

**U.S. District Court
Eastern District of New York (Brooklyn)
CIVIL DOCKET FOR CASE #: 1:07-cv-00504-JBW-RLM**

Zyprexa Litigation et al
Assigned to: Senior-Judge Jack B. Weinstein
Referred to: Magistrate-Judge Roanne L. Mann
Cause: 28:1331 Fed. Question: Personal Injury

Date Filed: 02/05/2007
Date Terminated: 03/06/2007
Jury Demand: None
Nature of Suit: 365 Personal Inj.
Prod. Liability
Jurisdiction: Federal Question

Date Filed	#	Docket Text
12/17/2006		NOTE: This civil docket number was opened as per the 1 order, so ordered by Judge Jack B. Weinstein on 2/5/2007: "The Clerk of the Court shall issue without prepayment of fees, a civil docket number to cover the various motions and proceedings seeking a temporary restraining order, preliminary injunction and final injunction arising out of the revelations of documents in violation of CM03." Ordered by Judge Jack B. Weinstein, on 2/5/2007. (Barrett, C) (Entered: 02/06/2007)
12/18/2006	3	Minute Entry for proceedings held before Roanne L. Mann : Telephone Discovery Hearing held on 12/18/2006. The Court hears argument concerning the production of Lilly's documents by plaintiff's expert in violation of the Protective Order in this case. See Calendar Order for further details. NOTE: This is document no. 978 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/05/2007)
12/18/2006		Minute Entry for proceedings held before Brian M. Cogan: Hearing on emergency oral application pursuant to Rule 37, the All Writs Act and the Court's inherent power to enforce its own orders on 12/18/2006. Telephonic hearing held before Judge Cogan because Judge Weinstein was outside the district. Counsel for all parties present; see transcript for appearances. Mr. Gottstein and his attorney Mr. McKay also appeared by telephone. The Court issued a mandatory injunction requiring James Gottstein to, inter alia, deliver the at-issue documents to the special master. See transcript for further details. A written order of injunction will follow. (Court Reporter Lisa Schmid) (Barrett, C) (Entered: 02/06/2007)
12/19/2006	4	ORDER FOR MANDATORY INJUNCTION. Ordered by Judge Brian M. Cogan, on 12/18/2006. NOTE: This is

		document no. 981 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/05/2007)
12/20/2006		Minute Entry for proceedings held before Brian M. Cogan: Status Conference held on 12/20/2006. Telephonic conference held before Judge Cogan because Judge Weinstein was outside the district. Counsel for all parties present; see transcript for appearances. Mr. Gottstein appeared by his attorney Mr. McKay by telephone. See transcript for details. (Barrett, C) (Entered: 02/06/2007)
12/26/2006	6	Letter dated 12/26/2006 from Nina M. Gussack, regarding Dr. David Egilman's violation of Case Management Order No. 3. NOTE: This is document 986 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
12/28/2006	5	ORDER FOR MANDATORY INJUNCTION. Ordered by Judge Brian M. Cogan, on 12/18/2006. NOTE: This is document 988 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
12/28/2006	7	Letter dated 12/17/2006 to Special Master Woodin, informing of events which were not conveyed to him (Special Master Woodin) by Lilly and the PSC that demonstrate that the materials were produced in full conformance with CMO-3. NOTE: This is document 990 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
12/28/2006	8	Article dated 12/17/2006 entitled "Eli Lilly Said to Play Down Risk of Top Pill," by Alex Berenson. Retrieved from The New York Times. NOTE: This is document 991 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
12/29/2006	9	ORDER for Temporary Mandatory Injunction. Ordered by Judge Brian M. Cogan on 12/29/2006 @ 4:00 p.m. NOTE: This is document 996 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
12/29/2006	10	ORDER TO SHOW CAUSE ISSUED TO DAVID EGILMAN, M.D.: Show Cause Hearing set for 12/28/2006 @ 02:00 PM before Senior-Judge Jack B. Weinstein VIA TELECONFERENCE. Ordered by Judge Jack B. Weinstein, on 12/26/06. NOTE: This is document 1001 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/03/2007	11	Letter dated 12/21/2006 from Henry Waxman, Ranking Minority Member, to Special Master Woodin, regarding the return of documents provided by Mr. Goldstein. (Documents

		not enclosed). Also informing that documents on the Committee computer have been voluntarily deleted. NOTE: This is document 1006 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/03/2007	12	Supplemental Information Re: Gottstein Compliance, filed by John McKay. NOTE: This is document 1009 in 04-md-1596 (JBW) RLM). (Barrett, C) (Entered: 02/06/2007)
01/03/2007	18	ORDER Regarding David Egilman, M.D., M.P.H. Ordered by Judge Jack B. Weinstein, on 12/28/2006. NOTE: This is document 1010 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/04/2007	19	Letter dated 12/28/2006 from Alexander A. Reinert to USDJ Weinstein, in response to Eli Lilly's letter dated 12/26/2006, requesting emergency relief to develop "factual predicate" for its motion seeking to hold Dr. Egilman in contempt of Court for his alleged violation of CMO-3. NOTE: This is document 1011 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/05/2007	20	Letter dated 1/2/2007 from Ted Chabasinski to USDJ Weinstein, urging the court to dissolve the present injunction and to issue no further injunctions of the same kind, both because it would be a futile gesture and because such a further injunction would be clearly be against the public interest. NOTE: This is document 1013 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/05/2007	21	ORDER Setting Hearing on Motion: Motion for reargument on the extension and modification of the 12/29/2006 Temporary Mandatory Injunction. Hearing set for 1/8/2007 @ 02:00 PM before Senior-Judge Jack B. Weinstein. Ordered by Judge Jack B. Weinstein, on 1/5/2007. Copies faxed by Chambers. NOTE: This is document 1017 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/05/2007	22	ORDER for Temporary Mandatory Injunction: the joint motion for a temporary mandatory injunction entered 12/29/2006 is extended to 1/16/2007. Ordered by Judge Jack B. Weinstein, on 1/4/2007. Copies faxed by Chambers. NOTE: This is document 1021 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/05/2007	23	ORDER TO SHOW CAUSE issued as to James B. Gottstein, Esq. Show Cause Hearing set for 1/16/2007 @ 02:00 PM before Senior-Judge Jack B. Weinstein. Ordered by Judge Jack B.

		Weinstein, on 1/4/2007 @ 9:30 a.m. Copies faxed by Chambers. NOTE: This is document 1022 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/08/2007	24	MEMORANDUM in Opposition to the Motion for Re-Argument of the Court's Order Extending the December 29, 2006, Temporary Mandatory Injunction by Eli Lilly and Company, filed by Samuel Abate. NOTE: This is document 1018 in 04-md-1596 (JBW) (RLM). (Barrett, C) (Entered: 02/06/2007)
01/08/2007	25	EXHIBIT to the Memorandum in Opposition to the Motion for Re-Argument of the Court's Order Extending the December 29, 2006, Temporary Mandatory Injunction by Eli Lilly and Company, filed by Samuel Abate. Related document: 24 Memorandum in Opposition, filed by Eli Lilly & Co. NOTE: This is document 1019 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/09/2007	13	TRANSCRIPT of Phone Conference held on 12/18/2006 before Judge Cogan. Court Reporter: Lisa S. Cox. NOTE: This is document 1030 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/09/2007	14	NOTICE: counsel wishing to participate telephonically at the hearings scheduled for 1/16/2007, may do so by calling (888) 857-6932, confirmation code- 7254299, title- Judge Weinstein's status conference. (Signed by June Lowe, case manager, on 1/9/2007). NOTE: This is document 1031 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/09/2007	15	Letter dated 1/4/07 from Ted Chabasinski, Esq., to Judge Weinstein, requesting that the Court reconsider the order forbidding MindFreedom from exercising its First Amendment rights. NOTE: This is document 1034 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/09/2007	16	ORDER: the issues raised in the 1/5/2007 letter from Ted Chabasinski, Esq., will be heard at the hearing now scheduled for 1/16/2007, @ 2:00 p.m. EST. Ordered by Judge Jack B. Weinstein, on 1/5/2007. Copies faxed by Chambers. NOTE: This is document 1037 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/09/2007	17	Letter dated 1/5/2007 from Ted Chabasinski, Esq., to Judge Weinstein regarding Order to Show Cause Issued 1/4/07. (See letter for details) NOTE: This is document 1038 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)

01/09/2007	38	Notice of MOTION to Vacate <i>CMO-3 entered by this court on 12/29/2006 and subsequently extended to 1/16/2007 or, in the alternative, an order dissolving the Injunction in part. NOTE: this is document 1128 in 04-md-1596 (JWB)(RLM). Filed by Vera Sharav, Alliance for Human Research Protection. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Certificate of Service# 4 Letter of Enclosure) (Barrett, C) (Entered: 02/06/2007)</i>
01/15/2007	26	MEMORANDUM in Opposition to Motions Filed by John Doe, Vera Sharav, David Cohen, and the Alliance for Human Research Protection by Eli Lilly and Company. (Attachments: # 1 Exhibit A) NOTE: this is document 1065 in 04-md-1596 (JBW) (RLM). (Barrett, C) (Entered: 02/06/2007)
01/15/2007	27	STATUS REPORT Counterstatement by Eli Lilly and Company, filed by Samuel Abate: NOTE: this is document 1067 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/16/2007	28	RESPONSE TO ORDER TO SHOW CAUSE by James B. Gottstein, filed by John McKay. NOTE: this is document 1068 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/16/2007	29	Minute Entry for proceedings held before Jack B. Weinstein : Conference on Special Masters Fees held on 1/16/2007. Motion argued & granted. NOTE: this is document 1087 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/16/2007	30	Minute Entry for proceedings held before Jack B. Weinstein : Show Cause Hearing held on 1/16/2007. Hearing ordered and begun. Hearing continued to 1/17/2007 @ 11:00 a.m. NOTE: this is document 1096 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/17/2007	31	ORDER: the temporary mandatory injunction issued on 1/4/2007 is extended until the court rules on the motion to modify the injunction which is currently pending. hearings on that motion began today and will be continued tomorrow, 1/17/2006 @ 11:00 a.m. Ordered by Judge Jack B. Weinstein, on 1/16/2007. Copies faxed by Chambers. NOTE: this is document 1070 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/17/2007	34	Minute Entry for proceedings held before Jack B. Weinstein : Show Cause Hearing held on 1/17/2007. Hearing continues. Hearing ends. Additional briefs to be submitted. NOTE: this is

		document 1088 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/18/2007	32	(AMENDED) ORDER Regarding David Egilman, M.D., M.P.H. Ordered by Judge Jack B. Weinstein, on 12/28/2006. NOTE: this is document 1075 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/19/2007	33	SUPPLEMENTAL Brief for Clarification of Injunction, filed by Fred von Lohmann on behalf of John Doe. w/attached exhibits A-B. NOTE: this is document 1084 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/29/2007	36	ORDER: the parties shall arrange with Case Manager June Lowe to set a date for argument of the motion to declassify documents that are the subject of this court's preliminary injunction of 1/4/2007, and to modify the protective order under which those documents were classified. The brief filed in support of the motion will also be treated as a submission in the pending injunction proceedings. Ordered by Judge Jack B. Weinstein, on 1/25/2007. NOTE: this is document 1106 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/30/2007	37	INVITATION & ORDER as to Alex Berenson. Ordered by Judge Jack B. Weinstein, on 1/29/2007. NOTE: this is document 1114 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/31/2007	39	NOTICE by Eli Lilly and Company of Service of Invitation and Order upon Mr. Berenson. NOTE: this is document 1129 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/31/2007	40	MEMORANDUM in Support Eli Lilly and Company's Memorandum of Points and Authorities Concerning Its Request to Modify and Extend the Court's January 3, 2007 Temporary Mandatory Injunction by Eli Lilly and Company. (Attachments: # 1 Exhibits A and B# 2 Proposed Order) NOTE: this is document 1131 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/31/2007	41	Letter dated 1/31/2007 from Andrew R. Rogoff to USDJ Weinstein, enclosing a courtesy copy of a Notice of Service of Invitation and Order upon Mr. Berenson. (Encl. attached) NOTE: this is document 1138 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
01/31/2007	42	Notice of MOTION for Leave to Appear Pro Hac Vice <i>as to Fred von Lohmann</i> . NOTE: this is document 1139 in 04-md-

		1596. Filing fee \$ 25. by John Doe. (Attachments: # 1 Affidavit in Support# 2 Proposed Order# 3 Receipt for Payment) (Barrett, C) (Entered: 02/06/2007)
01/31/2007	43	Proposed Findings of Fact by Eli Lilly & Co. (Attachments: # 1 Exhibits 1-3# 2 Exhibit 4# 3 Exhibits 5-6# 4 Exhibit 7# 5 Exhibits 8-12# 6 Exhibit 13# 7 Exhibits 14-15# 8 Exhibit 16# 9 Exhibit 17# 10 Exhibits 18-22# 11 Exhibit 23# 12 Exhibit 24# 13 Exhibit 25 (Part 1 of 2)# 14 Exhibit 25 (Part 2 of 2)# 15 Exhibits 26-34) NOTE: this is document 1130 in 04-md-1596 (JBW)(RLM) (Barrett, C) (Entered: 02/06/2007)
02/02/2007	35	ORDER: the court regrets that rescheduling (of the time set for New York Times reporter Alex Berenson's testimony) is not possible at this time. Ordered by Judge Jack B. Weinstein, on 2/1/2007. (Endorsed on letter dated 1/31/2007 from D. John McKay to USDJ Weinstein) NOTE: this is document 1135 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
02/05/2007	2	Notice of Related Case Assignment (Bowens, Priscilla) (Entered: 02/05/2007)
02/05/2007	1	Order the Clerk of the Court shall issue without prepayment of fees, civil docket number to cover the various motions and proceedings seeking a temporary restraining order, preliminary injunction and final injunction arising out of the revelations of documents in violation of CM03. Ordered by Judge Jack B. Weinstein on 2/5/2007. (Bowens, Priscilla) (Entered: 02/05/2007)
02/05/2007		ORDER, endorsed on document 42 , granting the Motion for Leave to Appear pro hac vice as to Fred von Lohmann, Esq. Ordered by Judge Jack B. Weinstein, on 1/11/2007. (Barrett, C) (Entered: 02/06/2007)
02/06/2007	44	ORDER: the hearing is canceled in view of this letter. Ordered by Judge Jack B. Weinstein, on 2/5/2007. (Endorsed on letter dated 2/5/2007 from George Freeman to USDJ Weinstein, regarding Your Honor's Invitation and Order of 1/29/2007) NOTE: this is document 1140 in 04-md-1596 (JBW)(RLM). (Barrett, C) (Entered: 02/06/2007)
02/06/2007	45	Letter from Sean P. Fahey to The Honorable Jack B. Weinstein, dated February 6, 2007 by Eli Lilly & Co. (Abate, Samuel) (Entered: 02/06/2007)
02/07/2007	46	Advertisement/Article on Internet Downloads regarding Zyprexa. (Barrett, C) (Entered: 02/07/2007)

02/07/2007	47	MEMORANDUM in Opposition of <i>Nonparties Mindfreedom International, Judi Chamberlin, Robert Whitaker, Vera Sharov, David Cohen, Alliance for Human Research Protection, and John Doe in Opposition to Eli Lilly's Request to Extend The January 4, 2007 Temporary Mandatory Injunction</i> by Vera Sharav. (Von Lohmann, Fred) (Entered: 02/07/2007)
02/07/2007	48	Proposed Findings of Fact by Vera Sharav (Attachments: # 1 Exhibit A-D# 2 Exhibit E-G# 3 Exhibit H-1--H-3) (Von Lohmann, Fred) (Entered: 02/07/2007)
02/08/2007	49	MEMORANDUM in Opposition TO ELI LILLY AND COMPANYS JANUARY 31, 2007, MEMORANDUM OF POINTS AND AUTHORITIES by David Egilman. (Attachments: # 1 Certificate of Service) (Reinert, Alexander) (Entered: 02/08/2007)
02/08/2007	50	Letter dated 2/1/2007 from Peter H. Woodin to USDJ Weinstein, updating the court about the return of the documents that had been produced by Eli Lilly and Company under the protections of CMO-3. (Barrett, C) (Entered: 02/08/2007)
02/08/2007	51	AFFIDAVIT in Opposition to Eli Lilly and Company's 43 Amended Proposed Findings of Fact and Proposed Order for Mandatory Injunction, filed by Laura Ziegler. Copies mailed by Chambers. w/attached US Postal Track and Confirm Receipt attached. (Barrett, C) (Entered: 02/08/2007)
02/08/2007	52	Email, dated 12/19/2006, from Grace Jackson to Jim Gottstein, regarding return of Zyprexa documents to a Special Master. w/attachment (Barrett, C) (Entered: 02/08/2007)
02/08/2007	53	Letter dated 1/9/2007 from Dr. Stefan P. Kruszewski to Special Master Woodin, regarding the documents mailed to him by Mr. Gottstein. (Barrett, C) (Entered: 02/08/2007)
02/08/2007	54	Email, dated 12/19/2006, from Dr. Stefan P. Kruszewski to Jim Gottstein, stating that he will return anything that he receives from him unopened. w/attachment (Barrett, C) (Entered: 02/08/2007)
02/08/2007	55	Letter dated 12/23/2006 from Bruce Whittington to Special Master Woodin, enclosing the DVD-ROM, which he received from Mr. Gottstein. w/o encl. (Barrett, C) (Entered: 02/08/2007)
02/08/2007	56	Letter dated 12/21/2006 from Ranking Minority Member Henry A. Waxen to Special Master Woodin, voluntarily returning the documents provided by Mr. Gottstein and informing that all copies have been voluntarily deleted from the Committee on

		Government Reform of the U.S. House of Representatives' computers. w/o encl. (Barrett, C) (Entered: 02/08/2007)
02/08/2007	57	MEMORANDUM of Points and Authorities of Respondents MindFreedom International, Judi Chamberlin, Robert Whitaker Opposing Extension of Mandatory Injunction. (Barrett, C) (Entered: 02/08/2007)
02/08/2007	58	MEMORANDUM of Points and Authorities of Respondents MindFreedom International, Judi Chamberlin, Robert Whitaker in Support of Motion to Modify CMO-3. (Barrett, C) (Entered: 02/08/2007)
02/10/2007	59	MOTION for Preliminary Injunction <i>Motion to Dissolve Injunction</i> by James B. Gottstein. (McKay, John) (Entered: 02/10/2007)
02/10/2007	60	RESPONSE in Support re 59 MOTION for Preliminary Injunction <i>Motion to Dissolve Injunction Response of Terrie Gottstein to Lilly Request to Modify and Extend Injunction</i> filed by Terri Gottstein. (McKay, John) (Entered: 02/10/2007)
02/10/2007	61	RESPONSE in Support re 59 MOTION for Preliminary Injunction <i>Motion to Dissolve Injunction Response of James B. Gottstein to Lilly's January 31 Request to Modify and Extend Injunction and In Support of Mr. Gottstein's Motion to Dissolve Injunction</i> filed by James B. Gottstein. (McKay, John) (Entered: 02/10/2007)
02/10/2007	62	RESPONSE in Support re 59 MOTION for Preliminary Injunction <i>Motion to Dissolve Injunction Declaration of D. John McKay in Support of James Gottstein Response to Lilly Request to Modify and Extend Injunction and in Support of Mr. Gottstein's Motion to Dissolve Injunction</i> filed by James B. Gottstein. (Attachments: # 1 Exhibits to Declaration of D. John McKay) (McKay, John) (Entered: 02/10/2007)
02/10/2007	63	RESPONSE in Support re 59 MOTION for Preliminary Injunction <i>Motion to Dissolve Injunction James B. Gottstein's Verified Opposition to Lilly's Amended Proposed Findings of Fact Concerning Injunction</i> filed by James B. Gottstein. (Attachments: # 1 Exhibits to James B. Gottstein's Verified Opposition to Lilly's Amended Proposed Findings of Fact Concerning Injunction) (McKay, John) (Entered: 02/10/2007)
02/10/2007	64	RESPONSE in Support re 59 MOTION for Preliminary Injunction <i>Motion to Dissolve Injunction James B. Gottstein's Proposed Findings of Fact and Conclusions of Law</i> filed by

		James B. Gottstein. (Attachments: # 1 Exhibits to Gottstein Proposed Findings & Conclusions) (McKay, John) (Entered: 02/10/2007)
02/12/2007	65	Sealed Documents received from Special Master Peter Woodin. (Sealed as per Judge Jack B. Weinstein, on 2/7/2007) (Barrett, C) (Entered: 02/12/2007)
02/12/2007	66	ORDER: the request to submit a reply brief, on or before 2/12/2007, to address the submission made by the enjoined parties on 2/7 and the submissions by Special Master Woodin updating the Court and parties on the return of documents by certain of the enjoined parties is granted. No further time. Ordered by Judge Jack B. Weinstein, on 2/7/2007. (Endorsed on letter dated 2/6/2007, from Sean P. Fahey to USDJ Weinstein) Copies faxed by Chambers. (Barrett, C) (Entered: 02/12/2007)
02/12/2007	67	ORDER: (the request for an extension of the filing time for filing responses for James Gottstein and Terrie Gottstein to Lilly's 1/31 filings, as proposed is)denied. Time extended to 2/9/2007 @ 5:00 p.m. No extension to Lilly. This court's schedule regrettably does not permit further delay. Ordered by Judge Jack B. Weinstein, on 2/7/2007. (Endorsed on letter dated 2/7/2007 from D. John McKay to USDJ Weinstein) Copies faxed by Chambers. (Barrett, C) (Entered: 02/12/2007)
02/12/2007	68	AFFIDAVIT in Opposition to Eli Lilly and Company's 43 Amended Proposed Findings of Fact and Proposed Order for Mandatory Injunction, filed by Laura Ziegler. (Barrett, C) (Entered: 02/12/2007)
02/12/2007	69	Supplemental Brief for Clarification of Injunction, filed by Fred von Lohmann. (Attachments: # 1 Exhibit A# 2 Exhibit B) (Barrett, C) (Entered: 02/12/2007)
02/12/2007		REMINDER TO ALL COUNSEL: ALL ACTIONS BEFORE THIS COURT are ECF matters. It is MANDATORY that you file all original documents electronically. From this point forward, original documents are REQUIRED to be filed electronically and forward a hard copy, labeled courtesy copy, to chambers. To avoid having your documents returned or chambers being notified of your non-compliance, please adhere to The Judges' Individual Rules of Chambers and Administrative Order 2004-08. Further information on ECF requirements and online ECF registration may be found at the website for the Eastern District of New York at www.nyed.uscourts.gov (Barrett, C) (Entered: 02/12/2007)

02/12/2007	70	REPLY in Support of <i>Its Motion to Modify and Extend the Court's January 3, 2007 Temporary Mandatory Injunction</i> by Eli Lilly & Co.. (Attachments: # 1 Exhibits A-H# 2 Proposed Order) (Abate, Samuel) (Entered: 02/12/2007)
02/13/2007	71	MEMORANDUM, FINAL JUDGMENT, ORDER & INJUNCTION: the preliminary injunction was justified. The references and restrictions upon various sites on the Internet are not carried over to the final injunction in the exercise of discretion. The final judgment and injunction is stayed for ten days to permit an application to the Court of Appeals of the Second Circuit for reinstatement of this court's order of 1/4/2007 including within a preliminary injunction various websites, or for other relief. The preliminary injunction shall remain in effect to 10 days. It is hereby ordered that the listed individuals are enjoined from further disseminating documents produced by Eli Lilly and Company subject to CMO-3. He or she shall forthwith return any such documents and copies still in his or her possession or control to Special Master Peter Woodin. Ordered by Judge Jack B. Weinstein, on 2/13/2007. (Attachments: # 1 Part 2 (pages 39-78) of the Memorandum, Final Judgment, Order & Injunction) (Barrett, C) (Entered: 02/13/2007)
02/13/2007	72	MEMORANDUM, FINAL JUDGMENT, ORDER & INJUNCTION: James Gottstein's 59 motion and Terri Gottstein's motion for her email communication with her husband not to be considered are denied. They are mooted by this court's final injunction dated 2/13/2007. The court has not considered the substance of any email communication between Terri and James Gottstein in deciding Lilly's motions. Ordered by Judge Jack B. Weinstein, on 2/13/2007. Copies faxed by Chambers. (Barrett, C) (Entered: 02/13/2007)
03/06/2007	73	JUDGMENT & ORDER: a review of the docket of this court shows no application for an appeal seeking further stay of entry of the 2/13/2007 Order, Judgment, and Injunction. Accordingly, the Court will file and docket the 2/13/2007 judgment. Ordered by Judge Jack B. Weinstein, on 3/1/2007. (Barrett, C) (Entered: 03/06/2007)
03/06/2007		Copy of Document 73 faxed by Chambers. (Barrett, C) (Entered: 03/06/2007)
03/06/2007	74	Letter dated 2/13/2007 from Alan C. Milstein to Special Master Woodin, enclosing the disk in his possession. w/attached copy of the Memorandum, Final Judgment, Order & Injunction,

		dated 2/13/2007. (Hard copy filed under 04-md-1596, document 1182) (Barrett, C) (Entered: 03/06/2007)
03/13/2007	75	NOTICE by James B. Gottstein re 72 Order on Motion for Preliminary Injunction, 71 Judgment,,,, <i>Notice of Appeal</i> (Bezanson, Philip) (Entered: 03/13/2007)
03/13/2007	77	NOTICE OF APPEAL as to 72 Order on Motion for Preliminary Injunction, by James B. Gottstein. Filing fee \$ 455. Receipt # 336944. NOA served Electronically. (Gonzalez, Mary) (Entered: 03/19/2007)
03/14/2007	76	NOTICE OF APPEAL as to 71 Judgment,,,, 73 Judgment, by David Egilman. Filing fee \$ 455, receipt number 2279251. (Attachments: # 1 Certificate of Service) (Reinert, Alexander) (Entered: 03/14/2007)
03/14/2007		Electronic Index to Record on Appeal sent to US Court of Appeals. For docket entries without a hyperlink, contact the court and we'll arrange for the document(s) to be made available to you. 45 Letter, 16 Order, 11 Letter, 38 Motion to Vacate, 20 Letter, 66 Order, 23 Order to Show Cause, 74 Letter, 60 Response in Support of Motion, 6 Letter, 67 Order, 68 Affidavit in Opposition, 50 Letter, 52 Interoffice Memorandum/Email, 31 Order, 75 Notice(Other), 72 Order on Motion for Preliminary Injunction, 13 Transcript, 2 Notice of Related Case Assignment, 10 Order to Show Cause, 76 Notice of Appeal, 1 Order, 21 Order Setting Hearing on Motion, 63 Response in Support of Motion, 57 Memorandum in Opposition, 55 Letter, 32 Order, 22 Permanent Injunction, 30 Show Cause Hearing, 14 Notice of Hearing, 35 Order, 7 Letter, 27 Reply in Opposition, 71 Judgment,,,, 46 Docket Annotation, 36 Order,, 56 Letter, 28 Response to Order to Show Cause, 9 Permanent Injunction, 15 Letter, 12 Docket Annotation, 70 Reply in Support, 34 Show Cause Hearing, 18 Order, 49 Memorandum in Opposition, 69 Docket Annotation, 61 Response in Support of Motion, 19 Letter, 73 Judgment, 29 Status Conference, 25 Exhibit, 58 Memorandum in Support, 39 Certificate of Service, 47 Memorandum in Opposition, 5 Permanent Injunction, 44 Order, 51 Affidavit in Opposition, 33 Docket Annotation, 64 Response in Support of Motion, 62 Response in Support of Motion, 17 Letter, 26 Memorandum in Opposition, 4 Permanent Injunction, 54 Interoffice Memorandum/Email, 59 Motion for Preliminary Injunction, 24 Memorandum in Opposition, 37 Order, 8 Docket Annotation, 43 Proposed Findings of Fact, 3 Discovery Hearing,, Telephone Conference, 53 Letter, 42 Motion for Leave to Appear Pro Hac

