
12 civil contempt is so vague and overlapping that it doesn't
13 make any sense from a conceptual point of view with respect to
14 the issue you are raising. I think anybody who has been in
15 this field knows that but nevertheless, he said that if you
16 don't commit yourself not to proceed with a criminal contempt
17 sanction, his client will plead the Fifth Amendment.

18 So if you don't want to give him that assurance,
19 tell him that immediately, as soon as you can. He will give
20 you a letter and then that simplifies matters.

21 MR. McKAY: I'm still asking can they say at this
22 time whether they are not going to pursue criminal contempt
23 against Mr. Gottstein.

24 THE COURT: They are not in a position to tell you
25 that because he is theoretically in the same position as Mr.

1 Hayes' client.

2 MR. McKAY: The remaining question is I would ask
3 that your Honor rule that there is no further relief
4 appropriate with respect to the order to show cause both for
5 the reasons that I stated in the brief, and in any event
6 because he is fully, as you know, provided the substantial
7 relief that was sought in that order and there is no reason to
8 pursue that matter further.

9 THE COURT: I'll consider that. It's an argument
10 and I'll certainly consider that.

11 MR. McKAY: The reason I ask your Honor if there
12 were to be anything further, we don't understand how there
13 could be we're here and obviously if it's something -- I
14 understand.

15 THE COURT: He is under an inhibition as I
16 understand the matter not to further disseminate what is in
17 his possession with respect to these documents and he has
18 agreed to and the status quo is going to be held until I make
19 a decision.

20 MR. McKAY: Yes, your Honor. The only relief, and I
21 apologize if I was confusing, the only relief I'm talking
22 about is in the order to show cause, not the initial temporary
23 mandatory injunction, but the order to show cause as far as
24 producing himself and documents, he has done that.

25 THE COURT: He has done that.

1 MR. GOTTSTEIN: May I consult with my attorney,
2 your Honor?

3 THE COURT: Before we break, yes.

4 MR. CHABASINSKI: Your Honor, I don't know what is
5 going on.

6 THE COURT: We're waiting for a final submission by
7 Mr. McKay.

8 MR. CHABASINSKI: Thank you.

9 MR. MCKAY: Thank you, your Honor.

10 The concern that we have, and I think your Honor
11 would recognize it, is that you had left open for Lilly the
12 option outside of this hearing that was to take care of this
13 to go through the documents and see if there is something else
14 they want to submit. We can respond with a brief after they
15 have. Mr. Gottstein is concerned that things may be
16 characterized in a way that would ordinarily he would have a
17 chance to testify about that.

18 Can we assume that perhaps without the need for
19 anything more than an affidavit, he can at least respond?

20 THE COURT: Yes, he can respond by affidavit to the
21 characterization of any document.

22 And you or any other party can submit other
23 documents from that Redwell that Lilly doesn't.

24 MR. VON LOHMANN: On that point, do we have a date
25 when Lilly has to identify those documents? Because if

1 Mr. Egilman's deposition doesn't occur, it would be nice to
2 have a date.

3 THE COURT: Try to do it in the next few business
4 days. And do it on a rolling basis so that as you find them,
5 you give them.

6 MR. MILSTEIN: So they are going to send us the
7 documents?

8 THE COURT: They are going to send you the whole
9 Redwell because you may find something you want to use. And
10 then they are going to specify which documents they are going
11 to rely on specifically, and if you want to do that, you'll
12 send them those documents and indicate that you want to rely
13 on them.

14 Does everybody understand where we are?

15 MR. CHABASINSKI: Yes.

16 MR. HAYES: Yes.

17 MR. VON LOHMANN: Yes.

18 MR. McKAY: Yes.

19 THE COURT: It's a pleasure to have such
20 distinguished counsel before me.

21 Have a nice evening.

22 (Matter concluded.)

23

24

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