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SEEGER WEISS LLP
ATTORNEYS AT LAW
ONE WILLIAM STREET
NEW YORK, NEW YORK 10004-2502
(212) 584-0700
FAX (212) 584-0799
www.seegerweiss.com

CHRISTOPHER A. SEEGER**
STEPHEN A. WEISS*
DAVID R. BUCHANAN**
SETH A. KATZ*
DIOGENES P. KEKATOS*

MICHAEL L. ROSENBERG**
MARC S. ALBERT*

ADMITTED IN
*NY, *NJ, -CT
*MA, *PA
^COUNSEL

AMY P. ALBERT**
ERIC T. CHAFFIN*
PATRICIA D. CODEY*
DONALD A. ECKLUND**
MICHAEL S. FARKAS**
JEFFREY S. GRAND*
ROOPAL P. LUHANA**
LAURENCE V. NASSIF**
JAMES A. O'BRIEN III*
ELIZABETH A. WALL**

July 16, 2004

BY HAND

Honorable A. Simon Chrein
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *In re Zyprexa Products Liability Litig.; MDL No. 1596*

Dear Magistrate Judge Chrein:

I write on behalf of the Plaintiffs' Steering Committee ("PSC") to oppose Eli Lilly and Company's ("Lilly") letter brief seeking the entry of an oppressive protective order that impinges on the attorney-client relationship, chills Plaintiffs' ability to retain experts, and requests that the PSC enter an agreement that violates its members' ethical obligations to their clients.

While counsel for Lilly and the PSC have, through a very successful meet-and-confer process, reached agreement on the vast majority of contested issues in connection with the protective order, the PSC vehemently opposes any order that prohibits them from sharing documents with the Plaintiffs on whose behalf the cases have been brought and requires the unnecessary identification of experts retained by the Plaintiffs. Additionally, Lilly's bad faith attempt to "sneak one past" the PSC by changing the definition of "competitor" that has been the subject of negotiations for weeks should not be indulged by this Court. Despite hours of negotiations, Lilly has modified the definition of "competitor" to add consultants and make it virtually impossible for Plaintiffs to retain experts. A copy of the protective order being discussed for weeks is attached as Exhibit A hereto so that the Court may compare the definition of "competitor" being negotiated with that submitted to this Court by Lilly without meeting-and-conferring with the PSC or even advising the PSC or the Court of this significant change in its letter brief. These types of "commando" litigation tactics have no place in our legal system.

Plaintiffs' Access to Discovery Materials

While the PSC does not take the position, that documents can never be designated as "Attorneys' Eyes Only," there simply is no justification for preventing our clients from reviewing documents in this litigation. Lilly's attempts to prevent the Plaintiffs themselves from seeing any documents in this litigation is absurd and not supported by governing law. In fact, even the cases Lilly cites in its letter brief do not support such a result.

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In *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559 (1985), Judge Weinstein adopted then-Magistrate Scheindlin's decision that lifted the blanket protective order and required the defendants to bear the burden — through a motion on notice — of establishing why particular documents should be designated confidential. *Id.* at 574, 575. Thus, the Plaintiffs, absent class members, and the public were provided access to the documents unless and until the defendant established that limiting such access was warranted. If Lilly is permitted to prevent a limited subset of documents from being disclosed to the Plaintiffs, it only should be permitted to do so consistent with the *Agent Orange* decision, by bearing the burden — through a motion on notice — of establishing such need on a document-by-document basis, not as to all documents falling within the scope of this Protective Order. Thus, Plaintiffs should be included in Paragraph 6 of the protective order.

Lilly also relies on *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, 1998 WL 186728 (E.D. LA), a case that is factually inapposite to the instant case. *Chrysler* involved two commercially sophisticated parties, who had a business relationship and a dispute arising out of that relationship. Additionally, in *Chrysler*, the plaintiff-dealership had already disseminated an exhibit that "contain[ed] sensitive and proprietary information." *Id.* at *1. Such facts simply do not exist here. Following this disclosure, Chrysler sought to have a certain "very limited number of documents" (*id.* at *2) designated as "For Attorney Eyes Only." The *Chrysler* court found that limiting disclosure of certain information to attorneys and experts is proper "when there is some risk that a party might use the information or disseminate it to others who might employ it to gain a competitive advantage over the producing party." *Id.* The *Chrysler* court also found that the previous disclosure by the plaintiff-dealership established just such a risk. *Id.* Lilly has not and cannot make such a showing that any plaintiffs have or will disseminate truly proprietary information. Accordingly, *Chrysler* does not support preventing the Plaintiffs from seeing any documents in the instant litigation. Each of these individual Plaintiffs has absolutely no interest in or motivation to disseminate confidential information in violation of a protective order.¹

In the instant case, due to the fact that there has been no showing of prejudice or even risk of prejudice to Lilly, counsel would be violating their ethical obligations to their clients by denying them access to their own files. See *In re Ruden*, 265 A.D.2d 25, 26 (2d Dep't. 2000) (failure to turn file over to client found to be a violation of Code of Professional Responsibility). Additionally, the New York Court of Appeals has found — at least in arena of a terminated client — that the majority view that "courts and State legal ethics advisory bodies considering a client's access to the attorney's file in a represented matter ... presumptively accord the client full access to the entire attorney's file...with narrow exceptions" is the proper view. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 34 (1997). If this is true in a terminated attorney-client relationship, presumptively such a right is stronger in an existing attorney-client relationship.²

¹ Lilly mischaracterizes certain negotiations of the preservation order in its letter brief. The PSC has never stated that plaintiffs cannot be expected to preserve the contents of their personal computers. Rather, the PSC refused to agree to a procedure that required all plaintiffs to set up a separate "mailbox" on their computer for the segregation of relevant materials stored on the pc. This is the same argument that Lilly has made in those negotiations, that the PSC cannot tell Lilly how to preserve. Lilly's implication that rather than preserve Zyprexa information, plaintiffs will either e-mail confidential information or post it somewhere in cyberspace is absurd and merely designed to gain shock value with this Court. Such shenanigans should not be countenanced.

² Lilly seeks to gain some traction from the fact that the Plaintiffs are being treated for mental illness to support the fact that these people should not be given access to information. Lilly has elected to profit handsomely from selling

Hon. A. Simon Chrein
 July 16, 2004
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Moreover, such a rule would prevent the proper preparation of the case for trial and deposition. Lilly will likely seek to depose each of the Plaintiffs in this MDL. Invariably, Lilly will ask the Plaintiffs for the basis for certain allegations in the complaint or why they believe Zyprexa caused their injuries. If their counsel cannot share documents with their clients, they will not be able to properly prepare for the deposition.³ Accordingly, the PSC respectfully submits that Your Honor should add the Plaintiffs to Paragraph 6, which identifies to whom confidential information can properly be disclosed.

Disclosure to Competitors and Customers

Lilly simply misstates the PSC's objection to the last paragraph in Paragraph 6. The PSC does not object to giving Lilly three-days notice before disclosing confidential information to true competitors. What the PSC objects to is Lilly's wildly overbroad definition of the terms "competitor" and "customer." In fact, despite negotiating one definition of "competitor" with the PSC for several weeks, Lilly has submitted a wholly different definition to this Court — undoubtedly in the hope that the PSC will not notice their underhanded tactics.⁴

Lilly's definition of competitor, which the PSC learned of for the very first time in Lilly's July 15th letter brief, would effectively end this litigation.⁵ If a competitor is defined to include any person who has been a consultant for any pharmaceutical manufacturer, it would include all possible experts — as all experts are consultants for one pharmaceutical manufacturer or another. The PSC respectfully urges the Court to limit the definition of "competitor" to mean "any manufacturer of a second generation antipsychotic" — the class of drug that Zyprexa is in.

Lilly's definition of "customer" is also oppressively broad. Under Lilly's current definition, Plaintiffs could not retain and show documents to a pharmacologist who works for or is affiliated with a pharmacy that purchases anything from Lilly. Lilly's motivation is clear — they do not want Plaintiffs to be able to retain experts, and they also want to keep the dangers of Zyprexa hidden from the medical community and the public at large — an effort they have successfully undertaken for many years. This Court should not permit Lilly to continue to hide the true dangers about Zyprexa any longer. Accordingly, "customers" should be removed from the Protective Order or, at a minimum, should be significantly narrowed.

its products to this population and should not be able to now hide behind the very condition Zyprexa was designed to treat to resist providing people with the documents that establish their claims.

³ Lilly's attempt to use what has been included in other protective orders — including those in two state court Zyprexa actions — is of no moment. As Your Honor aptly pointed out on July 2nd, "there are different dynamics in different cases and different products" (Trans. at 13, copy attached as Exhibit B) and we are now dealing with a PSC, not "150 individual plaintiffs." *Id.* at 17.

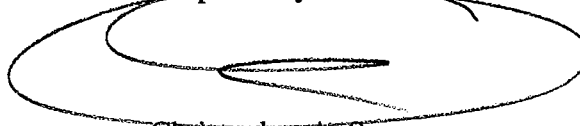
⁴ While the PSC does not believe either definition is warranted, as discussed in detail herein, if the Court believes that it must choose one of these two definitions, the PSC respectfully submits that the one we had been negotiating for weeks is less oppressive and is the lesser of the two evils.

⁵ It is often the case that experts will refuse to work on pharmaceutical litigation cases if their identity is shared with the drug manufacturer. This is because many experts are dependent on the manufacturers for a significant source of their income. Lilly is well aware of this dynamic and seeks to capitalize on it to defend this case on a basis other than the merits.

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The PSC respectfully submits that Lilly's proposed Protective Order should not be entered for the reasons stated herein and that following Your Honor's ruling the PSC will submit a revised order reflecting those rulings.⁶

Respectfully submitted,



Christopher A. Seeger
Plaintiffs' Liaison Counsel

Enclosures

cc: Hon. Jack Weinstein, U.S.D.J. (By Hand, w/ encl.)
Nina Gussack, Esq. (by fax, w/ encl.)
Samuel Abate, Jr., Esq. (by fax, w/ encl.)
All Members of the PSC (by e-mail, w/ encl.)

⁶ While the issue was not raised in Lilly's letter, the PSC finds that the last sentence of paragraph immediately following Paragraph 6(m) is confusing and should be clarified before entry of the Protective Order. The PSC will agree to provide a copy of the Endorsement to the Protective Order for any *testifying expert* at the time the expert's designation is served. If, however, at the time the designation is served, no confidential documents have been shared with the testifying expert, then the Endorsement will not exist and cannot be served at that time. Another issue of ambiguity is that in the last sentence of Paragraph 14, the word "cooperation" is ambiguous as it is written. This issue has always been objected to by the PSC during the meet-and-confer process. The PSC respectfully submits that "cooperation" be limited to providing the 5 areas of information identified in that paragraph. Finally, with respect to Paragraph 10(a), throughout the negotiations, the PSC has insisted that this paragraph include language that in the event the parties cannot obtain a ruling before the deposition commences, the deposition shall be permitted to proceed, but the witness not be able to retain copies of any confidential documents shown to that witness and the transcript will be sealed until a ruling is obtained. Because this language has been omitted by Lilly — which is yet another area that Lilly has altered the language being negotiated without telling the PSC or identifying it as an area of dispute for the Court — the PSC objects to Paragraph 10 and requests that the Court order that it be re-written consistent with the PSC's position and to strike Lilly's language that "and no confidential documents shall be shown to the deponent until the Court has ruled."

TAB “A”

Michael A. London

From: "Fairweather, Aline" <fairweaa@pepperlaw.com>
To: "Christopher A. Seeger (E-mail)" <cseeger@seegerweiss.com>; "Michael A. London (E-mail)" <mlondon@dandl-law.com>
Cc: "Vale, Tony" <VALEA@pepperlaw.com>; "Hamilton, Matthew" <HAMILTOM@pepperlaw.com>
Sent: Thursday, July 01, 2004 12:43 PM
Attach: #1602804 v1 - Lilly Draft Protective Order.doc
Subject: Zyprexa MDL: Protective Order

<<#1602804 v1 - Lilly Draft Protective Order.doc>> Attached is a draft which captures Lilly's positions. We have bolded the sections we need to either agree on, or brief. Please note that we have taken out what was 4(c).

When you've reviewed this, let's confirm where we stand on the Protective Order.

Aline.

This email is for the use of the intended recipient(s) only. If you have received this email in error, please notify the sender immediately and then delete it. If you are not the intended recipient, you must not keep, use, disclose, copy or distribute this email without the author's prior permission. We have taken precautions to minimize the risk of transmitting software viruses, but we advise you to carry out your own virus checks on any attachment to this message. We cannot accept liability for any loss or damage caused by software viruses. The information contained in this communication may be confidential and may be subject to the attorney-client privilege. If you are the intended recipient and you do not wish to receive similar electronic messages from us in future then please respond to the sender to this effect.

DRAFT – FOR DISCUSSION AND NEGOTIATION PURPOSES ONLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

MDL No. 1596

-----X

THIS DOCUMENT RELATES TO:
ALL ACTIONS

-----X

PRETRIAL ORDER NO. (PROTECTIVE ORDER)

The parties to the above-captioned litigation and this agreement recognize that in the course of prosecuting and defending this action, they may seek discovery of sensitive medical, mental health, and business information. The parties acknowledge each party’s need to control the dissemination of sensitive medical, mental health, and business information and to keep such information confidential. To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, adequately protect confidential material, and ensure that protection is afforded only to material so entitled, the parties hereby agree to the following terms of this Stipulated Protective Order (“Order”), pursuant to Rule 26 of the Federal Rules of Civil Procedure.

1. Discovery Materials

This Order applies to all products of discovery and all information derived therefrom, including, but not limited to, all documents, objects or things, deposition testimony and interrogatory/request for admission responses, and any copies, excerpts or summaries thereof, obtained by any party pursuant to the requirements of any court order, requests for production of documents, requests for admissions, interrogatories, or subpoena (“discovery materials”). This Order is limited to the litigation or appeal of any action brought by or on behalf of Plaintiffs, alleging personal injuries or other damages arising from Plaintiffs’ ingestion

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of olanzapine, commonly known as Zyprexa® (“Litigation”) and includes any State where counsel for the Plaintiff has agreed to be bound by this order.

2. Use of Discovery Materials

With the exception of documents or information that has become publicly available without a breach of the terms of this Order, all documents, information or other discovery materials produced or discovered in this Litigation shall be used by the receiving party solely for the prosecution or defense of this Litigation, and not for any other purpose, including any other litigation or judicial proceedings, or any business, competitive, governmental, commercial, or administrative purpose or function.

3. “Confidential Discovery Materials” Defined

For the purposes of this Order, “Confidential Discovery Materials” shall mean any information, or the contents of any document (including copies, transcripts, videos, and computer stored information),

a. which the designating party contends and in good faith believes is a trade secret or other confidential or proprietary research, development, trading, customer or commercial information, financial information, or information subject to a legally protected right of privacy (such as patient medical and mental health information or employee personnel records), and

b. which counsel for the designating party designates as “Confidential Discovery Materials” upon a good faith belief that there is cause therefore under applicable law. Confidential discovery materials shall not consist of information which at any time has been produced, disclosed or made available to the public or otherwise available for public access; provided, however, that confidential compilations of information shall not be deemed to have been so produced or disclosed merely because some or all of the component data have been so produced or disclosed other than in such compilation. Any information that has not been preserved or maintained in a manner calculated to preserve its confidentiality may not be designated as confidential.

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The terms of this Order shall in no way affect the right of any person (a) to withhold information on alleged grounds of immunity from discovery such as, for example, attorney/client privilege, work product or privacy rights of such third parties as patients, physicians, clinical investigators, or reporters of claimed adverse reactions; or (b) to withhold information on alleged grounds that such information is neither relevant to the subject matter involved in this action nor reasonably calculated to lead to the discovery of relevant and admissible evidence. Where the reason for a redaction of a particular document is unclear to the party receiving the document, such party may make a reasonable demand for an explanation of the redaction, to which the opposing party will respond in writing. Nothing herein prevents a party from moving to compel the withheld or redacted information.

In addition, the parties recognize that when large volumes of discovery materials are provided to the requesting party's counsel for preliminary inspection and designation for production, these discovery materials may not have yet been reviewed for confidentiality purposes, and the producing party reserves the right to so designate and redact appropriate discovery materials after they are designated by the requesting party for production. During the preliminary inspection process, all discovery materials reviewed by the requesting party's counsel shall be treated as Confidential discovery material.

4. Designation of Documents as "Confidential"

a. For the purposes of this Order, the term "document" means all tangible items, whether written, recorded or graphic, whether produced or created by a party or another person, whether produced pursuant to subpoena, to discovery request, by agreement, or otherwise.

b. Any document which the producing party intends to designate as Confidential shall be stamped (or otherwise have the legend recorded upon it in a way that brings the legend to the attention of a reasonable examiner):

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CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER
In re Zyprexa Products Liability Litigation
Eastern District of New York
MDL 1596

Such stamping or marking will take place prior to production by the producing person, or subsequent to selection by the receiving party for copying. The stamp shall be affixed in such a manner as not to obliterate or obscure any written material.

c. A party may preliminarily designate as “Confidential” all documents produced by a third party entity employed by the party for the purposes of document management, quality control, production, reproduction, storage, scanning, or other such purpose related to discovery, by notifying counsel for the other party that all documents being produced are to be accorded such protection. Once said documents are produced by such third party vendor, the designating party will then review the documents and, as appropriate, designate them as “Confidential” by stamping the document (or otherwise having the legend recorded upon it in a way that brings its attention to a reasonable examiner) as such.

5. Non-Disclosure of Confidential Discovery Materials

Except with the prior written consent of the party or other person originally producing Confidential discovery materials, or as hereinafter provided under this Order, no Confidential discovery materials, or any portion thereof, may be disclosed to any person.

6. Permissible Disclosures of Confidential Discovery Material

Notwithstanding paragraph 5, Confidential discovery materials may be disclosed to and used only by:

a. **counsel of record for the parties in this Litigation who are actively engaged in the conduct of this Litigation and to his/her partners, associates,**

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secretaries, legal assistants, and employees to the extent considered reasonably necessary to render professional services in the Litigation;

b. inside counsel of the parties, to the extent reasonably necessary to render professional services in the Litigation;

c. court officials involved in this Litigation (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Court);

d. any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper;

e. where produced by Plaintiff, in addition to the persons described in subsections (a) and (b) of this section, Defendant's in-house paralegals and outside counsel, including any attorneys employed by or retained by Defendant's outside counsel who are assisting in connection within this Litigation, and the paralegal, clerical, secretarial, and other staff employed or retained by such outside counsel or retained by the attorneys employed by or retained by Defendant's outside counsel. To the extent a Defendant does not have in-house counsel, it may designate two individuals employed by such Defendant (in addition to outside counsel) to receive Confidential Discovery Materials produced by Plaintiff.

f. where produced by Defendants, in addition to the persons described in subsections (a) and (b) of this section, Plaintiff's attorneys in other filed litigation alleging injuries or damages resulting from the use of Zyprexa® including their paralegal, clerical, secretarial and other staff employed or retained by such counsel, provided that such counsel have agreed to be governed by the terms of this Order and shall sign a copy of the order.

g. where produced by any Defendant, outside counsel for any other Defendant, including any attorneys employed by or retained by any other Defendant's outside

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counsel who are assisting in connection with this Litigation, and the paralegal, clerical, secretarial, and other staff employed or retained by such outside counsel.

h. **persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify;**

i. outside consultants or outside experts retained for the purpose of assisting counsel in the Litigation;

j. employees of counsel involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designating programs for handling data connected with this action, including the performance of such duties in relation to a computerized litigation support system;

k. employees of third-party contractors performing one or more of the functions set forth in (j) above;

l. any employee of a party or former employee of a party, but only to the extent considered necessary for the preparation and trial of this action; and

m. any other person, if consented to by the producing party.

Any individual to whom disclosure is to be made under subparagraphs (d) through (m) above, shall sign, prior to such disclosure, a copy of the Endorsement of Stipulated Protective Order, attached as Exhibit A. Counsel providing access to Confidential discovery materials shall retain copies of the executed Endorsement(s) of Stipulated Protective Order. **Any party seeking a copy of an endorsement may make a reasonable demand to which the opposing party will respond in writing. If the dispute cannot be resolved the demanding party may move the Court for an order compelling production upon a showing of good cause.** For testifying experts, a copy of the Endorsement of Stipulated Protective Order executed by the testifying expert shall be furnished to counsel for the party who produced the Confidential discovery materials to which the expert has access, at the time the expert's designation is served, or at the time the Confidential discovery materials are provided to the testifying expert, whichever is later.

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Before disclosing Confidential discovery materials to any person listed in subparagraphs (d) through (m) who is a Customer or Competitor (or an employee of either) of the party that so designated the discovery materials, but who is not an employee of a party, the party wishing to make such disclosure shall give at least three (3) business days advance notice in writing to the counsel who designated such discovery materials as Confidential, stating that such disclosure will be made, identifying by subject matter category the discovery material to be disclosed, and stating the purposes of such disclosure. If, within the three (3) business day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the Court has denied such motion. As used in this paragraph, (a) the term “Customer” means any direct purchaser of products from Lilly, or any regular indirect purchaser of products from Lilly (such as a pharmacy generally purchasing through wholesale houses), and does not include physicians; (b) the term “Competitor” means any manufacturer or seller of prescription medications.

7. Production of Confidential Materials by Non-Parties

Any non-party who is producing discovery materials in the Litigation may agree to and obtain the benefits of the terms and protections of this Order by designating as “Confidential” the discovery materials that the non-party is producing, as set forth in paragraph 4.

8. Inadvertent Disclosures

a. The parties agree that the inadvertent production of any discovery materials that would be protected from disclosure pursuant to the attorney-client privilege, the work product doctrine or any other relevant privilege or doctrine shall not constitute a waiver of the applicable privilege or doctrine. If any such discovery materials are inadvertently produced, the recipient of the discovery materials agrees that, upon request from the producing party, it will promptly return the discovery materials and all copies of the discovery materials in its

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possession, delete any versions of the discovery materials on any database it maintains and make no use of the information contained in the discovery materials; provided, however, that the party returning such discovery materials shall have the right to apply to the Court for an order that such discovery materials are not protected from disclosure by any privilege. The person returning such material may not, however, assert as a ground for such motion the fact or circumstances of the inadvertent production.

b. The parties further agree that in the event that the producing party or other person inadvertently fails to designate discovery materials as Confidential in this or any other litigation, it may make such a designation subsequently by notifying all persons and parties to whom such discovery materials were produced, in writing, as soon as practicable. After receipt of such notification, the persons to whom production has been made shall prospectively treat the designated discovery materials as Confidential, subject to their right to dispute such designation in accordance with paragraph 9.

9. Declassification

a. Nothing shall prevent disclosure beyond that limited by this Order if the producing party consents in writing to such disclosure.

b. If at any time a party (or aggrieved entity permitted by the Court to intervene for such purpose) wishes for any reason to dispute a designation of discovery materials as Confidential made hereunder, such person shall notify the designating party of such dispute in writing, specifying by exact Bates number(s) the discovery materials in dispute. The designating party shall respond in writing within 20 days of receiving this notification.

c. If the parties are unable to amicably resolve the dispute, the proponent of confidentiality may apply by motion to the Court for a ruling that discovery materials stamped as Confidential are entitled to such status and protection under Rule 26 of the Federal Rules of Civil Procedure and this Order, provided that such motion is made within forty

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five (45) days from the date the challenger of the confidential designation challenges the designation or such other time period as the parties may agree. The designating party shall have the burden of proof on such motion to establish the propriety of its Confidential designation.

d. If the time for filing a motion, as provided in paragraph 9.c, has expired without the filing of any such motion, or ten (10) business days (or such longer time as ordered by this Court) have elapsed after the appeal period for an order of this Court that the discovery material shall not be entitled to Confidential status, the Confidential discovery material shall lose its designation.

10. Confidential Discovery Materials in Depositions

a. Counsel for any party may show Confidential discovery materials to a deponent during deposition and examine the deponent about the materials so long as the deponent already knows the Confidential information contained therein or if the provisions of paragraph 6 are complied with. **If a deponent refuses to sign an endorsement of the protective order, the examining party shall continue the deposition and move the Court for an Order directing that deponent to abide by the terms of the protective order.** Deponents shall not retain or copy portions of the transcript of their depositions that contain Confidential information not provided by them or the entities they represent unless they sign the form described, and otherwise comply with the provisions in paragraph 6. A deponent who is not a party shall be furnished a copy of this Order before being examined about potentially Confidential discovery materials. While a deponent is being examined about any Confidential discovery materials or the Confidential information contained therein, persons to whom disclosure is not authorized under this Order shall be excluded from being present.

b. Parties (and deponents) may, within thirty (30) days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as Confidential. Until expiration of such thirty (30) day period, the entire transcript, including exhibits, will be treated as subject to Confidential protection under this Order. If no party or deponent timely designates

DRAFT – FOR DISCUSSION AND NEGOTIATION PURPOSES ONLY

a transcript as Confidential, then none of the transcript or its exhibits will be treated as confidential.

11. Confidential Discovery Materials Offered as Evidence at Trial

Confidential discovery materials and the information therein may be offered in evidence at trial or any court hearing, provided that the proponent of the evidence gives notice to counsel for the party or other person that designated the discovery materials or information as Confidential in accordance with the Federal Rules of Evidence and any local rules, standing orders, or rulings in the Litigation governing identification and use of exhibits at trial. Any party may move the Court for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The Court will then determine whether the proffered evidence should continue to be treated as Confidential and, if so, what protection, if any, may be afforded to such discovery materials or information at trial.

12. Filing

Confidential discovery materials shall not be filed with the Clerk except when required in connection with matters pending before the Court. If filed, they shall be filed in a sealed envelope, clearly marked:

DRAFT – FOR DISCUSSION AND NEGOTIATION PURPOSES ONLY

“THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION COVERED BY A PROTECTIVE ORDER OF THE COURT AND IS SUBMITTED UNDER SEAL PURSUANT TO THAT PROTECTIVE ORDER. THE CONFIDENTIAL CONTENTS OF THIS DOCUMENT MAY NOT BE DISCLOSED WITHOUT EXPRESS ORDER OF THE COURT”

and shall remain sealed while in the office of the Clerk so long as they retain their status as Confidential discovery materials. Said Confidential discovery materials shall be kept under seal until further order of the Court; however, said Confidential discovery materials and other papers filed under seal shall be available to the Court, to counsel of record, and to all other persons entitled to receive the confidential information contained therein under the terms of this Order.

13. Client Consultation

Nothing in this Order shall prevent or otherwise restrict counsel from rendering advice to their clients in this Litigation and, in the course thereof, relying generally on examination of Confidential discovery materials; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 6.

14. Subpoena by other Courts or Agencies

If another court or an administrative agency subpoenas or otherwise orders production of Confidential discovery materials which a person has obtained under the terms of this Order, the person to whom the subpoena or other process is directed shall not provide or otherwise disclose such discovery materials until ten (10) business days after notifying counsel for the designating party in writing of all of the following: (1) the discovery materials that are requested for production in the subpoena; (2) the date on which compliance with the subpoena is requested; (3) the location at which compliance with the subpoena is requested; (4) the identity of the party serving the subpoena; and (5) the case name, jurisdiction and index, docket, complaint, charge, civil action or other identification number or other designation identifying the

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litigation, administrative proceeding or other proceeding in which the subpoena or other process has been issued. **Furthermore, the person receiving the subpoena or other process shall cooperate with the producing party in any proceeding related thereto.**

15. Non-termination

The provisions of this Order shall not terminate at the conclusion of this Litigation. Within ninety (90) days after final conclusion of all aspects of this Litigation, Confidential discovery materials and all copies of same (other than exhibits of record) shall be returned to the party or person which produced such documents or, at the option of such party or person (if it retains at least one copy of the same), destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the discovery materials not more than one hundred twenty (120) days after final termination of this Litigation. Outside counsel, however, shall not be required to return or destroy any pretrial or trial records as are regularly maintained by that counsel in the ordinary course of business; which records will continue to be maintained as confidential in conformity with this Order.

16. Modification Permitted

Nothing in this Order shall prevent any party or other person from seeking modification of this Order or from objecting to discovery that it believes to be otherwise improper.

17. Responsibility of Attorneys; Copies

The attorneys of record are responsible for employing reasonable measures to control and record, consistent with this Order, duplication of, access to, and distribution of Confidential discovery materials, including abstracts and summaries thereof.

No duplications of Confidential discovery materials shall be made except for providing working copies and for filing in Court under seal; provided, however, that copies may be made only by those persons specified in sections (a), (b) and (c) of paragraph 6 above. Any copy provided to a person listed in paragraph 6 shall be returned to counsel of

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record upon completion of the purpose for which such copy was provided. In the event of a change in counsel, retiring counsel shall fully instruct new counsel of their responsibilities under this Order and new counsel shall sign this Order.

18. No Waiver of Rights or Implication of Discoverability

a. No disclosure pursuant to any provision of this Order shall waive any rights or privileges of any party granted by this Order.

b. This Order shall not enlarge or affect the proper scope of discovery in this or any other litigation; nor shall this order imply that Confidential discovery materials are properly discoverable, relevant, or admissible in this or any other litigation. Each party reserves the right to object to any disclosure of information or production of any documents that the producing party designates as Confidential discovery materials on any other ground it may deem appropriate.

c. The entry of this Order shall be without prejudice to the rights of the parties, or any one of them, or of any non-party to assert or apply for additional or different protection. Nothing in this Order shall prevent any party from seeking an appropriate protective order to further govern the use of Confidential discovery materials at trial.

19. Improper Disclosure of Confidential Discovery Material

Disclosure of discovery materials designated Confidential other than in accordance with the terms of this Protective Order may subject the disclosing person to such sanctions and remedies as the Court may deem appropriate.

DRAFT – FOR DISCUSSION AND NEGOTIATION PURPOSES ONLY

Plaintiffs Lead Counsel

Nina M. Gussack
Anthony C.H. Vale
Aline Fairweather
Matthew J. Hamilton
PEPPER HAMILTON LLP
3000 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103
*Attorneys for Defendant
Eli Lilly and Company*

Dated: _____

Dated: : _____

SO ORDERED

Jack B. Weinstein
Senior District Judge

Dated: _____, _____, 2004
Brooklyn, New York

FILED

IN CLERK'S OFFICE
U.S. DISTRICT COURT, E.D.N.Y.

DOCKET & FILE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

★ AUG 09 2004 ★

BROOKLYN OFFICE

In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

MDL No. 1596

-----X
THIS DOCUMENT RELATES TO:
ALL ACTIONS

**MOVANT'S COUNSEL IS DIRECTED
TO SERVE A COPY OF THIS ORDER
ON ALL PARTIES UPON RECEIPT**

-----X
CASE MANAGEMENT
(CAJ)
att
PROTECTIVE ORDER NO. 3 (PROTECTIVE ORDER)

To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, adequately protect confidential material, and ensure that protection is afforded only to material so entitled, the Court enters this Protective Order pursuant to Rule 26 of the Federal Rules of Civil Procedure.

1. Discovery Materials

This Order applies to all products of discovery and all information derived therefrom, including, but not limited to, all documents, objects or things, deposition testimony and interrogatory/request for admission responses, and any copies, excerpts or summaries thereof, obtained by any party pursuant to the requirements of any court order, requests for production of documents, requests for admissions, interrogatories, or subpoena ("discovery materials"). This Order is limited to the litigation or appeal of any action brought by or on behalf of plaintiffs, alleging personal injuries or other damages arising from plaintiffs' ingestion of olanzapine, commonly known as Zyprexa® ("Litigation") and includes any state court action where counsel for the plaintiff has agreed to be bound by this order.

2. Use of Discovery Materials

With the exception of documents or information that has become publicly available without a breach of the terms of this Order, all documents, information or other

discovery materials produced or discovered in this Litigation and that have been designated confidential shall be used by the receiving party solely for the prosecution or defense of this Litigation, to the extent reasonably necessary to accomplish the purpose for which disclosure is made, and not for any other purpose, including any other litigation or judicial proceedings, or any business, competitive, governmental, commercial, or administrative purpose or function.

3. **“Confidential Discovery Materials” Defined**

For the purposes of this Order, “Confidential Discovery Materials” shall mean any information that the producing party in good faith believes is properly protected under Federal Rule of Civil Procedure 26(c)(7).

The terms of this Order shall in no way affect the right of any person (a) to withhold information on alleged grounds of immunity from discovery such as, for example, attorney/client privilege, work product or privacy rights of such third parties as patients, physicians, clinical investigators, or reporters of claimed adverse reactions; or (b) to withhold information on alleged grounds that such information is neither relevant to any claim or defense nor reasonably calculated to lead to the discovery of admissible evidence. If information is redacted on the basis it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, the redacting party shall identify on a separate log that identifies the document subject to redaction and the reason for such redaction.

Where large volumes of discovery materials are provided to the requesting party’s counsel for preliminary inspection and designation for production, and have not been reviewed for confidentiality purposes, the producing party reserves the right to so designate and redact appropriate discovery materials after they are designated by the requesting party for production. During the preliminary inspection process, and before production, all discovery materials reviewed by the requesting party’s counsel shall be treated as Confidential Discovery material.

4. **Designation of Documents as “Confidential”**

a. For the purposes of this Order, the term “document” means all tangible items, whether written, recorded or graphic, whether produced or created by a party or

another person, whether produced pursuant to subpoena, to discovery request, by agreement, or otherwise.

b. Any document which the producing party intends to designate as Confidential shall be stamped (or otherwise have the legend recorded upon it in a way that brings the legend to the attention of a reasonable examiner) with a notation substantially similar to the following:

Zyprexa MDL 1596: Confidential-Subject to Protective Order

Such stamping or marking will take place prior to production by the producing person, or subsequent to selection by the receiving party for copying. The stamp shall be affixed in such a manner as not to obliterate or obscure any written material.

c. A party may preliminarily designate as "Confidential" all documents produced by a third party entity employed by the party for the purposes of document management, quality control, production, reproduction, storage, scanning, or other such purpose related to discovery, by notifying counsel for the other party that all documents being produced are to be accorded such protection. Once said documents are produced by such third party vendor, the designating party will then review the documents and, as appropriate, designate them as "Confidential" by stamping the document (or otherwise having the legend recorded upon it in a way that brings its attention to a reasonable examiner) as such.

5. Non-Disclosure of Confidential Discovery Materials

Except with the prior written consent of the party or other person originally producing Confidential Discovery Materials, or as hereinafter provided under this Order, no Confidential Discovery Materials, or any portion thereof, may be disclosed to any person, including any plaintiff, except as set forth in section 6(d) below.

6. **Permissible Disclosures of Confidential Discovery Material**

Notwithstanding paragraph 5, Confidential Discovery Materials may be disclosed to and used only by:

- a. counsel of record for the parties in this Litigation and to his/her partners, associates, secretaries, legal assistants, and employees to the extent considered reasonably necessary to render professional services in the Litigation ,
- b. inside counsel of the parties, to the extent reasonably necessary to render professional services in the Litigation;
- c. court officials involved in this Litigation (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Court);
- d. any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper;
- e. where produced by a plaintiff, in addition to the persons described in subsections (a) and (b) of this section, a defendant's in-house paralegals and outside counsel, including any attorneys employed by or retained by defendant's outside counsel who are assisting in connection within this Litigation, and the paralegal, clerical, secretarial, and other staff employed or retained by such outside counsel or retained by the attorneys employed by or retained by defendant's outside counsel. To the extent a defendant does not have in-house counsel, it may designate two individuals employed by such defendant (in addition to outside counsel) to receive Confidential Discovery Materials produced by plaintiff;
- f. where produced by defendant Eli Lilly and Company, in addition to the persons described in subsections (a) and (b) of this section, plaintiff's attorneys in other filed litigation alleging injuries or damages resulting from the use of Zyprexa® including their paralegal, clerical, secretarial and other staff employed or retained by such counsel, provided that

such counsel have agreed to be governed by the terms of this Order and shall sign a copy of the order;

g. where produced by any defendant, outside counsel for any other defendant, including any attorneys employed by or retained by any other defendant's outside counsel who are assisting in connection with this Litigation, and the paralegal, clerical, secretarial, and other staff employed or retained by such outside counsel;

h. persons noticed for depositions or designated as trial witnesses, or those who counsel of record in good faith expect to testify at deposition or trial, to the extent reasonably necessary in preparing to testify;

i. outside consultants or outside experts retained for the purpose of assisting counsel in the Litigation;

j. employees of counsel involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designating programs for handling data connected with this action, including the performance of such duties in relation to a computerized litigation support system;

k. employees of third-party contractors performing one or more of the functions set forth in (j) above;

l. any employee of a party or former employee of a party, but only to the extent considered necessary for the preparation and trial of this action; and

m. any other person, if consented to by the producing party.

Any individual to whom disclosure is to be made under subparagraphs (d) through (m) above, shall sign, prior to such disclosure, a copy of the Endorsement of Protective Order, attached as Exhibit A. Counsel providing access to Confidential Discovery Materials shall retain copies of the executed Endorsement(s) of Protective Order. Any party seeking a copy of an endorsement may make a demand setting forth the reasons therefor to which the opposing party will respond in writing. If the dispute cannot be resolved the demanding party may move the Court for an order compelling production upon a showing of good cause. For testifying experts,

a copy of the Endorsement of Protective Order executed by the testifying expert shall be furnished to counsel for the party who produced the Confidential Discovery Materials to which the expert has access, at the time the expert's designation is served, or at the time the Confidential Discovery Materials are provided to the testifying expert, whichever is later.

Before disclosing Confidential discovery materials to any person listed in subparagraphs (d) through (m) who is a Customer or Competitor (or an employee of either) of the party that so designated the discovery materials, but who is not an employee of a party, the party wishing to make such disclosure shall give at least three (3) business days advance notice in writing to the counsel who designated such discovery materials as Confidential, stating that such disclosure will be made, identifying by subject matter category the discovery material to be disclosed, and stating the purposes of such disclosure. If, within the three (3) business day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the Court has denied such motion. As used in this paragraph, (a) the term "Customer" means any direct purchaser of products from Lilly, or any regular indirect purchaser of products from Lilly (such as a pharmacy generally purchasing through wholesale houses), and does not include physicians; and (b) the term "Competitor" means any manufacturer or seller of prescription medications.

The notice provision immediately above applies to consultants and/or independent contractors of Competitors to the extent the consultants or contractors derive a substantial portion of their income, or spend a substantial portion of their time working for a pharmaceutical company that manufactures prescription medical products in the neuroscience area.

7. Production of Confidential Materials by Non-Parties

Any non-party who is producing discovery materials in the Litigation may agree to and obtain the benefits of the terms and protections of this Order by designating as "Confidential" the discovery materials that the non-party is producing, as set forth in paragraph 4.

8. Inadvertent Disclosures

a. The parties agree that the inadvertent production of any discovery materials that would be protected from disclosure pursuant to the attorney-client privilege, the work product doctrine or any other relevant privilege or doctrine shall not constitute a waiver of the applicable privilege or doctrine. If any such discovery materials are inadvertently produced, the recipient of the discovery materials agrees that, upon request from the producing party, it will promptly return the discovery materials and all copies of the discovery materials in its possession, delete any versions of the discovery materials on any database it maintains and make no use of the information contained in the discovery materials; provided, however, that the party returning such discovery materials shall have the right to apply to the Court for an order that such discovery materials are not protected from disclosure by any privilege. The person returning such material may not, however, assert as a ground for such motion the fact or circumstances of the inadvertent production.

b. The parties further agree that in the event that the producing party or other person inadvertently fails to designate discovery materials as Confidential in this or any other litigation, it may make such a designation subsequently by notifying all persons and parties to whom such discovery materials were produced, in writing, as soon as practicable. After receipt of such notification, the persons to whom production has been made shall prospectively treat the designated discovery materials as Confidential, subject to their right to dispute such designation in accordance with paragraph 9.

9. Declassification

a. Nothing shall prevent disclosure beyond that limited by this Order if the producing party consents in writing to such disclosure.

b. If at any time a party (or aggrieved entity permitted by the Court to intervene for such purpose) wishes for any reason to dispute a designation of discovery materials as Confidential made hereunder, such person shall notify the designating party of such dispute in writing, specifying by exact Bates number(s) the discovery materials in dispute. The designating party shall respond in writing within 20 days of receiving this notification.

c. If the parties are unable to amicably resolve the dispute, the proponent of confidentiality may apply by motion to the Court for a ruling that discovery materials stamped as Confidential are entitled to such status and protection under Rule 26 of the Federal Rules of Civil Procedure and this Order, provided that such motion is made within forty five (45) days from the date the challenger of the confidential designation challenges the designation or such other time period as the parties may agree. The designating party shall have the burden of proof on such motion to establish the propriety of its Confidential designation.

d. If the time for filing a motion, as provided in paragraph 9.c, has expired without the filing of any such motion, or ten (10) business days (or such longer time as ordered by this Court) have elapsed after the appeal period for an order of this Court that the discovery material shall not be entitled to Confidential status, the Confidential Discovery Material shall lose its designation.

10. Confidential Discovery Materials in Depositions

a. Counsel for any party may show Confidential Discovery Materials to a deponent during deposition and examine the deponent about the materials so long as the deponent already knows the Confidential information contained therein or if the provisions of paragraph 6 are complied with. The party noticing a deposition shall obtain each witness' endorsement of the protective order in advance of the deposition and shall notify the designating party at least ten (10) days prior to the deposition if it has been unable to obtain that witness' endorsement. The designating party may then move the Court for an Order directing that the witness abide by the terms of the protective order, and no confidential document shall be shown to the deponent until the Court has ruled. Deponents shall not retain or copy portions of the

transcript of their depositions that contain Confidential information not provided by them or the entities they represent unless they sign the form described, and otherwise comply with the provisions in paragraph 6. A deponent who is not a party shall be furnished a copy of this Order before being examined about potentially Confidential Discovery Materials. While a deponent is being examined about any Confidential Discovery Materials or the Confidential information contained therein, persons to whom disclosure is not authorized under this Order shall be excluded from being present.

b. Parties (and deponents) may, within thirty (30) days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as Confidential. Until expiration of such thirty (30) day period, the entire transcript, including exhibits, will be treated as subject to Confidential protection under this Order. If no party or deponent timely designates a transcript as Confidential, then none of the transcript or its exhibits will be treated as confidential.

11. Confidential Discovery Materials Offered as Evidence at Trial

Confidential Discovery Materials and the information therein may be offered in evidence at trial or any court hearing, provided that the proponent of the evidence gives notice to counsel for the party or other person that designated the discovery materials or information as Confidential in accordance with the Federal Rules of Evidence and any local rules, standing orders, or rulings in the Litigation governing identification and use of exhibits at trial. Any party may move the Court for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The Court will then determine whether the proffered evidence should continue to be treated as Confidential and, if so, what protection, if any, may be afforded to such discovery materials or information at trial.

12. Filing

Confidential Discovery Materials shall not be filed with the Clerk except when required in connection with matters pending before the Court. If filed, they shall be filed in a sealed envelope, clearly marked:

“THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION COVERED BY A PROTECTIVE ORDER OF THE COURT AND IS SUBMITTED UNDER SEAL PURSUANT TO THAT PROTECTIVE ORDER. THE CONFIDENTIAL CONTENTS OF THIS DOCUMENT MAY NOT BE DISCLOSED WITHOUT EXPRESS ORDER OF THE COURT”

and shall remain sealed while in the office of the Clerk so long as they retain their status as Confidential Discovery Materials. Said Confidential Discovery Materials shall be kept under seal until further order of the Court; however, said Confidential Discovery Materials and other papers filed under seal shall be available to the Court, to counsel of record, and to all other persons entitled to receive the confidential information contained therein under the terms of this Order.

13. Client Consultation

Nothing in this Order shall prevent or otherwise restrict counsel from rendering advice to their clients in this Litigation and, in the course thereof, relying generally on examination of Confidential Discovery Materials; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 6.

14. Subpoena by other Courts or Agencies

If another court or an administrative agency subpoenas or otherwise orders production of Confidential Discovery Materials which a person has obtained under the terms of this Order, the person to whom the subpoena or other process is directed shall promptly notify the designating party in writing of all of the following: (1) the discovery materials that are requested for production in the subpoena; (2) the date on which compliance with the subpoena is requested; (3) the location at which compliance with the subpoena is requested; (4) the identity of the party serving the subpoena; and (5) the case name, jurisdiction and index, docket, complaint, charge, civil action or other identification number or other designation identifying the

litigation, administrative proceeding or other proceeding in which the subpoena or other process has been issued. In no event shall confidential documents be produced prior to the receipt of written notice by the designating party and a reasonable opportunity to object. Furthermore, the person receiving the subpoena or other process shall cooperate with the producing party in any proceeding related thereto.

15. Non-termination

The provisions of this Order shall not terminate at the conclusion of this Litigation. Within ninety (90) days after final conclusion of all aspects of this Litigation, counsel shall, at their option, return or destroy Confidential Discovery Materials and all copies of same. If counsel elects to destroy Confidential Discovery Materials, they shall consult with counsel for the producing party on the manner of destruction and obtain such party's consent to the method and means of destruction. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the discovery materials not more than one hundred twenty (120) days after final termination of this Litigation. Outside counsel, however, shall not be required to return or destroy any pretrial or trial records as are regularly maintained by that counsel in the ordinary course of business; which records will continue to be maintained as confidential in conformity with this Order.

16. Modification Permitted

Nothing in this Order shall prevent any party or other person from seeking modification of this Order or from objecting to discovery that it believes to be otherwise improper.

17. Responsibility of Attorneys; Copies

The attorneys of record are responsible for employing reasonable measures to control and record, consistent with this Order, duplication of, access to, and distribution of Confidential Discovery Materials, including abstracts and summaries thereof.

No duplications of Confidential Discovery Materials shall be made except for providing working copies and for filing in Court under seal; provided, however, that copies may

be made only by those persons specified in sections (a), (b) and (c) of paragraph 6 above. Any copy provided to a person listed in paragraph 6 shall be returned to counsel of record upon completion of the purpose for which such copy was provided. In the event of a change in counsel, retiring counsel shall fully instruct new counsel of their responsibilities under this Order and new counsel shall sign this Order.

18. No Waiver of Rights or Implication of Discoverability

a. No disclosure pursuant to any provision of this Order shall waive any rights or privileges of any party granted by this Order.

b. This Order shall not enlarge or affect the proper scope of discovery in this or any other litigation; nor shall this order imply that Confidential Discovery Materials are properly discoverable, relevant, or admissible in this or any other litigation. Each party reserves the right to object to any disclosure of information or production of any documents that the producing party designates as Confidential Discovery Materials on any other ground it may deem appropriate.

c. The entry of this Order shall be without prejudice to the rights of the parties, or any one of them, or of any non-party to assert or apply for additional or different protection. Nothing in this Order shall prevent any party from seeking an appropriate protective order to further govern the use of Confidential Discovery Materials at trial.

19. Improper Disclosure of Confidential Discovery Material

Disclosure of discovery materials designated Confidential other than in accordance with the terms of this Protective Order may subject the disclosing person to such sanctions and remedies as the Court may deem appropriate.

SO ORDERED *as approving act of*
Magistrate Judge and parties.
No objection being here made.



Hon. A. Simon Chrein
United States Magistrate Judge

Dated: August 3, 2004
Brooklyn, New York



Hon. Jack B. Weinstein
Senior District Judge

Dated: 8/3, 2004
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

MDL No. 1596

-----X
THIS DOCUMENT RELATES TO:

ALL ACTIONS

-----X
ENDORSEMENT OF PROTECTIVE ORDER

I hereby attest to my understanding that information or documents designated Confidential are provided to me subject to the Protective Order ("Order") dated _____, 2004 (the "Protective Order"), in the above-captioned litigation ("Litigation"); that I have been given a copy of and have read the Order; and that I agree to be bound by its terms. I also understand that my execution of this Endorsement of Protective Order, indicating my agreement to be bound by the Order, is a prerequisite to my review of any information or documents designated as Confidential pursuant to the Order.

I further agree that I shall not disclose to others, except in accord with the Order, any Confidential Discovery Materials, in any form whatsoever, and that such Confidential Discovery Materials and the information contained therein may be used only for the purposes authorized by the Order.

I further agree to return all copies of any Confidential Discovery Materials I have received to counsel who provided them to me upon completion of the purpose for which they were provided and no later than the conclusion of this Litigation.

I further agree and attest to my understanding that my obligation to honor the confidentiality of such discovery material will continue even after this Litigation concludes.

I further agree and attest to my understanding that, if I fail to abide by the terms of the Order, I may be subject to sanctions, including contempt of court, for such failure. I agree to be subject to the jurisdiction of the United States District Court, Eastern District of New York, for the purposes of any proceedings relating to enforcement of the Order.

I further agree to be bound by and to comply with the terms of the Order as soon as I sign this Agreement, regardless of whether the Order has been entered by the Court.

Date: _____

By: _____



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

MDL No. 1596

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ENDORSEMENT OF PROTECTIVE ORDER

I hereby attest to my understanding that information or documents designated Confidential are provided to me subject to the Protective Order ("Order") dated 11/10, ²⁰⁰⁶ ~~2004~~ (the "Protective Order"), in the above-captioned litigation ("Litigation"); that I have been given a copy of and have read the Order, and that I agree to be bound by its terms. ^{as amended below.} ~~I also understand that my execution of this Endorsement of Protective Order, indicating my agreement to be bound by the Order, is a prerequisite to my review of any information or documents designated as Confidential pursuant to the Order.~~

I further agree that I shall not disclose to others, except in accord with the Order, any Confidential Discovery Materials, in any form whatsoever, and that such Confidential Discovery Materials and the information contained therein may be used only for the purposes authorized by the Order, ^{unless release is needed to protect public}

I further agree to return all copies of any Confidential Discovery Materials I have received to counsel who provided them to me upon completion of the purpose for which they were provided and no later than the conclusion of this Litigation.

I further agree and attest to my understanding that my obligation to honor the confidentiality of such discovery material will continue even after this Litigation concludes.

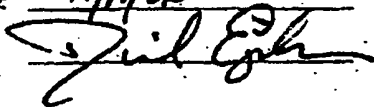
I further agree and attest to my understanding that, if I fail to abide by the terms of the Order, I may be subject to sanctions, including contempt of court, for such failure. I agree to be subject to the jurisdiction of the United States District Court, Eastern District of New York, for the purposes of any proceedings relating to enforcement of the Order.

I further agree to be bound by and to comply with the terms of the Order as soon as I sign this Agreement, regardless of whether the Order has been entered by the Court.

Date:

11/14/07

By:

 NO 1018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

MDL No. 1596

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ENDORSEMENT OF PROTECTIVE ORDER

I hereby attest to my understanding that information or documents designated Confidential are provided to me subject to the Protective Order ("Order") dated 8/3, 2004 (the "Protective Order"), in the above-captioned litigation ("Litigation"); that I have been given a copy of and have read the Order, and that I agree to be bound by its terms. I also understand that my execution of this Endorsement of Protective Order, indicating my agreement to be bound by the Order, is a prerequisite to my review of any information or documents designated as Confidential pursuant to the Order.

I further agree that I shall not disclose to others, except in accord with the Order, any Confidential Discovery Materials, in any form whatsoever, and that such Confidential Discovery Materials and the information contained therein may be used only for the purposes authorized by the Order, *unless this conflicts with any other sworn statements.*

I further agree to return all copies of any Confidential Discovery Materials I have received to counsel who provided them to me upon completion of the purpose for which they were provided and no later than the conclusion of this Litigation.

I further agree and attest to my understanding that my obligation to honor the confidentiality of such discovery material will continue even after this Litigation concludes.

I further agree and attest to my understanding that, if I fail to abide by the terms of the Order, I may be subject to sanctions, including contempt of court, for such failure. I agree to be subject to the jurisdiction of the United States District Court, Eastern District of New York, for the purposes of any proceedings relating to enforcement of the Order.

I further agree to be bound by and to comply with the terms of the Order as soon as I sign this Agreement, regardless of whether the Order has been entered by the Court.

Date:

11/11/06

By:

Dial Gil

December 6, 2006

Robert A. Armitage
General Counsel
Eli Lilly and Company
Lilly Corporate Center
Indianapolis, IN 46285
Phone: (317) 433-5499
FAX: (317) 433-3000

Dear Mr. Armitage:

I am a consulting witness in the Zyprexa litigation and have access to over 500,000 documents and depositions which Lilly claims are "Confidential Discovery Materials." Lilly defines these as "any information that the producing party in good faith believes properly protected under Federal Rule of Civil Procedure 26(c)(7)."

Lilly has claimed that newspaper articles and press releases fit this definition. I have received a subpoena attached that calls for the production of all these documents and depositions. In compliance with the protective order I am supplying a complete copy of the subpoena which notifies you of all the following:

- (1) the discovery materials that are requested for production in the subpoena;
- (2) the date on which compliance with the subpoena requested;
- (3) the location at which compliance with the subpoena is requested;
- (4) the identity of the party serving the subpoena; and
- (5) the case name, jurisdiction and index, docket, complaint, charge, civil action or other identification number or other designation identifying the litigation, administrative proceeding or other proceeding in which the subpoena or other process has been issued:

David Egilman MD
8 North Main Street
Suite 404
Attleboro, MA 02703
degilman@egilman.com
508-226-5091 ext 11
cell 508-472-2809

IN THE ~~DISTRICT~~/SUPERIOR COURT FOR THE STATE OF ALASKA
AT ANCHORAGE

In the Matter of the Guardianship
of B.B.

Respondent ~~XXXXXXXXXX~~
~~XXX~~

~~XXXXXXXXXX~~

CASE NO. 3AN-04-545 P/G

SUBPOENA FOR TAKING DEPOSITION

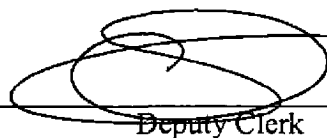
To: **David Egilman, MD, MPH**
Address: **8 North Main Street, Attleboro, Massachusetts 02703**

You are commanded to appear and testify ~~under oath in the above case at:~~ ^{/telephonically}
Date and Time: December 20, 2006 at 10:00 AST, 2:00 PM EST
~~Office of:~~ Telephone No. 907) 274-7686
Address: n/a

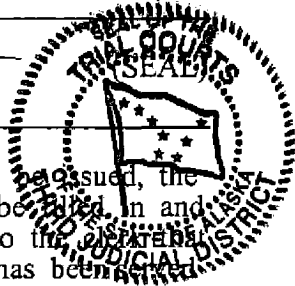
Notice, as required by Civil Rule 45(d), has been served upon James H. Parker
on December 6, 2006. You are ordered to bring with you _____
See attached

12/16/06
Date

Subpoena issued at request of
James B. Gottstein, Esq.
Attorney for Respondent
Address: 406 G Street, Suite 206
Telephone: 274-7686
If you have any questions, contact the person
named above.


Deputy Clerk

Before this subpoena may be issued, the
above information must be filed in and
proof must be presented to the Judicial District
a notice to take deposition has been served
upon opposing counsel.



RETURN

I certify that on the date stated below, I served this subpoena on the person to whom it is
addressed, _____, in _____,
Alaska. I left a copy of the subpoena with the person named and also tendered mileage and
witness fees for one day's court attendance.

Date and Time of Service

Service Fees:
Service \$ _____
Mileage \$ _____
TOTAL \$ _____

Signature

Print or Type Name

Title

If served by other than a peace officer, this return must be notarized.

Subscribed and sworn to or affirmed before me at _____, Alaska
on _____.

(SEAL)

Clerk of Court, Notary Public or other
person authorized to administer oaths.
My commission expires _____

Attachment to Subpoena Duces Tecum
(Production of Documents)
David Egilman MD, MPH

1. Your curriculum vitae.
2. Subject to any applicable restrictions, all expert reports prepared by you within the last five years pertaining to psychiatric medications.
3. Subject to any applicable restrictions, all documents you have in your possession, or have access to, including those in electronic format, and have read, reviewed or considered, pertaining to the testing, marketing, efficacy, effectiveness, risks and harms of commonly prescribed psychiatric drugs in the United States, including but not limited to Haldol, Thorazine, Mellaril, Clozaril, Risperdal, Zyprexa, Seroquel, Abilify, Geodon, Lithium, Depakote, Prozac, Paxil, Zoloft, and Wellbutrin.

R. Armitage
DEC 06 2006

December 6, 2006

Robert A. Armitage
General Counsel
Eli Lilly and Company
Lilly Corporate Center
Indianapolis, IN 46285
Phone: (317) 433-5499
FAX: (317) 433-3000

Dear Mr. Armitage:

I am a consulting witness in the Zyprexa litigation and have access to over 500,000 documents and depositions which Lilly claims are "Confidential Discovery Materials." Lilly defines these as "any information that the producing party in good faith believes properly protected under Federal Rule of Civil Procedure 26(c)(7)."

Lilly has claimed that newspaper articles and press releases fit this definition. I have received a subpoena attached that calls for the production of all these documents and depositions. In compliance with the protective order I am supplying a complete copy of the subpoena which notifies you of all the following:

- (1) the discovery materials that are requested for production in the subpoena;
- (2) the date on which compliance with the subpoena requested;
- (3) the location at which compliance with the subpoena is requested;
- (4) the identity of the party serving the subpoena; and
- (5) the case name, jurisdiction and index, docket, complaint, charge, civil action or other identification number or other designation identifying the litigation, administrative proceeding or other proceeding in which the subpoena or other process has been issued:

David Egilman MD
8 North Main Street
Suite 404
Attleboro, MA 02703
degilman@egilman.com
508-226-5091 ext 11
cell 508-472-2809

December 15, 2006

Dear Mr. Jamieson:

This morning Mr. Gottstein sent me a copy by email of a fax he received from you of a letter you apparently addressed to Mr. Gottstein and me about the production of documents that Lilly claims are confidential. If a copy of this letter was sent to me I did not receive it. None the less because of the importance of this matter I am sending this fax.

On December 6, 2006 I received a subpoena which you now have from Mr. Gottstein. I spoke with him and he told me this material was needed for an emergency hearing. I told him the information was subject to the CMO and explained the procedure I would follow to comply with both the subpoena and the CMO. The CMO did not include any contact information. My staff called the general counsel office at Lilly and the office refused to give out a fax number. I searched the web and found a contact fax number for the general counsel attached to a CLE lecture he had given. I faxed a copy of the subpoena I received from Mr. Gottstein on December 6, 2006 to Lilly's general counsel twice and received a notice of receipt on 12/6/06 at 3 PM for the first fax. In addition I sent a copy via regular mail on the same day. On December 11, 2006, I received an email from Mr. Gottstein which instructed me, "In order for the deposition to go smoothly and as efficiently as possible by allowing me to review them ahead of time, please deliver the subpoena'd materials to me as soon as you can." This came with an amended subpoena that called for production of documents prior to the deposition but was otherwise identical to the one I was sent on December 6, 2006.

The CMO states that I am obligated to provide a "reasonable opportunity to object." In the section that pertains to my subpoena this is undefined, however, elsewhere in the document it is defined as three business days, "Before disclosing Confidential discovery materials to any person listed in subparagraphs (d) through (m) who is a Customer or Competitor (or an employee of either) of the party that so designated the discovery materials, but who is not an employee of a party, the party wishing to make such disclosure shall give at least three (3) business days advance notice in writing to the counsel who designated such discovery materials as Confidential, stating that such disclosure will be made, identifying by subject matter category the discovery material to be disclosed, and stating the purposes of such disclosure. If, within the three (3) business day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the Court has denied such motion." Today (10 days after I sent my fax to Lilly) I received a copy of the letter you sent to Mr. Gottstein that was

addressed to me and Mr. Gottstein. I still have not been directly contacted by anyone representing Lilly. Unfortunately I felt I had to comply with the subpoena having received no guidance from Lilly.

David Egilman MD, MPH

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

MDL No. 1596

-----X
THIS DOCUMENT RELATES TO:
ALL ACTIONS

-----X
ORDER

Upon consideration of the joint request by members of the Plaintiffs' Steering Committee and counsel for Eli Lilly and Company, and based on the facts described below as reported by them, and in the exercise of my authority as Special Discovery Master appointed by Judge Jack B. Weinstein to oversee the implementation of the orders of the United States District Court for the Eastern District of New York relating to discovery, including Case Management Order No. 3 ("CMO-3"), which sets forth the protective order entered in the above captioned multi-district litigation to protect and ensure the confidentiality of discovery materials produced by the parties, it is hereby ordered that:

1. James Gottstein, Esquire, is in possession of documents produced by Eli Lilly and Company in the above-captioned action in violation of CMO-3, and has been so notified by counsel for Eli Lilly and Company without response by Mr. Gottstein.

2. Mr. Gottstein has further disseminated these documents to additional third parties in violation of CMO-3.


3. Mr. Gottstein shall immediately return any and all such documents (including all copies of any electronic documents, hard copy documents and CDs/DVDs)

provided by David Egilman, M.D., M.P.H., or any other source, to the Special Discovery Master at the following address, where they shall be maintained, under seal, until further order:

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

4. David Egilman, M.D., M .P.H., shall immediately return any documents in his possession produced by Eli Lilly and Company in the above-captioned action, or otherwise provided to him by the Lanier Law Firm or any other source (including all copies of any electronic documents, hard copy documents and CDs/DVDs), to Richard D. Meadow, Esquire of the Lanier Law Firm. I understand Mr. Meadow has already made such a request to Dr. Egilman today.

SO ORDERED this 15th day of December, 2006



Peter Woodin, Special Master

X-Mailer: QUALCOMM Windows Eudora Version 7.0.1.0
Date: Sat, 16 Dec 2006 19:06:21 -0900
To: "Peter Woodin" <pwoodin@jamsadr.com>, <jim.gottstein@psychrights.org>
From: Jim Gottstein <jim.gottstein@psychrights.org>
Subject: Re: Zyprexa MDL: Discovery Order 12-15-2006
Cc: "Fahey, Sean P." <Faheys@pepperlaw.com>, <RDM@lanierlawfirm.com>, "Rogoff, Andy" <ROGOFFA@pepperlaw.com>, "David Egilman" <degilman@egilman.com>, JamiesonB@LanePowell.com

Dear Special Discovery Master Woodin,

I understood from your voice mail that it would be acceptable for me to return your call any time during the weekend, which I intended to do. However, since you issued the order without giving me a chance to respond, dealing with that seems the matter at hand. I may seek my own counsel, but I hope to have a letter back to you before the end of the weekend. First, to allay any concerns, I voluntarily ceased further dissemination of any of the materials when I received Mr. Jamieson's fax on December 15th and won't further disseminate them without at least reasonable notice. I will say the whole thing seems silly since they are already in the public domain.

I am working on a response to your order. It seems highly irregular in many respects. I won't go into all of them now, but that you would issue such an order "based on the facts described by [Eli Lilly and the PSC]" without giving me a meaningful opportunity to respond is one of them. Please provide me with exactly what facts were alleged in these *ex parte* proceedings.

You also recite the order was "in the exercise of my authority as Special Discovery Master." It is very difficult for me to see how the order could be within such authority so please provide me with a copy of the order of reference or whatever document(s) there are granting you your authority.

Probably the key flaw in your Order, other than I am at a loss to understand how you believe the court has obtained jurisdiction over me, is that my possession of the documents is "in violation of CMO-3." I believe they came into my possession completely legally. If I tried to put all of the analysis in this e-mail, I would defeat my purpose in quickly letting you know that I will be responding and that the status quo is being maintained. I hope to be able to get it to you tomorrow. However, there is also an expedited motion regarding discovery in the Alaska case that needs a response by noon on Monday, so that might present a problem.

At 08:52 PM 12/15/2006, Peter Woodin wrote:

Dear Mr. Gottstein:

I have had no response from you to my voicemail message earlier today. I attach an order issued by me, in my capacity as Special Discovery Master in the Zyprexa multi-district litigation pending in the U.S. District Court for the Eastern District of New York, directing you to return to me all copies of the documents produced by Eli Lilly and Company in this litigation which you received from Dr. David Egilman or anyone else.

Thank you,
Peter H. Woodin
Special Discovery Master

Peter H. Woodin
JAMS
280 Park Avenue, 28th floor
New York, NY 10017
Tel: 212-607-2736

Note New E-mail Address

James B. (Jim) Gottstein, Esq.

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska 99501
USA
Phone: (907) 274-7686) Fax: (907) 274-9493
jim.gottstein[-at-]psychrights.org
<http://psychrights.org/>

Psych Rights ®
Law Project for
Psychiatric Rights

The Law Project for Psychiatric Rights is a public interest law firm devoted to the defense of people facing the horrors of unwarranted forced psychiatric drugging. We are further dedicated to exposing the truth about these drugs and the courts being misled into ordering people to be drugged and subjected to other brain and body damaging interventions against their will. Extensive information about this is available on our web site, <http://psychrights.org/>. Please donate generously. Our work is fueled with your IRS 501(c) tax deductible donations. Thank you for your ongoing help and support.

PsychRights®

Law Project for
Psychiatric Rights, Inc.

December 17, 2006

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th floor
New York, NY 10017

Draft

via e-mail

Re: Your December 15, 2006, Order in MDL 1596

Dear Mr. Woodin:

On December 16, 2006, I e-mailed you requesting certain information regarding the Order you signed December 15, 2006, under your "authority as Special Discovery Master" in MDL 1596 "to oversee the implementation of the orders of the United States District Court for the Eastern District of New York relating to discovery, including Case Management Order No. 3 ("CMO-3")" and indicated I would try to respond more fully this weekend. You have not responded to my request, but even without it, some things can be said. By doing so, I am not agreeing that the MDL 1596 court has jurisdiction over me or the documents that came into my possession in what I believe is full compliance with CMO-3.¹ I am not entering an appearance, or otherwise participating in *In re: Zyprexa Products Liability litigation*, MDL No. 1596, United States District Court, Eastern District of New York (MDL 1596) in any manner whatsoever.² Instead, I am using this mechanism to inform you of events which was not conveyed to you by Lilly and the PSC that demonstrate that the materials were produced in full conformance with CMO-3. You might thereafter decide *sua sponte* to vacate the Order.

Background

The Law Project for Psychiatric Rights (PsychRights) is a tax-exempt, public interest law firm whose mission is to mount a strategic litigation campaign against forced (court ordered) psychiatric drugging and electroshock around the country. The massive amounts of forced drugging in this country, amounting to probably at least a million cases a year,³ is resulting in decreased, rather than increased, public safety; causing an almost unimaginable amount of physical harm, including death; turning many patients into drooling zombies; and preventing at least half the people who currently become

¹ I did not have a copy of CMO-3 until I received the fax from Mr. Fahey on the afternoon of Friday, December 15, 2006, a copy of which is enclosed.

² I am not signing this lest that somehow be deemed sufficient to confer jurisdiction and to emphasize this I am merely providing you, as a courtesy, with a draft.

³ See, e.g., Mary L. Durham, "Civil Commitment of the Mentally Ill: Research, Policy and Practice," in Bruce D. Sales and Saleem A. Shah, eds., *Mental Health and Law Research, Policy and Services* (Durham, N.C.: Carolina Academic Press, 1996), pp. 17-40 (p.17). This is a citation for involuntary commitment as I understand it, but presumably most, if not all are subject to forced drugging and there is also a large number of people now under outpatient forced drugging court orders.

diagnosed with "serious and persistent mental illness" (f/k/a "chronic mental illness") from recovering⁴ and going on to the full, rich lives they could otherwise enjoy.⁵

In large part, this state of affairs has been created by the lies told by the manufacturers of psychiatric drugs, particularly the neuroleptics, of which Zyprexa (olanzapine), the subject of MDL 1596, is perhaps the biggest seller.⁶ I do know people who find these drugs, even Zyprexa, helpful; I think these individuals should certainly be allowed to use them, but they should be told the truth in order to make an informed decision. My impression is that Eli Lilly's lies about Zyprexa form the basis of the plaintiffs' claims in MDL 1596, but that is not PsychRights' focus. PsychRights' focus is helping people avoid being forcibly drugged pursuant to court orders, where the courts have been, in my view, duped by Eli Lilly and other pharmaceutical company prevarications.

In addition to the compilations of published studies, PsychRights' website has been the first to publish some material on psychiatric medication, and as well has produced some original analysis. For example, I believe PsychRights was the first to post the February 18, 2004, Dr. Andrew Mosholder's *Report on Suicidality in Pediatric Clinical Trials with Paroxetine (Paxil)* and other antidepressant drugs that the Food and Drug Administration (FDA) ordered Dr. Mosholder to suppress.⁷ Another example is the Allen Jones "Whistleblower Report" on the fraud involved in the Texas Medication Algorithm Project (TMAP),⁸ which has been downloaded from the PsychRights website approximately 50,000 times,⁹ and which just this week played what would appear to be a pivotal role in the Texas Attorney General's decision to join a lawsuit against Johnson and Johnson, and five related companies, for allegedly misrepresenting the safety and effectiveness of an anti-psychotic drug, and unduly influencing at least one state official to make that drug a standard treatment in public mental health programs.¹⁰

⁴ See, the assembled *full* (not just the abstracts) published peer-reviewed studies available on the Internet at <http://psychrights.org/Research/Digest/NLPs/neuroleptics.htm> and <http://psychrights.org/Research/Digest/NLPs/neuroleptics.htm>.

⁵ See, the assembled proof of the effectiveness of non-drug therapies, and selective use of drug therapies, available at <http://psychrights.org/Research/Digest/Effective/effective.htm>.

⁶ The New York Times today reports that Zyprexa's sales were \$4.2 billion last year.

⁷ The original file that was uploaded is at <http://psychrights.org/Research/Digest/AntiDepressants/Mosholder/MosholderReporttwo24.pdf>. Under intense pressure and presumably because the report had already been leaked, the FDA subsequently allowed release of the report and this better copy is now on PsychRights' website at <http://psychrights.org/Research/Digest/AntiDepressants/Mosholder/MosholderReport.pdf>.

⁸ <http://psychrights.org/Drugs/AllenJonesTMAPJanuary20.pdf>

⁹ See, <http://psychrights.org/stats/>.

¹⁰ See, "State's mental facilities duped into using drug: Abbott alleges lawsuit claims state official pushed drug, was rewarded with money," *Austin Statesman*, December 16, 2006, accessed on the Internet

With respect to Zyprexa, for example, Ellen Liversidge, whose son had been killed by the drug,¹¹ provided PsychRights with the FDA's response to her *Freedom of Information Act* ("FOIA") request regarding adverse events reported from all of the so-called "atypical" neuroleptics, of which Zyprexa is one.¹² Since March, 2003, PsychRights has also posted documents which the author of *Mad in America*, Robert Whitaker, received from the FDA under a FOIA request regarding Zyprexa's approval, as well as Grace E. Jackson, M.D.'s affidavit regarding, among other things, the clinical trials contained in these FOIA documents. These documents belie Eli Lilly's public, or at least proxy, claims.¹³ As will be described below, these documents, which may not appear anywhere else on the Internet, are what caused Dr. Egilman to contact me. Before discussing those events, however, some more background is in order.

Just last summer, in *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238 (Alaska 2006), in PsychRights' first case, the Alaska Supreme Court invalidated Alaska's forced psychiatric drugging procedures as unconstitutional for not requiring *the court* to find such drugging to be in the person's *best interests*, and that there are no less restrictive alternatives. The last paragraph of the *Myers* decision thus holds:

We conclude that the Alaska Constitution's guarantees of liberty and privacy require an independent judicial determination of an incompetent mental patient's best interests before the superior court may authorize a facility like API to treat the patient with psychotropic drugs. Because the superior court did not determine Myers's best interest before authorizing psychotropic medications, we VACATE its involuntary treatment order. Although no further proceedings are needed here because Myers's case is now technically moot, we hold that in future non-emergency cases a court may not permit a treatment facility to administer psychotropic drugs unless the court makes findings that comply with all applicable statutory requirements and, in addition, expressly finds by clear and convincing evidence that the proposed treatment is in the patient's best interests and that no less intrusive alternative is available.

At 138 P.3d, 252, the Alaska Supreme Court gave the following guidance:

¹¹ More specifically, her son died of profound hyperglycemia after taking Zyprexa for two years and gaining 100 pounds without any warning from the label or prescribing doctor.

¹² PsychRights has posted these flat text files at <http://psychrights.org/Research/Digest/NLPs/FDAFOIAs/>, was then able to get to have these parsed into a pretty clean 35 megabyte database that is available at [http://psychrights.org/Research/Digest/NLPs/FDAFOIAs/FDAAtypicalNLPAdverseEventReportingSystem\(AERS\).mdb](http://psychrights.org/Research/Digest/NLPs/FDAFOIAs/FDAAtypicalNLPAdverseEventReportingSystem(AERS).mdb), and has been trying to get someone to analyze this data ever since.

¹³ See, <http://psychrights.org/States/Alaska/CaseOne/30-Day/ExhC-FDAonOlanzapineSave.pdf> and <http://psychrights.org/States/Alaska/CaseOne/30-Day/ExhibitD-Olanzapine.htm>, respectively.

Evaluating whether a proposed course of psychotropic medication is in the best interests of a patient will inevitably be a fact-specific endeavor. At a minimum, we think that courts should consider :

[...]

(B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of dosages, *possible side effects and benefits*, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;

[emphasis added].

In reaching its conclusion, the Alaska Supreme Court discussed the rights involved, as follows:

When a law places substantial burdens on the exercise of a fundamental right, we require the state to "articulate a compelling [state] interest" and to demonstrate "the absence of a less restrictive means to advance [that] interest."

* * *

In the past we have recognized that Alaska's constitutional rights of privacy and liberty encompass the prerogative to control aspects of one's personal appearance, privacy in the home, and reproductive rights. We have noted that "few things [are] more personal than one's own body," and we have held that Alaska's constitutional right to privacy "clearly... shields the ingestion of food, beverages or other substances."

* * *

Because psychotropic medication can have profound and lasting negative effects on a patient's mind and body, we now similarly hold that Alaska's statutory provisions permitting nonconsensual treatment with psychotropic medications implicate fundamental liberty and privacy interests

[footnotes and citations omitted].

Clearly, the documents in question here are highly relevant to the constitutionally-required court inquiry before it can make an informed decision about whether to order forced psychiatric drugging, which might very well include Zyprexa.

Production of the Subpoena'd Documents

Out of the blue, on or about November 29, 2006, Dr. Egilman called me to ask if I had *FOIA* documents pertaining to Zyprexa. He identified himself as one of plaintiffs' retained experts in Zyprexa damages litigation. I directed him to the location of the *FOIA*
Draft August 7, 2007 A-66

information available on PsychRights' website, and also mentioned to him the Adverse Events database. During the course of the conversation, I learned that he had access to secret Eli Lilly documents pertaining to Zyprexa. I told him that I wanted access to those documents, and would undertake a case from which to subpoena them. Dr. Egilman told me he was subject to a protective order to provide notification of such a subpoena. I informed him that I understood, and indicated that, typically, forced drugging hearings occur very quickly and that they are often scheduled for hearing the same day they are filed, but that I always ask for a short continuance to prepare.¹⁴

Since I knew at the time that I would be away from Alaska from December 22, 2006, until January 15, 2007, I proceeded to try to acquire a suitable case in earnest.¹⁵ In spite of the impediments to doing so interposed by the Alaska Psychiatric Institute, I was able to acquire a suitable case in the evening of December 5, 2006. This case, however, was not within an AS 47.30.839 court ordered forced drugging proceeding, but involved a guardianship wherein the public guardian, the Alaska Office of Public Advocacy (OPA), was granted full guardianship powers under AS 13.26.090 through .155, including the power to "approve administration of psychotropic medications," meaning the right to agree to the forced drugging of its ward, who was now PsychRights' client.

The next morning I filed papers to, among other things terminate the guardianship and remove the guardian's right to consent to forced drugging, the court issued four deposition subpoenas at my request, including one to Dr. Egilman setting his telephonic deposition for December 20, 2006, a copy of which is attached. It is my belief that Dr. Egilman promptly notified Eli Lilly of this subpoena, a belief which is supported by a December 14, 2006, letter from Eli Lilly's Alaska counsel, Brewster Jamieson, a copy of which is enclosed.¹⁶ Over the weekend, in reviewing the paperwork, I realized that the subpoena's requirement for Dr. Egilman to "bring with" him the subpoena'd materials didn't make any sense for a telephonic deposition, so on Monday, December 11, 2006, the court issued an amended subpoena, a copy of which is enclosed, that required Dr. Egilman to deliver the subpoena'd materials to me prior to the deposition. This amended subpoena, a copy of which is enclosed, was served on Dr. Egilman by e-mail which states, in its entirety:

Dear Dr. Egilman,

I have (hopefully) attached an amended subpoena. I assume that you will also accept service of this amended subpoena in this manner. If not please notify me immediately.

In reviewing the original subpoena I realized it did not take into account that this was a telephonic deposition. Therefore the amended one

¹⁴ See, AS 47.30.839(e).

¹⁵ These efforts are chronicled at <http://psychrights.org/States/Alaska/CaseXX.htm>.

¹⁶ It is noted that this letter recites a copy of Dr. Egilman's letter transmitting the subpoena, which was not included in either the fax or hard copy of the letter received by PsychRights.

orders [you] to deliver the material to me prior to the date and time set for the deposition, rather than bring it with you.

In order for the deposition to go smoothly and as efficiently as possible by allowing me to review them ahead of time, *please deliver the subpoena'd materials to me as soon as you can.*

[emphasis added]. I registered the Internet domain ZyprexaDocuments.Net that same day, December 11, 2006, in order to set up a secure method, via "file transfer protocol," for Dr. Egilman to deliver the subpoena'd documents to me. I then so informed Dr. Egilman.

Subpoena'd materials began being uploaded on December 12, 2006, but ceased after I e-mailed Dr. Egilman a copy of the after-hours Jamieson letter of December 14, 2006, which I received on December 15, 2006, and which is enclosed.¹⁷

Analysis

Section 14 of the CMO provides:

14. Subpoena by other Courts or Agencies

If another court or an administrative agency subpoenas or otherwise orders production of Confidential Discovery Materials which a person has obtained under the terms of this Order, the person to whom the subpoena or other process is directed shall promptly notify the designating party in writing of all of the following: (1) the discovery materials that are requested for production in the subpoena; (2) the date on which compliance with the subpoena is requested; (3) the location at which compliance with the subpoena is requested; (4) the identity of the party serving the subpoena; and (5) the case name, jurisdiction and index, docket, complaint, charge, civil action or other identification number or other designation identifying the litigation, administrative proceeding or other proceeding in which the subpoena or other process has been issued. In no event shall confidential documents be produced prior to the receipt of written notice by the designating party and a reasonable opportunity to object. Furthermore, the person receiving the subpoena or other process shall cooperate with the producing party in any proceeding related thereto.

Alaska Civil Rule 45(d), as is typical, provides in pertinent part:

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena

¹⁷ I e-mailed this letter to Dr. Egilman because the fax cover sheet did not indicate it had been faxed to him.
Draft August 7, 2007

for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

Thus, CMO-3 recognizes, as it must, that MDL 1596 has no authority to enjoin enforcement of a subpoena in another proceeding, and gives the party seeking protection a mechanism to do so in the forum from which such subpoena(s) might issue.¹⁸ I fully expected Eli Lilly to follow the specified procedure, instructing Dr. Egilman to invoke Civil Rule 45(d). I expected, we would then be making our respective arguments to the court here as to why the documents should or should not be produced. In my view, the proper disposition of the question would be in favor of my client's right to inform the court of the extreme harm caused by Zyprexa, which Eli Lilly has successfully hidden for so long, while making its billions off the pill.

However, since Eli Lilly sat on its rights under CMO-3 and Civil Rule 45(d)(1), it has lost them. The documents came into my possession free of any restrictions in full compliance with CMO-3 and Civil Rule 45(d)(1). Apparently, recognizing this, various Lilly Lawyers have sent me all kinds of threatening letters, copies of which are attached, and gotten you to issue the order, which I, respectfully, do not believe is within your authority or within the jurisdiction of the MDL 1596 court.

Normally, if one disputes the validity of an order, one is still required to comply until such time as the validity has been determined. There are usually opportunities for appeal, stay, etc., and where special masters are appointed, as in CMO-3, the judge in the case often determines disputed issues rather than the master. Since I have yet to see the order of reference to you, I don't know the specifics of your appointment. However, I don't believe it really matters in this case, because it is my understanding that the rule that one must comply with an order until relieved of it, only applies if the court has jurisdiction. The MDL 1596 court does not have such jurisdiction and I therefore do not believe I am bound. This matter is properly within the jurisdiction of the Alaska Superior Court from which the subpoena was issued with Eli Lilly having filed a motion to quash and return of the documents.

Perhaps in light of this, you will *sua sponte* vacate the order, which, it is respectfully suggested will eliminate confusion over the proper posture of this matter.

¹⁸ This is confirmed by the December 15, 2006, letter from Richard Meadow of the Lanier Law Firm to Lilly, in which he states that he informed Lilly that this is what they needed to do when he talked to them on December 13, 2006. This is further confirmed by an e-mail from Eli Lilly's local counsel, on Sunday, December 17, 2006, after 4:00 p.m., in which Eli Lilly served me, via e-mail, with a motion it had filed the previous Friday to quash the subpoena, a copy of which motion is enclosed.

IN THE ~~DISTRICT~~/SUPERIOR COURT FOR THE STATE OF ALASKA
AT ANCHORAGE

In the Matter of the Guardianship
of B.B.

Respondent ~~XXXXXXXXXX~~
XXX

~~XXXXXXXXXX~~

CASE NO. 3AN-04-545 P/G

SUBPOENA FOR TAKING DEPOSITION

To: **David Egilman, MD, MPH**
Address: **8 North Main Street, Attleboro, Massachusetts 02703**

You are commanded to appear and testify under oath in the above case at:

Date and Time: December 20, 2006 at 10:00 AST, 2:00 PM EST

~~Office of:~~ Telephone No. 907) 274-7686

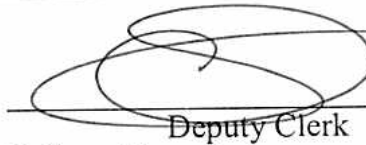
Address: n/a

Notice, as required by Civil Rule 45(d), has been served upon James H. Parker
on December 6, 2006. You are ordered to bring with you _____
See attached

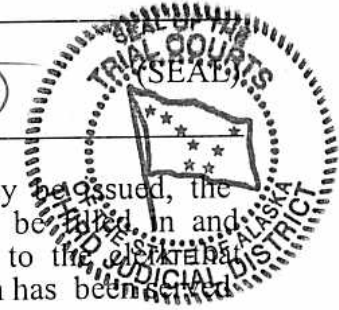
12/6/06
Date

Subpoena issued at request of
James B. Gottstein, Esq.
Attorney for Respondent
Address: 406 G Street, Suite 206
Telephone: 274-7686

If you have any questions, contact the person
named above.


Deputy Clerk

Before this subpoena may be issued, the
above information must be filed, in and
proof must be presented to the clerk of the
a notice to take deposition has been served
upon opposing counsel.



RETURN

I certify that on the date stated below, I served this subpoena on the person to whom it is
addressed, _____, in _____,
Alaska. I left a copy of the subpoena with the person named and also tendered mileage and
witness fees for one day's court attendance.

Date and Time of Service

Service Fees:
Service \$ _____
Mileage \$ _____
TOTAL \$ _____

Signature

Print or Type Name

Title

If served by other than a peace officer, this return must be notarized.

Subscribed and sworn to or affirmed before me at _____, Alaska
on _____.

(SEAL)
Draft August 7, 2007

Clerk of Court, Notary Public or other
person authorized to administer oaths
My commission expires _____ A-70

Attachment to Subpoena Duces Tecum
(Production of Documents)
David Egilman MD, MPH

1. Your curriculum vitae.
2. Subject to any applicable restrictions, all expert reports prepared by you within the last five years pertaining to psychiatric medications.
3. Subject to any applicable restrictions, all documents you have in your possession, or have access to, including those in electronic format, and have read, reviewed or considered, pertaining to the testing, marketing, efficacy, effectiveness, risks and harms of commonly prescribed psychiatric drugs in the United States, including but not limited to Haldol, Thorazine, Mellaril, Clozaril, Risperdal, Zyprexa, Seroquel, Abilify, Geodon, Lithium, Depakote, Prozac, Paxil, Zoloft, and Wellbutrin.

X-Mailer: QUALCOMM Windows Eudora Version 7.0.1.0
 Date: Mon, 11 Dec 2006 09:54:05 -0900
 To: "David Egilman" <degilman@egilman.com>
 From: Jim Gottstein <jim.gottstein@psychrights.org>
 Subject: Amended subpoena
 Cc: jim.Gottstein@psychrights.org

Dear Dr. Egilman,

I have (hopefully) attached an amended subpoena. I assume that you will also accept service of this amended subpoena in this manner. If not please notify me immediately.

In reviewing the original subpoena I realized it did not take into account that this was a telephonic deposition. Therefore the amended one orders to deliver the material to me prior to the date and time set for the deposition, rather than bring it with you.

In order for the deposition to go smoothly and as efficiently as possible by allowing me to review them ahead of time, please deliver the subpoena'd materials to me as soon as you can.



[DEgilmanAmendedSubpoena.pdf](#)

Note New E-mail Address

James B. (Jim) Gottstein, Esq.

Law Project for Psychiatric Rights
 406 G Street, Suite 206
 Anchorage, Alaska 99501
 USA
 Phone: (907) 274-7686) Fax: (907) 274-9493
 jim.gottstein[-at-]psychrights.org
<http://psychrights.org/>

Psych Rights®
 Law Project for
 Psychiatric Rights

The Law Project for Psychiatric Rights is a public interest law firm devoted to the defense of people facing the horrors of unwarranted forced psychiatric drugging. We are further dedicated to exposing the truth about these drugs and the courts being misled into ordering people to be drugged and subjected to other brain and body damaging interventions against their will. Extensive information about this is available on our web site, <http://psychrights.org/>. Please donate generously. Our work is fueled with your IRS 501(c) tax deductible donations. Thank you for your ongoing help and support.

Draft August 7, 2007

A-72

IN THE ~~DISTRICT~~/SUPERIOR COURT FOR THE STATE OF ALASKA
AT ANCHORAGE

In the Matter of the Guardianship
of B.B.

~~XXXXXXXXXX~~

~~XX~~

~~Defendant(s)~~

CASE NO. 3AN-04-545 P/G
AMENDED
SUBPOENA FOR TAKING DEPOSITION

To: David Egilman, Md, MPH
Address: 8 North Main Street, Attleboro, Massachusetts 02703

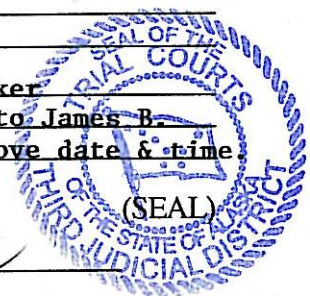
You are commanded to appear and testify ^{/telephonically} under oath in the above case at:

Date and Time: December 20, 2006 at 10:00 am AST, 2:00pm EST

Offices of: Law Project for Psychiatric Rights

~~Address:~~ telephone No (907) 274-7686

Notice, as required by Civil Rule 45(d), has been served upon James Parker
on December 6 2006. You are ordered to ~~bring with you~~ deliver to James B. Gottstein the material set forth on the attached prior to the above date & time.



12/11/2006
Date

J. Backman
Deputy Clerk

Subpoena issued at request of
James B. Gottstein, Esq.
Attorney for B.B.
Address: 406 G. St, Suite 206,
Telephone: 274-7686

Before this subpoena may be issued, the above information must be filled in and proof must be presented to the clerk that a notice to take deposition has been served upon opposing counsel.

If you have any questions, contact the person named above.

RETURN

I certify that on the date stated below, I served this subpoena on the person to whom it is addressed, _____, in _____, Alaska. I left a copy of the subpoena with the person named and also tendered mileage and witness fees for one day's court attendance.

Date and Time of Service

Service Fees:
Service \$ _____
Mileage \$ _____
TOTAL \$ _____

Signature

Print or Type Name

Title

If served by other than a peace officer, this return must be notarized.

Subscribed and sworn to or affirmed before me at _____, Alaska
on _____.

(SEAL)

Clerk of Court, Notary Public or other person authorized to administer oaths.
My commission expires _____

Attachment to Subpoena Duces Tecum
(Production of Documents)
David Egilman MD, MPH

1. Your curriculum vitae.
2. All expert reports prepared by you within the last five years pertaining to psychiatric medications.
3. All documents you have in your possession, or have access to, including those in electronic format, and have read, reviewed or considered, pertaining to the testing, marketing, efficacy, effectiveness, risks and harms of commonly prescribed psychiatric drugs in the United States, including but not limited to Haldol, Thorazine, Mellaril, Clozaril, Risperdal, Zyprexa, Seroquel, Abilify, Geodon, Lithium, Depakote, Prozac, Paxil, Zoloft, and Wellbutrin.



FACSIMILE COVER PAGE

Date: December 14, 2006

Client No.: 9867.38
Operator: Nanci

Please deliver the following pages to:

To: James B. Gottstein, Esq.274-9493
Elizabeth Russo, Esq.....258-6872

From: Brewster H. Jamieson, Esq.

Re: *In the Matter of the Guardianship of B.B*

If you do not receive the total number of pages (3), please call 907-277-9511

Original Document to be mailed: Yes No

MESSAGE

A Professional Corporation
301 West Northern Lights Boulevard, Suite 301
Anchorage, Alaska 99503-2648

www.Lanepowell.Com
T . 907.277.9511
F . 907.276.2631

Law Offices
Anchorage, Alaska; Olympia, Washington;
Portland, Oregon; Seattle, Washington
London, England

The information in this message is intended only for the addressee's authorized agent. The message may contain information that is privileged, confidential, or otherwise exempt from disclosure. If the reader of this message is not the intended recipient or recipient's authorized agent, then you are notified that any dissemination, distribution, or copying of this message is prohibited. If you have received this message in error, please notify the sender by telephone and return the original and any copies of the message by mail to the sender at the address stated above.

Please be advised that, if this communication includes federal tax advice, it cannot be used for the purpose of avoiding tax penalties unless you have expressly engaged us to provide written advice in a form that satisfies IRS standards for "covered opinions". We have informed you that those standards do not apply to this communication.

Draft Audit 7-2007

A-75



Brewster H. Jamieson, Esq.
Direct Dial (907) 264-3325
JamiesonB@LanePowell.com

December 14, 2006

James B. Gottstein, Esq.
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, Alaska 99501-2164

David Egilman, MD, MPH
8 North Main Street
Attleboro, Massachusetts 02703-2282

Re: *In the Matter of the Guardianship of B.B.*

Dear Dr. Egilman and Mr. Gottstein:

We represent Eli Lilly and Company in connection with the subpoena served on Dr. Egilman in the above-captioned action. Lilly's General Counsel recently received a letter from Dr. Egilman, notifying Lilly that Dr. Egilman had been subpoenaed for a deposition in this matter. Dr. Egilman provided a copy of the subpoena to General Counsel. From the letter, a copy of which is enclosed, we conclude that Dr. Egilman (i) has been retained as a consulting expert in the product liability actions pending against Lilly in various state and federal courts, (ii) has possession of, or access to, confidential discovery materials that have been produced by Lilly in those actions and (iii) understands his obligations under Case Management Order No. 3, *In re Zyprexa Products Liability Litigation*, MDL No. 1596 (E.D.N.Y.), to notify Lilly that he has received a subpoena that seeks production of those confidential discovery materials and to cooperate with Lilly in any proceeding related to maintaining the confidentiality of said materials.

Lilly possesses the materials to which Dr. Egilman refers, but it has made a copy of them available to plaintiffs' counsel in the MDL for use only (i) in connection with those proceedings and (ii) under the strict confidentiality protections contained in CMO-3. Because the subpoena issued by Mr. Gottstein seeks, in essence, materials in possession of Lilly, Lilly objects, pursuant to Rule 45(d)(1) of the Alaska Rules of Civil Procedure, to their disclosure, production or use in the above-captioned matter. As the MDL Court recognized when it issued CMO-3, these materials contain trade secrets and other confidential research, development and commercial information regarding a marketed product in a competitive industry. Thus, we ask Dr. Egilman to refrain from producing them and Mr. Gottstein to refrain from further seeking production of the materials unless and until the Superior Court

Re: *In the Matter of the Guardianship of B.B*
December 14, 2006
Page 2 of 2

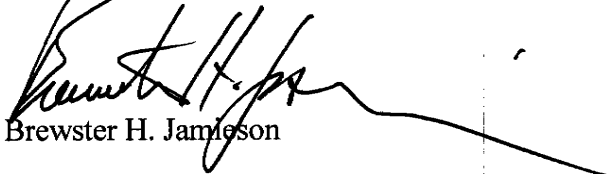
rules that production is required. Because Dr. Egilman is obligated to cooperate with Lilly under CMO-3, we ask that he confirm that he will refrain from producing the materials.

If either of you insists on producing the materials pursuant to the subpoena without resort to the court, Lilly will (i) seek to intervene in the matter and ask the Superior Court to quash the subpoena and (ii) seek relief from the MDL court under CMO-3. We understand that the parties are close to an agreement that would extend the production date (without prejudice to anyone's objections) by a few weeks to accommodate the schedules of all who are involved in this matter. If this does not occur, please advise me immediately.

Thank you for your cooperation.

Very truly yours,

LANE POWELL LLC



Brewster H. Jamieson

nlb

cc: Andrew R. Rogoff, Esq.
Rachel B. Weil, Esq.
Elizabeth Russo, Esq.

009867.0038/157693.1

PsychRights[®]
Law Project for
Psychiatric Rights, Inc.

Brewster H. Jamieson
Lane Powell
301 W. Northern Lights Blvd., Suite 301
Anchorage, Alaska 99503-2648

December 15, 2006

Re: In the Matter of the Guardianship of B.B.

Dear Mr. Jamieson:

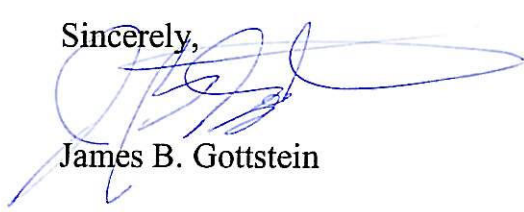
Your fax yesterday regarding the above was received in my office after I had left for the day. I note it refers to an enclosed letter from Dr. Egilman, but said letter was not included in the fax. Presumably, it is included in the mailed hard copy.

In any event, I should probably first inform you it is not precisely accurate to characterize the agreement we were working on with the State as extending the production date. Certain material has already been produced. Also, due to Eli Lilly's emergence, whether the agreement to postpone the depositions will end up being signed by PsychRights is up in the air at this point.

I am skeptical of your assertion that Eli Lilly has standing to invoke Civil Rule 45(d)(1). I have never seen Case Management Order No. 3, *In re: Zyprexa Products Liability Litigation*, MDL No. 1596 (Protective Order). However, in an abundance of caution, I am temporarily acting as if Civil Rule 45(d)(1) has been properly invoked. You must, however, immediately provide me with compelling authority for your assertion that Civil Rule 45(d)(1) has been properly invoked. If convincing, I will consider that Civil Rule 45(d)(1) has been properly invoked and act accordingly. Otherwise, I assume you will take whatever steps you deem necessary to protect your client's interests.

Finally, you assert that the materials subject to the Protective Order contain trade secrets and other confidential research, development and commercial information. I haven't had a chance to review the material in any detail, but I haven't seen anything that I don't think is discoverable and it is hard for me to see how at least some of it is confidential in any way.

Sincerely,



James B. Gottstein

cc: via e-mail

David Egilman, MD, MPH

Elizabeth Russo, Esq.

James Parker, Esq.

Draft August 7, 2007

406 G Street, Suite 206, Anchorage, Alaska 99501 ~ (907) 274-7686 Phone ~ (907) 274-9493 Fax

<http://psychrights.org>

A-78



THE
LANIER
LAW FIRM

FAX COVER SHEET

PLEASE DELIVER IMMEDIATELY!

DATE: December 15, 2006	NUMBER OF PAGES INCLUDING COVER PAGE: 13
--------------------------------	---

IF YOU ARE NOT RECEIVING A CLEAR COPY OF THIS DOCUMENT OR ARE NOT RECEIVING ALL MATERIALS TRANSMITTED, PLEASE CONTACT US AT (212) 421-2800.

TO:	James B. Gottstein, Esq. Law Offices of James B. Gottstein 406 G Street, Suite 206 Anchorage, Alaska 99501 Phone: 907-274-7686 Fax: 907-274-9493
------------	--

(HARD COPY OF THIS TRANSMISSION WILL ___ WILL NOT BE SENT BY REGULAR MAIL)

FROM:	Blair Robert Poole - Paralegal
MESSAGE:	Please see attached.

FILE NO.: 2074 - In re Zyprexa Products Liability Litigation

The information contained in this facsimile transmission is attorney privileged and confidential information intended only for the use of the individual or entity named herein. If you are not intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this information is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone and return the original message to us via U.S. mail at the address indicated on the letterhead above.

Draft August 7, 2007

POWER UP 120 EAST 56TH STREET, 6TH FLOOR NEW YORK, NEW YORK 10022

A-79



THE
LANIER
LAW FIRM

December 15, 2006

**VIA E-MAIL
AND REGULAR MAIL**

Andrew Rogoff, Esq.
Pepper Hamilton LLP
3000 Two Logan Square
Philadelphia, PA 19103-2799

Re: In re Zyprexa MDL (Subpoena to Dr. Egilman)

Dear Andy:

This letter confirms my receipt of your letter this afternoon and, in addition to substantively addressing your letter, also serves to set forth the history concerning my knowledge and involvement with the underlying issues that you have addressed concerning the subpoena that was served by James Gottstein, Esq., upon Dr. David Egilman.

Please be advised that until December 13, 2006, no individual at The Lanier Law Firm, including me, had any knowledge that a subpoena had been served upon Dr. Egilman. Such knowledge was first acquired when PSC Member, James Shaughnessy, Esq., directed an e-mail to the PSC in which he notified the PSC that Dr. Egilman was served with a subpoena.

On December 13, 2006, you contacted my office to determine if Dr. Egilman was retained by The Lanier Law Firm. I acknowledged that he was and I advised you to immediately file a motion to quash the subpoena in both Alaska and Massachusetts. Thereafter, I communicated with Dr. Egilman that nothing should be done in accordance with the subpoena until this issue was addressed by Lilly before the Court.

After receiving your letter this afternoon, I again communicated with Dr. Egilman. During my conversation with Dr. Egilman I addressed your letter and asked him if and when he complied with the subpoena. Dr. Egilman informed me that he had already complied with the subpoena by transmitting documents to James B. Gottstein, Esq., prior to my conversation with him on December 13, 2006.

HOUSTON

The Lanier Law Firm, PC
6810 FM 1960 West 77069
Post Office Box 691448

Houston, Texas 77069-1448
713.659.5200 • Fax: 713.659.2204

LONGVIEW

The Lanier Law Firm, PC
131 East Tyler Street
Longview, Texas 75601
903.234.2300 • Fax: 903.234.2346

lanierlawfirm.com
LANIER LAW FIRM

NEW YORK

The Lanier Law Firm, PLLC
Tower 56
126 East 56th Street, 6th Floor
New York, New York 10022
212.421.2800 • Fax: 212.421.2878

DEC-15-2006 15:37

2124212878 P.002

Draft August 7, 2007

A80

The following responses address *in seriatim* your numbered requests:

1. Attached hereto as Exhibit A to this letter is list of all bates numbered pages that have been transmitted by Dr. Egilman to Mr. Gottstein.

2. I have requested that Dr. Egilman provide my office with all confidential materials that have been provided to him by any individual involved in Zyprexa litigation.

3. I have instructed Dr. Egilman to not comment publicly on any such confidential materials.

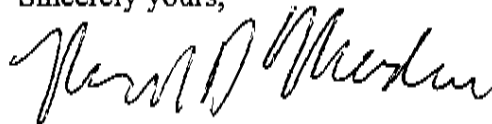
4. The only person to whom Dr. Egilman has provided confidential materials, if such materials are deemed confidential, is:

James B. Gottstein, Esq.
Law Office of James B. Gottstein
406 G Street, Suite 206
Anchorage, Alaska 99501-2164

Please further note that by providing a copy of this letter to Mr. Gottstein concerning Lilly's position that such materials were provided in violation of a court order, I am demanding the return of such materials to the PSC and I am further conveying Lilly's demand that no disclosure of such materials be made until such time as Lilly has had the opportunity to file its motion and be heard on this matter by Judge Weinstein of the Eastern District of New York.

Last, I am confirming that neither I, nor anyone else employed by my firm who is bound by the confidentiality requirements of this litigation, will comment publicly on any of the confidential materials. Obviously, I cannot make such representations for individuals who are beyond my control.

Sincerely yours,



Richard D. Meadow

cc: Andrew Rogoff, Esq. (via e-mail)--
W. Mark Lanier, Esq. (via e-mail)
James B. Gottstein, Esq. (via facsimile)

Pepper Hamilton LLP

Attorneys at Law

FAX INFORMATION SHEET

Date: December 15, 2006
ID Number: 32288
Identifier:

<u>Recipient's Name</u>	<u>Company</u>	<u>General Number</u>	<u>Fax Number</u>
James B. Gottstein, Esquire	Law Offices	907-274-7686	907-274-9493

Sender: Andrew R. Rogoff
Sender's Direct Line: 215-981-4881
Sender's Email Address: rogoffa@pepperlaw.com

Total Pages Including Cover:

Comments:

An original or a copy has or has not been sent to you by mail or by overnight service or by email .

◆ ◆ If total pages are not received, or an error occurred during this transmission, please call the sender at the direct line listed above. ◆ ◆

◆ ◆ CONFIDENTIALITY NOTE ◆ ◆

The documents accompanying this facsimile transmission contain information from the law firm of Pepper Hamilton LLP which is confidential and/or legally privileged. The information is intended only for the use of the individual or entity named on this transmission sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this faxed information is strictly prohibited, and that the documents should be returned to this Firm immediately. In this regard, if you have received this facsimile in error, please notify us by telephone immediately so that we can arrange for the return of the original documents to us at no cost to you.

Operator's Use Only

Start Time: : am [] pm [] End Time: : am [] pm []

Operator:

Pepper Hamilton LLP

Attorneys at Law

3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799
215.981.4000
Fax 215.981.4750

Andrew R. Rogoff
direct dial: 215-981-4881
direct fax: 215-689-4519
rogoffa@pepperlaw.com

December 15, 2006

VIA E-MAIL, FAX AND FEDERAL EXPRESS

James B. Gottstein, Esquire
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, Alaska 99501-2164

Re: In re Zyprexa MDL

Dear Mr. Gottstein:

We represent Eli Lilly and Company. We have been told that you have provided copies of materials to the New York Times that were (i) produced by Eli Lilly and Company in connection with In re Zyprexa Product Liability Litigation, MDL No. 1596 (E.D.N.Y.), and (ii) stamped "Confidential - Subject to Protective Order" pursuant to case management orders issued in that litigation. If such materials were provided to you by anyone subject to the protective order entered by the federal court, the person providing these items acted in violation of that order. We intend to ask the court overseeing the multidistrict litigation to issue sanctions against anyone who has violated the order.

If you have any materials that are, or may be, subject to the MDL protective order, we demand that you:

1. Identify those materials and immediately return them to us.
2. Refrain from further publishing or publicizing those materials, including using them on any website run by you or others.
3. Request the return of these materials from anyone to whom they have been provided.

Pepper Hamilton LLP
Attorneys at Law

James B. Gottstein, Esquire
Page 2
December 15, 2006

4. Identify the persons to whom you provided any such materials.

If we learn that any individuals have violated the orders of the federal court, we intend to seek all appropriate sanctions, whether before that court or, if appropriate, from bar disciplinary authorities. We request your cooperation in this regard.

Sincerely yours,



Andrew R. Rogoff

ARR/jls

Pepper Hamilton LLP

Attorneys at Law

3000 Two Logan Square
 Eighteenth and Arch Streets
 Philadelphia, PA 19103-2799
 215.981.4000
 Fax 215.981.4750
 www.pepperlaw.com

FAX INFORMATION SHEET

Date: December 15, 2006
 ID Number:

<u>Recipient's Name</u>	<u>Company</u>	<u>General Number</u>	<u>Fax Number</u>
James B. Gottstein, Esquire		907-274-7686	907-274-9493

Sender: Sean P. Fahey
 Sender's Direct Line: 215-981-4296
 Sender's Email Address: faheys@pepperlaw.com

Total Pages Including Cover: 19

Comments:

An original or a copy has or has not been sent to you by mail or by overnight service or by email .

◆ ◆ If total pages are not received, or an error occurred during this transmission,
 please call the sender at the direct line listed above. ◆ ◆

◆ ◆ CONFIDENTIALITY NOTE ◆ ◆

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Operator's Use Only

Start Time: : am [] pm [] End Time: : am [] pm []

Operator:

Pepper Hamilton LLP
Attorneys at Law

3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799
215.981.4000
Fax 215.981.4750

Sean P. Fahey
direct dial: 215-981-4296
direct fax: 215-689-4642
faheys@pepperlaw.com

December 15, 2006

VIA E-MAIL, FAX AND FEDERAL EXPRESS

James B. Gottstein, Esquire
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, Alaska 99501-2164

Re: In re Zyprexa MDL

Dear Mr. Gottstein:

As you know, my firm represents Eli Lilly and Company. I am in receipt of your December 15, 2006 letter, and by now you have received the message left with your office by Special Master Peter H. Woodin, the Special Discovery Matter appointed by Judge Weinstein to enforce (among other things) compliance with Case Management Order No. 3. For your convenience, a copy of CMO-3 is enclosed. As Special Master Woodin conveyed to you, in the clearest of terms, your possession of the documents produced by Eli Lilly and Company in connection with In re Zyprexa Product Liability Litigation, MDL No. 1596 (E.D.N.Y.) is in violation of CMO-3. As he instructed, you are to immediately return all such documents in your possession to him. His address is as follows:

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

Pepper Hamilton LLP
Attorneys at Law

James B. Gottstein, Esquire

Page 2

December 15, 2006

If you do not confirm in writing that you will immediately return these documents, by the close of business today, I will be left with no choice but to file a complaint with the Alaska attorney discipline board, and seek sanctions against you in the Zyprexa MDL, for your willful violation of a Federal order.

Please contact me immediately with such written confirmation.

Sincerely yours,



Sean P. Fahey

SPF/jls
Enclosures

A. SIMON CHREIN
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NY 11201
(718) 260-2500

August 5, 2004

Christopher A. Seeger, Esq.
Seeger Weiss LLP
One William Street
New York, NY 10004-2502

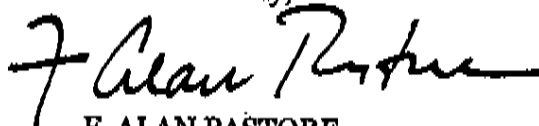
Re: *In re Zyprexa Products Liability Litigation*
04 MDL 1596 (JBW)

Dear Mr. Seeger:

Enclosed please find a copy of **Case Management Order No 3 (Protective Order)** in the above-entitled multidistrict litigation, cojointly "so ordered" by both Senior District Judge Jack B. Weinstein (on August 3, 2004) and Magistrate Judge A. Simon Chrein (on August 3, 2004).

N.B. that you are directed to serve a copy of it on all parties upon receipt.

Yours sincerely,



F. ALAN PASTORE
Secretary
Honorable A. Simon Chrein
United States Magistrate Judge
(718) 260-2502 • Private Line
(718) 260-2500 • Chambers
f_alan_pastore@nyed.uscourts.gov

Enclosure

DOCKET & FILE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

MDL No. 1596

THIS DOCUMENT RELATES TO:
ALL ACTIONS

MOVANT'S COUNSEL IS DIRECTED
TO SERVE A COPY OF THIS ORDER
ON ALL PARTIES UPON RECEIPT

CASE MANAGEMENT

(Handwritten initials)

FEDERAL ORDER NO. 3 (PROTECTIVE ORDER)

To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, adequately protect confidential material, and ensure that protection is afforded only to material so entitled, the Court enters this Protective Order pursuant to Rule 26 of the Federal Rules of Civil Procedure.

1. Discovery Materials

This Order applies to all products of discovery and all information derived therefrom, including, but not limited to, all documents, objects or things, deposition testimony and interrogatory/request for admission responses, and any copies, excerpts or summaries thereof, obtained by any party pursuant to the requirements of any court order, requests for production of documents, requests for admissions, interrogatories, or subpoena ("discovery materials"). This Order is limited to the litigation or appeal of any action brought by or on behalf of plaintiffs, alleging personal injuries or other damages arising from plaintiffs' ingestion of olanzapine, commonly known as Zyprexa® ("Litigation") and includes any state court action where counsel for the plaintiff has agreed to be bound by this order.

2. Use of Discovery Materials

With the exception of documents or information that has become publicly available without a breach of the terms of this Order, all documents, information or other

discovery materials produced or discovered in this Litigation and that have been designated confidential shall be used by the receiving party solely for the prosecution or defense of this Litigation, to the extent reasonably necessary to accomplish the purpose for which disclosure is made, and not for any other purpose, including any other litigation or judicial proceedings, or any business, competitive, governmental, commercial, or administrative purpose or function.

3. **"Confidential Discovery Materials" Defined**

For the purposes of this Order, "Confidential Discovery Materials" shall mean any information that the producing party in good faith believes is properly protected under Federal Rule of Civil Procedure 26(c)(7).

The terms of this Order shall in no way affect the right of any person (a) to withhold information on alleged grounds of immunity from discovery such as, for example, attorney/client privilege, work product or privacy rights of such third parties as patients, physicians, clinical investigators, or reporters of claimed adverse reactions; or (b) to withhold information on alleged grounds that such information is neither relevant to any claim or defense nor reasonably calculated to lead to the discovery of admissible evidence. If information is redacted on the basis it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, the redacting party shall identify on a separate log that identifies the document subject to redaction and the reason for such redaction.

Where large volumes of discovery materials are provided to the requesting party's counsel for preliminary inspection and designation for production, and have not been reviewed for confidentiality purposes, the producing party reserves the right to so designate and redact appropriate discovery materials after they are designated by the requesting party for production. During the preliminary inspection process, and before production, all discovery materials reviewed by the requesting party's counsel shall be treated as Confidential Discovery material.

4. **Designation of Documents as "Confidential"**

a. For the purposes of this Order, the term "document" means all tangible items, whether written, recorded or graphic, whether produced or created by a party or

another person, whether produced pursuant to subpoena, to discovery request, by agreement, or otherwise.

b. Any document which the producing party intends to designate as Confidential shall be stamped (or otherwise have the legend recorded upon it in a way that brings the legend to the attention of a reasonable examiner) with a notation substantially similar to the following:

Zyprexa MDL 1596: Confidential-Subject to Protective Order

Such stamping or marking will take place prior to production by the producing person, or subsequent to selection by the receiving party for copying. The stamp shall be affixed in such a manner as not to obliterate or obscure any written material.

c. A party may preliminarily designate as "Confidential" all documents produced by a third party entity employed by the party for the purposes of document management, quality control, production, reproduction, storage, scanning, or other such purpose related to discovery, by notifying counsel for the other party that all documents being produced are to be accorded such protection. Once said documents are produced by such third party vendor, the designating party will then review the documents and, as appropriate, designate them as "Confidential" by stamping the document (or otherwise having the legend recorded upon it in a way that brings its attention to a reasonable examiner) as such.

5. Non-Disclosure of Confidential Discovery Materials

Except with the prior written consent of the party or other person originally producing Confidential Discovery Materials, or as hereinafter provided under this Order, no Confidential Discovery Materials, or any portion thereof, may be disclosed to any person, including any plaintiff, except as set forth in section 6(d) below.

6. Permissible Disclosures of Confidential Discovery Material

Notwithstanding paragraph 5, Confidential Discovery Materials may be disclosed to and used only by:

- a. counsel of record for the parties in this Litigation and to his/her partners, associates, secretaries, legal assistants, and employees to the extent considered reasonably necessary to render professional services in the Litigation ,
- b. inside counsel of the parties, to the extent reasonably necessary to render professional services in the Litigation;
- c. court officials involved in this Litigation (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Court);
- d. any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper;
- e. where produced by a plaintiff, in addition to the persons described in subsections (a) and (b) of this section, a defendant's in-house paralegals and outside counsel, including any attorneys employed by or retained by defendant's outside counsel who are assisting in connection with this Litigation, and the paralegal, clerical, secretarial, and other staff employed or retained by such outside counsel or retained by the attorneys employed by or retained by defendant's outside counsel. To the extent a defendant does not have in-house counsel, it may designate two individuals employed by such defendant (in addition to outside counsel) to receive Confidential Discovery Materials produced by plaintiff;
- f. where produced by defendant Eli Lilly and Company, in addition to the persons described in subsections (a) and (b) of this section, plaintiff's attorneys in other filed litigation alleging injuries or damages resulting from the use of Zyprexa® including their paralegal, clerical, secretarial and other staff employed or retained by such counsel, provided that

such counsel have agreed to be governed by the terms of this Order and shall sign a copy of the order;

g. where produced by any defendant, outside counsel for any other defendant, including any attorneys employed by or retained by any other defendant's outside counsel who are assisting in connection with this Litigation, and the paralegal, clerical, secretarial, and other staff employed or retained by such outside counsel;

h. persons noticed for depositions or designated as trial witnesses, or those who counsel of record in good faith expect to testify at deposition or trial, to the extent reasonably necessary in preparing to testify;

i. outside consultants or outside experts retained for the purpose of assisting counsel in the Litigation;

j. employees of counsel involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designating programs for handling data connected with this action, including the performance of such duties in relation to a computerized litigation support system;

k. employees of third-party contractors performing one or more of the functions set forth in (j) above;

l. any employee of a party or former employee of a party, but only to the extent considered necessary for the preparation and trial of this action; and

m. any other person, if consented to by the producing party.

Any individual to whom disclosure is to be made under subparagraphs (d) through (m) above, shall sign, prior to such disclosure, a copy of the Endorsement of Protective Order, attached as Exhibit A. Counsel providing access to Confidential Discovery Materials shall retain copies of the executed Endorsement(s) of Protective Order. Any party seeking a copy of an endorsement may make a demand setting forth the reasons therefor to which the opposing party will respond in writing. If the dispute cannot be resolved the demanding party may move the Court for an order compelling production upon a showing of good cause. For testifying experts,

a copy of the Endorsement of Protective Order executed by the testifying expert shall be furnished to counsel for the party who produced the Confidential Discovery Materials to which the expert has access, at the time the expert's designation is served, or at the time the Confidential Discovery Materials are provided to the testifying expert, whichever is later.

Before disclosing Confidential discovery materials to any person listed in subparagraphs (d) through (m) who is a Customer or Competitor (or an employee of either) of the party that so designated the discovery materials, but who is not an employee of a party, the party wishing to make such disclosure shall give at least three (3) business days advance notice in writing to the counsel who designated such discovery materials as Confidential, stating that such disclosure will be made, identifying by subject matter category the discovery material to be disclosed, and stating the purposes of such disclosure. If, within the three (3) business day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the Court has denied such motion. As used in this paragraph, (a) the term "Customer" means any direct purchaser of products from Lilly, or any regular indirect purchaser of products from Lilly (such as a pharmacy generally purchasing through wholesale houses), and does not include physicians; and (b) the term "Competitor" means any manufacturer or seller of prescription medications.

The notice provision immediately above applies to consultants and/or independent contractors of Competitors to the extent the consultants or contractors derive a substantial portion of their income, or spend a substantial portion of their time working for a pharmaceutical company that manufactures prescription medical products in the neuroscience area.

7. Production of Confidential Materials by Non-Parties

Any non-party who is producing discovery materials in the Litigation may agree to and obtain the benefits of the terms and protections of this Order by designating as "Confidential" the discovery materials that the non-party is producing, as set forth in paragraph 4.

8. **Inadvertent Disclosures**

a. The parties agree that the inadvertent production of any discovery materials that would be protected from disclosure pursuant to the attorney-client privilege, the work product doctrine or any other relevant privilege or doctrine shall not constitute a waiver of the applicable privilege or doctrine. If any such discovery materials are inadvertently produced, the recipient of the discovery materials agrees that, upon request from the producing party, it will promptly return the discovery materials and all copies of the discovery materials in its possession, delete any versions of the discovery materials on any database it maintains and make no use of the information contained in the discovery materials; provided, however, that the party returning such discovery materials shall have the right to apply to the Court for an order that such discovery materials are not protected from disclosure by any privilege. The person returning such material may not, however, assert as a ground for such motion the fact or circumstances of the inadvertent production.

b. The parties further agree that in the event that the producing party or other person inadvertently fails to designate discovery materials as Confidential in this or any other litigation, it may make such a designation subsequently by notifying all persons and parties to whom such discovery materials were produced, in writing, as soon as practicable. After receipt of such notification, the persons to whom production has been made shall prospectively treat the designated discovery materials as Confidential, subject to their right to dispute such designation in accordance with paragraph 9.

9. **Declassification**

a. Nothing shall prevent disclosure beyond that limited by this Order if the producing party consents in writing to such disclosure.

b. If at any time a party (or aggrieved entity permitted by the Court to intervene for such purpose) wishes for any reason to dispute a designation of discovery materials as Confidential made hereunder, such person shall notify the designating party of such dispute in writing, specifying by exact Bates number(s) the discovery materials in dispute. The designating party shall respond in writing within 20 days of receiving this notification.

c. If the parties are unable to amicably resolve the dispute, the proponent of confidentiality may apply by motion to the Court for a ruling that discovery materials stamped as Confidential are entitled to such status and protection under Rule 26 of the Federal Rules of Civil Procedure and this Order, provided that such motion is made within forty five (45) days from the date the challenger of the confidential designation challenges the designation or such other time period as the parties may agree. The designating party shall have the burden of proof on such motion to establish the propriety of its Confidential designation.

d. If the time for filing a motion, as provided in paragraph 9.c, has expired without the filing of any such motion, or ten (10) business days (or such longer time as ordered by this Court) have elapsed after the appeal period for an order of this Court that the discovery material shall not be entitled to Confidential status, the Confidential Discovery Material shall lose its designation.

10. Confidential Discovery Materials in Depositions

a. Counsel for any party may show Confidential Discovery Materials to a deponent during deposition and examine the deponent about the materials so long as the deponent already knows the Confidential information contained therein or if the provisions of paragraph 6 are complied with. The party noticing a deposition shall obtain each witness' endorsement of the protective order in advance of the deposition and shall notify the designating party at least ten (10) days prior to the deposition if it has been unable to obtain that witness' endorsement. The designating party may then move the Court for an Order directing that the witness abide by the terms of the protective order, and no confidential document shall be shown to the deponent until the Court has ruled. Deponents shall not retain or copy portions of the

transcript of their depositions that contain Confidential information not provided by them or the entities they represent unless they sign the form described, and otherwise comply with the provisions in paragraph 6. A deponent who is not a party shall be furnished a copy of this Order before being examined about potentially Confidential Discovery Materials. While a deponent is being examined about any Confidential Discovery Materials or the Confidential information contained therein, persons to whom disclosure is not authorized under this Order shall be excluded from being present.

b. Parties (and deponents) may, within thirty (30) days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as Confidential. Until expiration of such thirty (30) day period, the entire transcript, including exhibits, will be treated as subject to Confidential protection under this Order. If no party or deponent timely designates a transcript as Confidential, then none of the transcript or its exhibits will be treated as confidential.

11. Confidential Discovery Materials Offered as Evidence at Trial

Confidential Discovery Materials and the information therein may be offered in evidence at trial or any court hearing, provided that the proponent of the evidence gives notice to counsel for the party or other person that designated the discovery materials or information as Confidential in accordance with the Federal Rules of Evidence and any local rules, standing orders, or rulings in the Litigation governing identification and use of exhibits at trial. Any party may move the Court for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The Court will then determine whether the proffered evidence should continue to be treated as Confidential and, if so, what protection, if any, may be afforded to such discovery materials or information at trial.

12. Filing

Confidential Discovery Materials shall not be filed with the Clerk except when required in connection with matters pending before the Court. If filed, they shall be filed in a sealed envelope, clearly marked:

"THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION COVERED BY A PROTECTIVE ORDER OF THE COURT AND IS SUBMITTED UNDER SEAL PURSUANT TO THAT PROTECTIVE ORDER. THE CONFIDENTIAL CONTENTS OF THIS DOCUMENT MAY NOT BE DISCLOSED WITHOUT EXPRESS ORDER OF THE COURT"

and shall remain sealed while in the office of the Clerk so long as they retain their status as Confidential Discovery Materials. Said Confidential Discovery Materials shall be kept under seal until further order of the Court; however, said Confidential Discovery Materials and other papers filed under seal shall be available to the Court, to counsel of record, and to all other persons entitled to receive the confidential information contained therein under the terms of this Order.

13. Client Consultation

Nothing in this Order shall prevent or otherwise restrict counsel from rendering advice to their clients in this Litigation and, in the course thereof, relying generally on examination of Confidential Discovery Materials; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 6.

14. Subpoena by other Courts or Agencies

If another court or an administrative agency subpoenas or otherwise orders production of Confidential Discovery Materials which a person has obtained under the terms of this Order, the person to whom the subpoena or other process is directed shall promptly notify the designating party in writing of all of the following: (1) the discovery materials that are requested for production in the subpoena; (2) the date on which compliance with the subpoena is requested; (3) the location at which compliance with the subpoena is requested; (4) the identity of the party serving the subpoena; and (5) the case name, jurisdiction and index, docket, complaint, charge, civil action or other identification number or other designation identifying the

litigation, administrative proceeding or other proceeding in which the subpoena or other process has been issued. In no event shall confidential documents be produced prior to the receipt of written notice by the designating party and a reasonable opportunity to object. Furthermore, the person receiving the subpoena or other process shall cooperate with the producing party in any proceeding related thereto.

15. Non-termination

The provisions of this Order shall not terminate at the conclusion of this Litigation. Within ninety (90) days after final conclusion of all aspects of this Litigation, counsel shall, at their option, return or destroy Confidential Discovery Materials and all copies of same. If counsel elects to destroy Confidential Discovery Materials, they shall consult with counsel for the producing party on the manner of destruction and obtain such party's consent to the method and means of destruction. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the discovery materials not more than one hundred twenty (120) days after final termination of this Litigation. Outside counsel, however, shall not be required to return or destroy any pretrial or trial records as are regularly maintained by that counsel in the ordinary course of business; which records will continue to be maintained as confidential in conformity with this Order.

16. Modification Permitted

Nothing in this Order shall prevent any party or other person from seeking modification of this Order or from objecting to discovery that it believes to be otherwise improper.

17. Responsibility of Attorneys; Copies

The attorneys of record are responsible for employing reasonable measures to control and record, consistent with this Order, duplication of, access to, and distribution of Confidential Discovery Materials, including abstracts and summaries thereof.

No duplications of Confidential Discovery Materials shall be made except for providing working copies and for filing in Court under seal; provided, however, that copies may

be made only by those persons specified in sections (a), (b) and (c) of paragraph 6 above. Any copy provided to a person listed in paragraph 6 shall be returned to counsel of record upon completion of the purpose for which such copy was provided. In the event of a change in counsel, retiring counsel shall fully instruct new counsel of their responsibilities under this Order and new counsel shall sign this Order.

18. No Waiver of Rights or Implication of Discoverability

a. No disclosure pursuant to any provision of this Order shall waive any rights or privileges of any party granted by this Order.

b. This Order shall not enlarge or affect the proper scope of discovery in this or any other litigation; nor shall this order imply that Confidential Discovery Materials are properly discoverable, relevant, or admissible in this or any other litigation. Each party reserves the right to object to any disclosure of information or production of any documents that the producing party designates as Confidential Discovery Materials on any other ground it may deem appropriate.

c. The entry of this Order shall be without prejudice to the rights of the parties, or any one of them, or of any non-party to assert or apply for additional or different protection. Nothing in this Order shall prevent any party from seeking an appropriate protective order to further govern the use of Confidential Discovery Materials at trial.

19. Improper Disclosure of Confidential Discovery Material

Disclosure of discovery materials designated Confidential other than in accordance with the terms of this Protective Order may subject the disclosing person to such sanctions and remedies as the Court may deem appropriate.



Hon. A. Simon Chreim
United States Magistrate Judge

Dated: August 3, 2004
Brooklyn, New York

SO ORDERED as approving act of
Magistrate Judge and Justice
Hon. Jack B. Weinstein
JBW

Hon. Jack B. Weinstein
Senior District Judge

Dated: 8/3, 2004
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

MDL No. 1596

THIS DOCUMENT RELATES TO:

ALL ACTIONS

ENDORSEMENT OF PROTECTIVE ORDER

I hereby attest to my understanding that information or documents designated Confidential are provided to me subject to the Protective Order ("Order") dated _____, 2004 (the "Protective Order"), in the above-captioned litigation ("Litigation"); that I have been given a copy of and have read the Order, and that I agree to be bound by its terms. I also understand that my execution of this Endorsement of Protective Order, indicating my agreement to be bound by the Order, is a prerequisite to my review of any information or documents designated as Confidential pursuant to the Order.

I further agree that I shall not disclose to others, except in accord with the Order, any Confidential Discovery Materials, in any form whatsoever, and that such Confidential Discovery Materials and the information contained therein may be used only for the purposes authorized by the Order.

I further agree to return all copies of any Confidential Discovery Materials I have received to counsel who provided them to me upon completion of the purpose for which they were provided and no later than the conclusion of this Litigation.

I further agree and attest to my understanding that my obligation to honor the confidentiality of such discovery material will continue even after this Litigation concludes.

I further agree and attest to my understanding that, if I fail to abide by the terms of the Order, I may be subject to sanctions, including contempt of court, for such failure. I agree to be subject to the jurisdiction of the United States District Court, Eastern District of New York, for the purposes of any proceedings relating to enforcement of the Order.

I further agree to be bound by and to comply with the terms of the Order as soon as I sign this Agreement, regardless of whether the Order has been entered by the Court.

Date: _____

By: _____

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
In re: :
: 04-MD-1596 (JBW)
ZYPREXA PRODUCT LIABILITY :
LITIGATION, : December 18, 2006
: Brooklyn, New York
:
-----X

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Eli Lilly: SEAN FAHEY, ESQ.

For Lanier Law Firm: EVAN JANUSH, ESQ.

Local Counsel for Lilly: BREWSTER JAMESON, ESQ.

Court Transcriber: SHARI RIEMER
TypeWrite Word Processing Service
356 Eltingville Boulevard
Staten Island, New York 10312

Proceedings recorded by electronic sound recording,
transcript produced by transcription service

1 THE COURT: This is Judge Mann on the line. I'm
2 conducting -- one moment. This is Judge Mann on the line. I'm
3 conducting a telephone conference in In re: Zyprexa
4 Litigation, 04-MD, I believe it's 1496.

5 Would counsel please state their -- 1596. Would
6 counsel please state their appearances for the record?

7 MR. FAHEY: This is Sean Fahey on behalf of Eli Lilly
8 & Co.

9 MR. JANUSH: This is Evan Janush on behalf of the
10 Lanier Law Firm plaintiff.

11 THE COURT: I'm sorry. Could you state your name
12 again?

13 MR. JANUSH: Evan Janush, E-V-A-N, last name J-A-N-U-
14 S-H on behalf of Lanier Law Firm plaintiff.

15 MR. JAMISON: This is Brewster Jamison. I'm local
16 counsel in Anchorage, Alaska for Eli Lilly.

17 MR. GODSTEIN: This is Jim Godstein but I'm not in
18 this case in any manner other than that I received documents
19 pursuant to a subpoena in another case.

20 THE COURT: I believe that it was Mr. Fahey who
21 requested that this conference be scheduled.

22 MR. FAHEY: Yes, Your Honor, and we wanted to bring
23 an issue of great importance to your attention. As you may
24 know, Special Master Wooden entered an order on Friday evening
25 which among other things directed Mr. Godstein -- found that

1 the possession of documents produced by Eli Lilly & Co. had
2 been in violation of the Case Management Order Number 3, found
3 that Mr. Godstein had further disseminated these documents to
4 additional third parties in violation of CMO 3 including the
5 New York Times, that Mr. Godstein was ordered to immediately
6 return all the documents until such further order of the Court.
7

8 Mr. Godstein has taken the position that Special
9 Master Wooden doesn't have the power to issue such orders as
10 Special Master even though Case Management Order Number 6
11 provides that he has the authority to -- all discovery matters
12 including the protective orders in the MDL and has at this
13 point refused to return the documents to Mr. Wooden.

14 Let me just address how Mr. Godstein came into
15 possession of these documents. As he details in his letter to
16 Special Master Wooden of last night, he learned from a
17 consulting expert on behalf of the plaintiffs -- a pressure
18 litigation that this consulting expert had possession of
19 documents that were produced by Eli Lilly and were covered by,
20 among other things, Case Management Order Number 3. He then in
21 his own words found a case that could be used to subpoena these
22 documents and had an issue -- had a subpoena issued on the 6th
23 of December. The return date for that subpoena was December
24 20th. That subpoena was sent to Lilly. Lilly took immediate
25 action to identify who was representing Dr. Egelman or who had

1 retained him. By the 13th, still a week before the documents
2 were to be produced, we informed the Lanier Law Firm that we
3 would be moving to quash the subpoena and asked them to convey
4 to Dr. Egelman that he should not produce documents during the
5 pendency of the motion. The Lanier Law Firm called Dr.
6 Egelman, told him not to produce documents. Dr. Egelman said
7 he would not produce documents.

8 It later turned out that Mr. Godstein and Dr. Egelman
9 had communicated through an amended subpoena which no one has
10 ever seen until this issue surfaced on Friday night which
11 called for the immediate production of documents, not on
12 December 20th but immediately, and Dr. Egelman without the
13 consent of the Lanier Law Firm, without the consent of Lilly,
14 started to produce documents subject to the protective order
15 via an internet transfer procedure on December 12th. Days
16 later the New York Times had those documents and we are
17 concerned not only about the violation of CMO 3 but also in
18 terms of the continued dissemination of these documents.

19 What we were asking for is for Mr. Godstein to return
20 the documents to Special Master Wooden so that we could avoid
21 any further dissemination of the documents until the issues
22 about whether he appropriately or inappropriately came upon
23 those documents was resolved.

24 THE COURT: Mr. Godstein, do you want to respond? I
25 have read your letter to Special Master Wooden.

1 MR. GODSTEIN: Well, I guess the main thing is that I
2 told Dr. Egelman that I thought he should give the amended
3 subpoena to Lilly and I'm not sure why he didn't.

4 THE COURT: When was it issued?

5 MR. GODSTEIN: December 11th. So I think he didn't
6 see the -- kind of the significance of it as I understand
7 although I tried to convey that to him. So I don't know. I
8 mean I feel like I have the doc -- I haven't seen Case
9 Management Order 6 or other documents, you know, and you've
10 read my letter so you see that the case that I got was part of
11 Psychrights [Ph.] mission and so it's in my view, and I don't
12 think there's much question about it, is entirely legitimate
13 use. I mean that's what Psychrights does is pick strategic
14 cases to further its mission.

15 THE COURT: Well, certainly you could have subpoenaed
16 documents from Lilly and then you could have litigated that in
17 the court in Alaska, but instead you chose to obtain these
18 documents through an expert who I presume you knew had come
19 into possession of them subject to the terms of a
20 confidentiality order. Is that correct?

21 MR. GODSTEIN: Yes, but I didn't know -- I didn't see
22 the confidentiality order until just this last Friday.

23 THE COURT: But you knew that he had obtained those
24 documents pursuant to a confidentiality order and before you
25 obtained the documents and before you amended the subpoena to

1 require immediate production you did not ask to have a copy of
2 it. Is that correct?

3 MR. GODSTEIN: Correct. Well, I -- I indicated and
4 he indicated that he had to comply with it and I understood
5 that and expected him to comply with it and frankly I never
6 expected to get the documents as I put in my little letter.

7 MR. JANUSH: Your Honor, this is Evan Janush on
8 behalf of --

9 MR. GODSTEIN: And then I didn't really -- the
10 amended subpoena doesn't say immediately.

11 MR. JANUSH: Your Honor, this is -- if I may, this is
12 Evan Janush.

13 THE COURT: Well, I'd like to hear -- please don't
14 interrupt one another. Mr. Godstein, do --

15 MR. JANUSH: I apologize.

16 THE COURT: Do you have anything further to say?

17 MR. GODSTEIN: You characterized the amended one as
18 saying immediately.

19 THE COURT: Well, you did -- you asked for it prior
20 to the return date which is on the 20th and as I understand it
21 from the documents that I've been reviewing in the last few
22 minutes there were some discussions going on about adjourning
23 the return date so that all counsel would have sufficient time
24 to consider these issues and to litigate them if need be.

25 MR. GODSTEIN: That happened later. That happened

1 after the production had already occurred. So what happened is
2 I had -- there were three other subpoenas issued in this case
3 because it's a real case and I -- it's a subpoena for a
4 telephonic deposition and it said for him to appear and bring
5 with him those documents and then I realized over the weekend
6 well, that doesn't make any sense. I can't examine him over
7 the telephone if he's got the documents. So I did the amended
8 one and said to -- the amended subpoena says to provide them
9 before the date and then in my email I said basically to give
10 me a chance to review them and make for an efficient deposition
11 to send them as soon as he can. So that's what it -- that's
12 how it was set up. I mean that was what happened.

13 MR. JAMISON: Your Honor, this is Brewster Jamison
14 for Lilly in Anchorage.

15 THE COURT: Yes.

16 MR. JAMISON: As far as I can tell, Your Honor, I've
17 spoken with the counsel for the State of Alaska. The amended
18 subpoena has not been served or was not served on James Parker
19 as far as we can tell and so the existence of the amended
20 subpoena seeking the unusual production of documents earlier
21 than the original subpoena date was not delivered and didn't
22 come to our attention until frankly last night.

23 MR. JANUSH: Well, the practice of --

24 MR. GODSTEIN: May I, Your Honor?

25 THE COURT: Well, I asked them not to interrupt you.

1 So if you would not interrupt them. I don't know that they've
2 finished.

3 Anything further from the defense?

4 MR. JAMISON: No, I think Mr. Janush was trying to
5 speak on behalf of the plaintiffs, Your Honor.

6 MR. JANUSH: Your Honor, this is Evan Janush and I
7 just wanted to add one point which I -- we are dealing with a
8 situation in which we have an attorney from Alaska who is quite
9 clearly aware of the concept of jurisdiction. In fact, he
10 challenged Special Master Wooden's jurisdiction in this very
11 matter and yet he issued a state subpoena on a state resident
12 of Massachusetts, my consultant, which he clearly as a Harvard
13 Law trained lawyer and as a -- as any lawyer clearly knows has
14 no jurisdiction over a Massachusetts resident.

15 So for someone who's challenging the jurisdiction of
16 this court on an order to have issued a state subpoena on a
17 Massachusetts resident is entirely suspect.

18 THE COURT: Mr. Godstein, is there anything else you
19 wanted to add?

20 MR. GODSTEIN: Well, there was something that Mr.
21 Jamison was saying that I wanted to respond to.

22 THE COURT: All right. If you have nothing you want
23 to add let me just say that I am very distressed about what
24 happened here. The issue before me is not whether ultimately
25 Mr. Godstein would be entitled to obtain these documents from

1 Eli Lilly. He could have subpoenaed Elli Lilly directly and
2 they could have litigated his entitlement to Lilly's documents
3 in state court in Alaska. The issue really is the propriety of
4 what was done here which was to obtain documents that had been
5 produced by Lilly pursuant to a protective order. To subpoena
6 them not even from opposing counsel in this litigation but from
7 an expert one step removed who when he received those documents
8 took an undertaking to comply with the protective order under
9 the terms of Case Management Order Number 4, he had to sign a
10 document indicating that he was aware of the conditions which
11 included that those documents would be used solely for purposes
12 of this litigation.

13 To have obtained them under these circumstances with
14 a return date of the 20th and then to have after Lilly was
15 notified and there apparently were communications with Lilly
16 concerning adjourning the return date to almost surreptitiously
17 modify that subpoena so that the documents would be produced
18 without Lilly's knowing at the time, without knowing that the
19 date had in effect been moved up, this is highly suspect. It
20 certainly has the ring of collusion here and I find it very
21 disturbing.

22 There is no doubt in my mind that the Court in the
23 Eastern District of New York has the authority to enforce its
24 orders and my only hesitation is as a Magistrate Judge. I do
25 not have the authority to grant injunctive relief or to hold

1 any individual in contempt of court. That would be a matter
2 that the District Court Judge would have the authority to do.
3 As I assume you're all aware, Judge Weinstein is traveling and
4 is unavailable at this time. So I am not in a position to
5 order -- issue any injunctive relief, but I am prepared to say
6 that I think that what happened here was an intentional
7 violation of Judge Weinstein's orders. I think it was
8 inappropriate. I cannot make -- if you want to litigate your
9 entitlement to these documents in Alaska, Mr. Godstein, then
10 you can subpoena Lilly but as I said, it appears to me that you
11 rather than face Lilly directly you were trying to attempt for
12 the back door what you should have done through the front door.
13 This was improper.

14 I personally am not in a position to order you to
15 return the documents. I can't make you return them but I can
16 make you wish you had because I think this is highly improper
17 not only to have obtained the documents on short notice without
18 Lilly being advised of the amendment but then to disseminate
19 them publicly before it could be litigated. It certainly
20 smacks as bad faith.

21 So this is the extent of what I'm prepared to do is
22 simply state my views on the record and if counsel in the MDL
23 case want to go before a District Court Judge who has more
24 authority -- I understand Judge Cogan is on miscellaneous duty
25 today.

1 MR. FAHEY: Yes, Your Honor. This is Sean Fahey on
2 behalf of Eli Lilly. We do intend to go before Judge Cogan
3 today and I would ask Mr. Godstein to provide me his
4 availability this afternoon for a hearing with Judge Cogan.

5 MR. GODSTEIN: Well, I'm going to get counsel here
6 and discuss this whole situation. I would want to say -- I do
7 want to say that I did advised Dr. Egelman to give the amended
8 subpoena to Lilly and he didn't seem to think it made any
9 difference.

10 THE COURT: Well, don't you think that you should
11 have done that directly? You were aware of the fact that these
12 documents were subject to a confidentiality order and you chose
13 to go through the expert who had them solely for purposes of
14 this litigation rather than subpoena Lilly directly. So don't
15 you think that you had an obligation to inform Lilly?

16 MR. GODSTEIN: No.

17 THE COURT: All right. Well, I think I've said all I
18 need to say. Is there anything further?

19 MR. FAHEY: Your Honor, I'm wondering if it would be
20 beyond your authority to at least ask Mr. Godstein to not
21 further disseminate the documents until we can have the issue
22 brought emergently to Judge Cogan?

23 THE COURT: Well, I can ask him not to and I think,
24 although I haven't used those precise words, I've certainly
25 suggested that he should not further disseminate them. Indeed

1 he ought to give them back and then litigate the issue.

2 MR. FAHEY: Thank you, Your Honor.

3 THE COURT: But he can't undo what's already been
4 done but that should not be an excuse for him to further
5 disseminate the documents.

6 MR. FAHEY: Thank you very much, Your Honor.

7 THE COURT: Thank you. Goodbye.

8 MR. GODSTEIN: I'll not further disseminate them.

9 THE COURT: All right. Goodbye.

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

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Shari Riemer

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Dated: 12/19/06

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

U.S. Courthouse
Brooklyn, New York

December 18, 2006

3:00 p. m.

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

1 **APPEARANCES:**

2

3 **For the Plaintiffs:**

4 **LANIER LAW FIRM, PLLC**

 Tower 56

5 126 East 56th Street, 6th Floor.

 New York, New York 10022

6 **BY: EVAN M. JANUSH, ESQ.**

RICHARD D. MEADOW, ESQ.

7

8 **For Eli Lilly & Company:**

9 **PEPPER, HAMILTON, LLP**

 3000 Two Logan Square

10 Eighteenth and Arch Streets.

 Philadelphia, Pennsylvania 19103

11 **BY: SEAN P. FAHEY, ESQ.**

12

 LANE, POWELL

13 301 West Northern Lights Boulevard

 Suite 301.

14 Anchorage, Alaska 99503

15 **BY: BREWSTER H. JAMIESON, ESQ.**

16 **Special Master:**

17 **PETER H. WOODIN, ESQ.**

 280 Park Avenue

18 West Building, 28th Floor

 New York, New York 11017.

19

20 **REPRESENTING MR. GOTTSTEIN:**

21 **JOHN MCKAY, ESQ.**

22 **ALSO PRESENT:**

23 **JAMES GOTTSTEIN, ESQ.**

24

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

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

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

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

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

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

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

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

25 MR. FAHEY: Okay.

1 THE COURT: Okay. Good bye.

2 (RECESS.)

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

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

7 MR. JANUSH: Evan Janush --

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

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

13 THE COURT: Okay.

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

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

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

24 MR. GOTTSTEIN: I am.

25 THE COURT: You like us to hold on

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

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

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

8 MR. GOTTSTEIN: Thank you.

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

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

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

1 about that. Hello?

2 THE COURT: Yes, Mr. Gottstein.

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

6 THE COURT: Please do.

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

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

14 MR. MCKAY: Hello?

15 THE COURT: Yeah.

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

18 THE COURT: That's okay.

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

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

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

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

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

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

8 THE COURT:

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

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

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

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

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

25 MR. FAHEY: Sure. This is Sean

1 Fahey, on behalf of Eli Lilly and Company.

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

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

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

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

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

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

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

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

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

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

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

14 THE COURT: All right.

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

17 MR. JANUSH: No, Your Honor.

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

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

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

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

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

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

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

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

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

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

14

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

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

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

7 THE COURT: You mean Rule 37?

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

10 THE COURT: Okay.

11 MR. FAHEY: And there is --

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

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

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

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

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

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

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

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

22 THE COURT: Okay.

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

1 did not receive these documents.

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

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

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

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

6 THE COURT: You are correct.

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

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

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

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

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

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

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

11 THE COURT: Okay.

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

15 THE COURT: Briefly, please.

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

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

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

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

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

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

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

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

25 MR. MCKAY: Your Honor, I could hear

1 you and --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. MCKAY: Your Honor?

11 THE COURT: Yes?

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

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

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

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

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

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

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

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

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

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

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

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

22 MR. MCKAY: No, Your Honor.

23 THE COURT: Okay. Thank you all.

24 (PROCEEDINGS CONCLUDED.)

25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In re: ZYPREXA PRODUCTS LIABILITY : MDL No. 1596
LITIGATION :
-----X
THIS DOCUMENT RELATES TO: :
ALL ACTIONS : **ORDER FOR MANDATORY**
 : **INJUNCTION**
 :
 :
 :
-----X

Upon receipt of the (i) Emergency Oral Joint Motion of members of the In Re Zyprexa Product Liability Litigation Plaintiffs' Steering Committee ("PSC") and Eli Lilly and Company to enforce compliance with Special Discovery Master Peter H. Woodin's Order dated December 15, 2006, Case Management Order No. 3 (CMO-3), and a joint request for mandatory injunction; (ii) the Report and Recommendation of Magistrate Mann dated December 18, 2006; and (iii) Mr. Gottstein's submission dated December 17, 2006; and upon having heard oral argument by counsel for the PSC, Eli Lilly and Company, and Mr. Gottstein (by his attorney, Mr. McKay), and relying on Mr. Gottstein's statements in his December 17, 2006 submission to Special Master Woodin, specifically that Mr. Gottstein has deliberately and knowingly aided and abetted Dr. David Egilman's breach of CMO-3, it is therefore

ORDERED that the Joint Motion for a Mandatory Injunction is hereby GRANTED, and Mr. Gottstein is enjoined from further dissemination of any of documents produced, pursuant to CMO-3, by Eli Lilly and Company (including all copies of any electronic documents, hard copy documents and CDs/DVDs);

It is hereby further ORDERED that:

(1) Special Master Woodin's Order dated December 15, 2006 is enforced, and Mr. Gottstein shall immediately return all documents produced, pursuant to CMO-3, by Eli Lilly and Company (including all copies of any electronic documents, hard copy documents and CDs/DVDs), and which were provided by David Egilman, M.D., M.P.H., or any other source, to the following address where they shall be maintained, under seal, until further Order:

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017;

(2) Mr. Gottstein shall immediately, upon receipt of this Order, provide to Special Master Woodin and the parties a listing of all persons, organizations or entities to which any documents covered by this Order, or any subset thereof, were provided;

(3) Mr. Gottstein shall, within 24 hours of this Order, identify to Special Master Woodin and the parties, by specific bates stamp, the particular documents given to any person, organization or entity noted above, which shall also include the date and location such documents were disseminated;

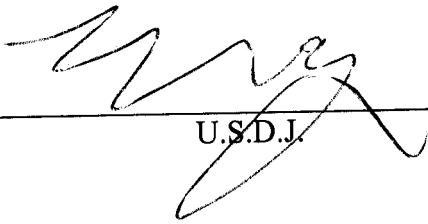
(4) Mr. Gottstein shall immediately take steps to retrieve any documents subject to this Order, regardless of their current location, and return all such documents to Special Master Woodin. This shall include the removal of any such documents posted on any website; and

(5) Mr. Gottstein shall take immediate steps to preserve, until further Order of the Court, all documents, voice mails, emails, materials, and information,

including, but not limited to all communications, that refer to, relate to or concern Dr. Egilman or any other efforts to obtain documents produced by Eli Lilly and Company.

SO ORDERED.

Dated: Brooklyn, New York
December 18, 2006



U.S.D.J.

X-Mailer: QUALCOMM Windows Eudora Version 7.0.1.0
Date: Mon, 18 Dec 2006 21:59:43 -0900
To: "breggin-hotmail.com" <breggin@hotmail.com>
From: Jim Gottstein <jim.gottstein@psychrights.org>
Subject: Zyprexa Documents
Cc: "Jim Gottstein" <jim.gottstein@psychrights.org>, mckay@alaska.net,
"Peter Woodin" <pwoodin@jamsadr.com>, EMJ@lanierlawfirm.com,
RDM@lanierlawfirm.com, JamiesonB@LanePowell.com, Faheys@pepperlaw.com

Dear Dr. Breggin,

I mailed you a DVD with some documents on them pertaining to Zyprexa and have been orally ordered to have them returned to:

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

A copy of the proposed written order is posted at <http://psychrights.org/States/Alaska/CaseXX/EilLilly/ProposedOrder.pdf> with a comment about certain language which I strenuously disagree with and we are trying to get eliminated from the signed order. Regardless, please return the DVD, hard copies and any other copies to Special Master Woodin immediately. If you have not yet received it, please return it to Special Master Woodin when you do receive it. In addition, please ensure that no copies exist on your computer or any other computer equipment, or in any other format, website(s) or FTP site(s), or otherwise on the Internet.

There is a question in my mind that the court actually has jurisdiction over me to issue the order. I believe I came into the documents completely legally, but the consequences to me if I am wrong about the jurisdiction issue are severe, so I will very much appreciate your compliance with this request.

Note New E-mail Address

James B. (Jim) Gottstein, Esq.

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska 99501
USA
Phone: (907) 274-7686) Fax: (907) 274-9493
jim.gottstein[-at-]psychrights.org
<http://psychrights.org/>

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X-Mailer: QUALCOMM Windows Eudora Version 7.0.1.0
Date: Mon, 18 Dec 2006 22:09:30 -0900
To: "grace jackson" <gracejackson1@suddenlink.net>
From: Jim Gottstein <jim.gottstein@psychrights.org>
Subject: Zyprexa Documents
Cc: "Jim Gottstein" <jim.gottstein@psychrights.org>, mckay@alaska.net,
"Peter Woodin" <pwoodin@jamsadr.com>, EMJ@lanierlawfirm.com,
RDM@lanierlawfirm.com, JamiesonB@LanePowell.com, Faheys@pepperlaw.com

Dear Dr. Jackson,

I mailed you DVD (or maybe two) with some documents on them pertaining to Zyprexa and have been orally ordered to have them returned to:

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

A copy of the proposed written order is posted at <http://psychrights.org/States/Alaska/CaseXX/EilLilly/ProposedOrder.pdf> with a comment about certain language which I strenuously disagree with and we are trying to get eliminated from the signed order. Regardless, please return the DVD, hard copies and any other copies to Special Master Woodin immediately. If you have not yet received it, please return it to Special Master Woodin when you do receive it. In addition, please ensure that no copies exist on your computer or any other computer equipment, or in any other format, website(s) or FTP site(s), or otherwise on the Internet.

There is a question in my mind that the court actually has jurisdiction over me to issue the order. I believe I came into the documents completely legally, but the consequences to me if I am wrong about the jurisdiction issue are severe, so I will very much appreciate your compliance with this request.

Note New E-mail Address

James B. (Jim) Gottstein, Esq.

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska 99501
USA
Phone: (907) 274-7686 Fax: (907) 274-9493
[jim.gottstein\[-at-\]psychrights.org](mailto:jim.gottstein[-at-]psychrights.org)
<http://psychrights.org/>

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X-Mailer: QUALCOMM Windows Eudora Version 7.0.1.0
Date: Mon, 18 Dec 2006 22:11:47 -0900
To: cohenda@fiu.edu
From: Jim Gottstein <jim.gottstein@psychrights.org>
Subject: Zyprexa Documents
Cc: "Jim Gottstein" <jim.gottstein@psychrights.org>, mckay@alaska.net,
"Peter Woodin" <pwoodin@jamsadr.com>, EMJ@lanierlawfirm.com,
RDM@lanierlawfirm.com, JamiesonB@LanePowell.com, Faheys@pepperlaw.com

Dear Dr. Cohen,

I mailed you a DVD with some documents on them pertaining to Zyprexa and have been orally ordered to have them returned to:

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

A copy of the proposed written order is posted at <http://psychrights.org/States/Alaska/CaseXX/EilLilly/ProposedOrder.pdf> with a comment about certain language which I strenuously disagree with and we are trying to get eliminated from the signed order. Regardless, please return the DVD, hard copies and any other copies to Special Master Woodin immediately. If you have not yet received it, please return it to Special Master Woodin when you do receive it. In addition, please ensure that no copies exist on your computer or any other computer equipment, or in any other format, website(s) or FTP site(s), or otherwise on the Internet.

There is a question in my mind that the court actually has jurisdiction over me to issue the order. I believe I came into the documents completely legally, but the consequences to me if I am wrong about the jurisdiction issue are severe, so I will very much appreciate your compliance with this request.

Note New E-mail Address

James B. (Jim) Gottstein, Esq.

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska 99501
USA
Phone: (907) 274-7686) Fax: (907) 274-9493
jim.gottstein[-at-]psychrights.org
<http://psychrights.org/>

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Draft August 7, 2007

1/16/2007

A-146
PETITIONERS 7 0334

X-Mailer: QUALCOMM Windows Eudora Version 7.0.1.0
Date: Mon, 18 Dec 2006 22:24:16 -0900
To: Will Hall <will@freedom-center.org>
From: Jim Gottstein <jim.gottstein@psychrights.org>
Subject: Zyprexa Documents
Cc: "Jim Gottstein" <jim.gottstein@psychrights.org>, mckay@alaska.net,
"Peter Woodin" <pwoodin@jamsadr.com>, EMJ@lanierlawfirm.com,
RDM@lanierlawfirm.com, JamiesonB@LanePowell.com, Faheys@pepperlaw.com

Hi Will,

I believe you downloaded *via* ftp and I mailed you a DVD or two with some documents on them pertaining to Zyprexa and have been orally ordered to have them returned to:

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

A copy of the proposed written order is posted at <http://psychrights.org/States/Alaska/CaseXX/EilLilly/ProposedOrder.pdf> with a comment about certain language which I strenuously disagree with and we are trying to get eliminated from the signed order. Regardless, please return the DVD(s), hard copies and any other copies to Special Master Woodin immediately. If you have not yet received it, please return it to Special Master Woodin when you do receive it. In addition, please ensure that no copies exist on your computer or any other computer equipment, or in any other format, website(s) or FTP site(s), or otherwise on the Internet.

There is a question in my mind that the court actually has jurisdiction over me to issue the order. I believe I came into the documents completely legally, but the consequences to me if I am wrong about the jurisdiction issue are severe, so I will very much appreciate your compliance with this request.

Note New E-mail Address

James B. (Jim) Gottstein, Esq.

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska 99501
USA
Phone: (907) 274-7686 Fax: (907) 274-9493
[jim.gottstein\[-at-\]psychrights.org](mailto:jim.gottstein[-at-]psychrights.org)
<http://psychrights.org/>

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Draft August 7, 2007

1/16/2007

A-147

PETITIONERS 7 0336

X-Mailer: QUALCOMM Windows Eudora Version 7.0.1.0
Date: Mon, 18 Dec 2006 22:30:03 -0900
To: berenson@nytimes.com
From: Jim Gottstein <jim.gottstein@psychrights.org>
Subject: Zyprexa Documents
Cc: "Jim Gottstein" <jim.gottstein@psychrights.org>, mckay@alaska.net,
"Peter Woodin" <pwoodin@jamsadr.com>, EMJ@lanierlawfirm.com,
RDM@lanierlawfirm.com, JamiesonB@LanePowell.com, Faheys@pepperlaw.com

Dear Mr. Berenson,

I believe you downloaded *via* ftp and I fed exed one and mailed you another DVD with some documents on them pertaining to Zyprexa and have been orally ordered to have them returned to:

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

A copy of the proposed written order is posted at <http://psychrights.org/States/Alaska/CaseXX/EilLilly/ProposedOrder.pdf> with a comment about certain language which I strenuously disagree with and we are trying to get eliminated from the signed order. Regardless, please return the DVD(s), hard copies and any other copies to Special Master Woodin immediately. If you have not yet received it, please return it to Special Master Woodin when you do receive it. In addition, please ensure that no copies exist on your computer or any other computer equipment, or in any other format, website(s) or FTP site(s), or otherwise on the Internet.

There is a question in my mind that the court actually has jurisdiction over me to issue the order. I believe I came into the documents completely legally, but the consequences to me if I am wrong about the jurisdiction issue are severe, so I will very much appreciate your compliance with this request.

Note New E-mail Address

James B. (Jim) Gottstein, Esq.

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska 99501
USA
Phone: (907) 274-7686) Fax: (907) 274-9493
jim.gottstein[-at-]psychrights.org
<http://psychrights.org/>

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X-Mailer: QUALCOMM Windows Eudora Version 7.0.1.0
Date: Mon, 18 Dec 2006 22:32:11 -0900
To: "MadPride-aol.com" <MadPride@aol.com>
From: Jim Gottstein <jim.gottstein@psychrights.org>
Subject: Zyprexa Documents
Cc: "Jim Gottstein" <jim.gottstein@psychrights.org>, mckay@alaska.net,
"Peter Woodin" <pwoodin@jamsadr.com>, EMJ@lanierlawfirm.com,
RDM@lanierlawfirm.com, JamiesonB@LanePowell.com, Faheys@pepperlaw.com

Dear Judi,

I mailed you a DVD (or two) with some documents on them pertaining to Zyprexa and have been orally ordered to have them returned to:

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

A copy of the proposed written order is posted at <http://psychrights.org/States/Alaska/CaseXX/EilLilly/ProposedOrder.pdf> with a comment about certain language which I strenuously disagree with and we are trying to get eliminated from the signed order. Regardless, please return the DVD, hard copies and any other copies to Special Master Woodin immediately. If you have not yet received it, please return it to Special Master Woodin when you do receive it. In addition, please ensure that no copies exist on your computer or any other computer equipment, or in any other format, website(s) or FTP site(s), or otherwise on the Internet.

There is a question in my mind that the court actually has jurisdiction over me to issue the order. I believe I came into the documents completely legally, but the consequences to me if I am wrong about the jurisdiction issue are severe, so I will very much appreciate your compliance with this request.

Note New E-mail Address

James B. (Jim) Gottstein, Esq.

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska 99501
USA
Phone: (907) 274-7686 Fax: (907) 274-9493
[jim.gottstein\[-at-\]psychrights.org](mailto:jim.gottstein[-at-]psychrights.org)
<http://psychrights.org/>

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X-Mailer: QUALCOMM Windows Eudora Version 7.0.1.0
Date: Mon, 18 Dec 2006 22:33:54 -0900
To: "VERACARE" <veracare@ahrp.org>
From: Jim Gottstein <jim.gottstein@psychrights.org>
Subject: Zyprexa Documents
Cc: "Jim Gottstein" <jim.gottstein@psychrights.org>, mckay@alaska.net,
"Peter Woodin" <pwoodin@jamsadr.com>, EMJ@lanierlawfirm.com,
RDM@lanierlawfirm.com, JamiesonB@LanePowell.com, Faheys@pepperlaw.com

Dear Ms. Sharav,

I mailed you two DVDs with some documents on them pertaining to Zyprexa and have been orally ordered to have them returned to:

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

A copy of the proposed written order is posted at <http://psychrights.org/States/Alaska/CaseXX/EilLilly/ProposedOrder.pdf> with a comment about certain language which I strenuously disagree with and we are trying to get eliminated from the signed order. Regardless, please return the DVD, hard copies and any other copies to Special Master Woodin immediately. If you have not yet received it, please return it to Special Master Woodin when you do receive it. In addition, please ensure that no copies exist on your computer or any other computer equipment, or in any other format, website(s) or FTP site(s), or otherwise on the Internet.

There is a question in my mind that the court actually has jurisdiction over me to issue the order. I believe I came into the documents completely legally, but the consequences to me if I am wrong about the jurisdiction issue are severe, so I will very much appreciate your compliance with this request.

Note New E-mail Address

James B. (Jim) Gottstein, Esq.

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska 99501
USA
Phone: (907) 274-7686 Fax: (907) 274-9493
[jim.gottstein\[-at-\]psychrights.org](mailto:jim.gottstein[-at-]psychrights.org)
<http://psychrights.org/>

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X-Mailer: QUALCOMM Windows Eudora Version 7.0.1.0
Date: Mon, 18 Dec 2006 22:37:17 -0900
To: nemo@vtlink.net
From: Jim Gottstein <jim.gottstein@psychrights.org>
Subject: Zyprexa Documents
Cc: "Jim Gottstein" <jim.gottstein@psychrights.org>, mckay@alaska.net,
"Peter Woodin" <pwoodin@jamsadr.com>, EMJ@lanierlawfirm.com,
RDM@lanierlawfirm.com, JamiesonB@LanePowell.com, Faheys@pepperlaw.com

Hi Laura,

I mailed you a DVD (or two) with some documents on them pertaining to Zyprexa and have been orally ordered to have them returned to:

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

A copy of the proposed written order is posted at <http://psychrights.org/States/Alaska/CaseXX/EilLilly/ProposedOrder.pdf> with a comment about certain language which I strenuously disagree with and we are trying to get eliminated from the signed order. Regardless, please return the DVD(s), hard copies and any other copies to Special Master Woodin immediately. If you have not yet received it, please return it to Special Master Woodin when you do receive it. In addition, please ensure that no copies exist on your computer or any other computer equipment, or in any other format, website(s) or FTP site(s), or otherwise on the Internet.

There is a question in my mind that the court actually has jurisdiction over me to issue the order. I believe I came into the documents completely legally, but the consequences to me if I am wrong about the jurisdiction issue are severe, so I will very much appreciate your compliance with this request.

Note New E-mail Address

James B. (Jim) Gottstein, Esq.

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska 99501
USA
Phone: (907) 274-7686) Fax: (907) 274-9493
jim.gottstein[-at-]psychrights.org
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1/16/2007

A-151
PETITIONERS 7 0344

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Law Project for
Psychiatric Rights, Inc.

December 20, 2006

Singeha Prakash
2939 Northampton St
Washington, DC 20015

Re: Zyprexa Documents

Dear Singeha:

I believe I mailed you a DVD with certain documents pertaining to Zyprexa. I have since been ordered by the United States District Court, Eastern District of New York to get it back. *See*, attached Order for Mandatory Injunction. I strenuously disagree that the order should have been granted, but unless and until that is overturned, it must be complied with. Therefore, please return the DVD, hard copies and any other copies to Special Master Woodin immediately at the following address:

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

If you have not yet received it, please return it to Special Master Woodin as soon as you do receive it. In addition, please ensure that no copies exist on your computer or any other computer equipment, or in any other format, website(s) or FTP site(s), or otherwise on the Internet.

Sincerely,



James B. (Jim) Gottstein

X-Mailer: QUALCOMM Windows Eudora Version 7.0.1.0
Date: Wed, 20 Dec 2006 08:27:38 -0900
To: stephen.cha@mail.house.gov
From: Jim Gottstein <jim.gottstein@psychrights.org>
Subject: Zyprexa Documents
Cc: "Jim Gottstein" <jim.gottstein@psychrights.org>, mckay@alaska.net,
"Peter Woodin" <pwoodin@jamsadr.com>, EMJ@lanierlawfirm.com,
RDM@lanierlawfirm.com, JamiesonB@LanePowell.com, Faheys@pepperlaw.com

Dear Mr. Cha,

First, please allow me to apologize for misspelling your name on your address when I sent you the Zyprexa documents you requested.

Since then, I have been ordered to:

immediately take steps to retrieve any documents subject to this Order, regardless of their current location, and return all such documents to Special Master Woodin. This shall include the removal of any such documents posted on any website

A copy of the order is posted at <http://psychrights.org/States/Alaska/CaseXX/EilLilly/InjunctionOrder.pdf> I strenuously disagree that it is a proper order, and it seems inevitable we will be taking steps to challenge its validity, but in the meantime it should be complied with.

Therefore, please return the DVD, hard copies and any other copies to Special Master Woodin immediately.

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

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

Note New E-mail Address

James B. (Jim) Gottstein, Esq.

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska 99501
USA
Phone: (907) 274-7686) Fax: (907) 274-9493
jim.gottstein[-at-]psychrights.org
<http://psychrights.org/>

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December 21, 2006

Special Master Peter H. Woodin
JAMS
280 Park Avenue, 28th Floor
New York, New York 10017

Re: Zyprexa Prooducts Liability Litigation, MDL 1596 (“Federal Litigation”)
Certification of James Gottstein

I, the undersigned, James B. Gottstein, make the following representations concerning compliance with the order signed by Hon. Brian Cogan on December 19, 2006, (“Order”) in the above-referenced federal litigation, directing the return of documents provided to me by Dr. David Egilman pursuant to subpoena (“Egilman Documents”) issued by the Superior Court for the State of Alaska, Third Judicial District, in *In the Matter of the Guardianship of B.B.*, Case No. 3AN-04-545 P/G. and specified other relief, as that Order has been amended in the course of the Status Hearing conducted before Judge Cogan on December 20, 2006 (“Status Hearing”).

For the record, I wish to note my continuing objection to the court’s assertion of authority over me and the propriety of the issuance of this Order, including but not limited to objections relating to the court’s jurisdiction to issue the Order, to the denial of due process with respect to proceedings culminating in the Order, and in particular to certain “findings” made in the Order. Dr. Egilman provided the documents at issue pursuant to my subpoena in the above-referenced state court litigation, only after following my instruction to give immediate notice of my subpoena to him to Eli Lilly and Company (“Lilly”) as a party that had produced a portion of the subpoenaed documents in the Federal Litigation, and affording Lilly a reasonable opportunity to direct him to object to production. It was and remains my belief that I was doing nothing wrong when I received and made use of the documents thereafter produced to me by Dr. Egilman. I understand the parties to the Federal Litigation may see this differently, though I would note that to my knowledge, neither Judge Cogan, Judge Weinstein, nor any other court has ever ruled that disclosure of the Egilman Documents is not in the public interest. That may be a matter for another day. My purpose here is simply to note, as my counsel did in the Status Hearing, the continuing nature and reservation of this objection, and the fact that in voluntarily undertaking the steps outlined in the Order, I am not thereby submitting to the jurisdiction of the court or waiving my objections.

All representations herein are made in good faith, in an effort to fully cooperate with the court and parties to the Federal Litigation, and are based on what I know or recall at this time, having made diligent and extensive efforts considering the time allotted to ensure the accuracy hereof. To my knowledge, I have made all disclosures and undertaken all activities encompassed by the Order. Should I subsequently discover or recall any information which, had I been aware of it at this time, should have been provided pursuant to the Order, I will promptly supplement this document by communicating it to the Special Discovery Master.

The Order specifies the return of documents produced by Lilly pursuant to CMO-3 and which were provided to me by Dr. David Egilman “or any other source.” I have no independent knowledge of the source of the documents sent to me by Dr. Egilman, but am assuming for

present purposes that all of the Egilman Documents were provided to him pursuant to CMO-3. To my knowledge, I have not obtained documents provided pursuant to CMO-3 from any other source, subject to the caveat set forth in section 6 below.

1. I certify that after issuance of Judge Cogan's Order I did not further disseminate the Egilman Documents (and in fact had voluntarily refrained from further distribution of Egilman Documents after receiving a letter from Lilly's counsel requesting this in the preceding week).

2. All documents provided by Dr. Egilman to me pursuant to my subpoena were received electronically. I do not have, and have not had, paper copies of any of the Egilman Documents. On December 20, 2006, after receiving clarification that the court and counsel for Lilly were dropping the requirement that I create a "Bates stamp" index of documents so that I no longer needed to preserve copies for that purpose, I deleted all Egilman Documents from my computer. Before doing so, I made a copy these documents on a DVD, labeled "All Z Docs 12/20/06." I have delivered this DVD today to my counsel, D. John McKay, for forwarding to you. Except as specified in items 5 and 6 below, I no longer have in my possession or control any copies of the Egilman Documents.

3. In addition to the aforementioned copies of the Egilman Documents sent electronically to and residing in my computer, I made a number of copies of these documents on DVDs, burned from my computer and distributed these copies. As noted further in section 7 below, I have retrieved or made a good faith effort to retrieve all of these copies. Those DVDs that I have been able to retrieve myself, or that were still in my possession, were turned over to local counsel for Eli Lilly yesterday for forwarding to the Special Master, per agreement. I have asked all others to whom I distributed the DVDs to turn over what I gave them to the Special Master and ensure that no copies exist. In addition, I happen to have copied one of the Egilman Documents onto a "flash drive." I have deleted it, and before doing so, I burned a copy of it onto a DVD that was among those delivered yesterday to counsel for Lilly, on a DVD labeled "from flash drive."

4. I have located the .pdf file Mr. McKay referred to in the December 20 status hearing, a word-searchable compilation of the Egilman Documents and the dozen or so files that were added together to make that file that I had created. As Mr. McKay promised, I have deleted that document from my computer.

5. While the Order does not specifically mention or address back-up copies, in an effort to fully cooperate in good faith with the intent of the order, I have taken steps to secure the removal of any copies of the Egilman Documents that might exist in any medium, in any location, where my computer is routinely backed up. I do not have the necessary access or technical expertise to accomplish this, but I have given directions to the individual who does have it to accomplish this as soon as practicable, and to ensure the security of the backup media in the meanwhile. Earlier this week I provided you with a copy of communication with this technician to this effect, and when the task is completed, my counsel will secure a certification to this effect and forward it to you.

6. In the course of my longstanding representation of clients and other advocacy work with respect to a variety of mental health-related issues, including but not limited to my work for the Law Project for Psychiatric Rights (PsychRights) and my successful prosecution of litigation culminating in the Alaska Supreme Court's ruling in *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238 (Alaska 2006) restricting forced drugging, I have had occasion to acquire and publicly disseminate many, many documents relating to mental health treatment and related issues. These

documents, and the litigation and other activities to which they relate, have often specifically concerned the use of drugs, including but not limited to Eli Lilly's drug Zyprexa, which is the subject of your above-referenced MDL products liability litigation. I have routinely made such documents available publicly to anyone interested in the rights of people diagnosed with serious mental illness, and will continue to do so, on my website and otherwise. I know that such documents collected and utilized in the past include a substantial number of documents specifically concerning Zyprexa, including but not limited to numerous Zyprexa-related documents that have previously been produced pursuant to the Federal Freedom of Information Act. Because of the voluminous nature of these documents previously in my possession, and the fact that due to the Order I am unable to ascertain the identity of all the items contained in the Egilman Documents that were temporarily in my possession, I wish to note that it is possible that contained within the Egilman Documents are items that I and others have previously, and entirely appropriately, possessed and used. I simply do not know, and compliance with the court's order makes it impossible for me to determine this now. I suspect that it is not unlikely, however, since it is my understanding that some of the files encompassed by the court's protective order include a number of documents such as newspaper articles and other items that are already public and may well be in my independently and previously existing collection of documents. Therefore, while I can certify in complete good faith that I have deleted and/or returned all of the Egilman Documents, I cannot warrant that I have no copies of any documents that might coincidentally be found among the hundreds and hundreds of files comprising the Egilman Documents.

7. The lists in the subsections below identify, to the best of my ability, the persons, organizations or entities who obtained copies of Egilman Documents through me. I am informed that in the course of the Status Hearing, the court amended its Order to eliminate the requirement that I create an index identifying by Bates stamp number which documents were disseminated to whom. All those who received copies of the Egilman Documents from me or through me received all or a portion of one of two datasets. On Tuesday, December 12, 2006, Dr. Egilman first sent me documents I had requested in my subpoena to him. When I received these, comprising 356 documents, I burned copies of them onto one or more identical DVDs labeled "356 ZDocs" or "Zdocs 356" (hereinafter referred to as "DVD 1") On the following day, Dr. Egilman electronically sent me additional documents pursuant to the subpoena, and when I received these I burned new identical DVDs, labeled "ZDocs 12/13/06," or "12/13/06 ZDocs" (hereinafter referred to as "DVD 2") which new DVD 2 contained both the documents that arrived that day, and the documents that arrived the day before. (A .pdf file showing a photocopy of each of the aforementioned DVDs delivered to local counsel for Lilly yesterday, for forwarding to the Special Master is attached hereto as Exhibit 1.) All those who received DVD copies of Egilman Documents from me received one of these two datasets, either by getting one of the DVDs, or accessing the document electronically from my computer. I cannot recall with absolute certainty who got which of the two datasets.

Those to whom copies were provided received these copies either in person, on DVDs, or via U.S. Mail, on DVD, or by accessing an Internet FTP server(s), as FTP files. Before the Order was signed, I began the process of contacting those to whom I had provided copies to secure their return. As to those I contacted by e-mail for this purpose, I copied the Special Discovery Master and counsel. Those to whom I gave copies to in person, I personally met with to retrieve their copies.

a) Those to whom I provided copies in person, and from whom I was subsequently able to personally retrieve these copies, all in DVD format, are as follows:

Recipient

- Terrie Gottstein
- Jerry Winchester

Format

DVD 1
DVD labeled "from J. Winchester," provided to Lilly counsel

To the best of my memory, I distributed no other copies in person.

b) Those who did not receive copies from me in person include the following. The notation indicating whether they received DVD 1 or DVD 2 or both, and/or whether they accessed the documents from an Internet FTP Server, reflects the best of my knowledge at this time:

Recipient	Affiliation or Other Identification	Format
Alex Berenson	New York Times	DVD 1. DVD 2, FTP Access.
Dr. Peter Breggin	Prominent psychiatrist of conscience, expert witness, and prolific author	DVD 1, possibly DVD 2.
Dr. Grace Jackson	Perhaps the most knowledgeable psychiatrist expert on psychopharmacology in the US, if not world, with respect to mechanisms of action in the brain and body	Both DVDs
Dr. David Cohen	Florida International University	Both DVDs, I believe
Bruce Whittington	PsychRights Executive Director	DVD 1
Dr. Stephen Kruszewski	Psychiatrist	Only DVD 2, I believe, maybe both
Laura Ziegler	Psychiatric Survivor/Activist	DVD 1 only, I believe
Judi Chamberlin	Psychiatric Survivor/Activist Icon, author of "On Our Own."	DVD 1 only, I believe
Vera Sherav	Alliance for Human Rights Protection	DVD 2, two copies
Robert Whitaker	Former medical/science journalist, and author of <i>Mad In America: Bad Science, Bad Medicine and the Enduring Mistreatment of the Mentally Ill</i>	Both DVDs, I think.
Steve Cha	House Committee on Government Reform (Minority Office)	DVD 2
Will Hall	Psychiatric Survivor/Activist, co-founder of the Freedom Center in Northampton, MA	Either or both DVDs and I believe FTP
Singeha Prakash	National Public Radio	DVD 2

c) Also, a .pdf file containing the FTP logs from my computer relating to the Egilman Documents is attached hereto as Exhibit 2, insofar as it may in some cases constitutes the best evidence, or supplemental evidence, of to whom Egilman Documents were provided, and/or of which documents were provided to whom.

Finally, I certify that I have taken steps to preserve, until further order of the court, all documents, voice mails, emails, materials and information, including but not limited to all
Draft August 7, 2007

communications that refer to, relate to or concern Dr. Egilman or any other efforts to obtain documents produced by Eli Lilly and Company in the Federal Litigation, reserving all rights and without waiving any objections that might be made to actually producing such documents based on any privilege or other provision of law, and subject to the caveat set forth in section 6.

James B.
Gottstein, Esq.

Digitally signed by James B. Gottstein, Esq.
DN: cn=James B. Gottstein, Esq., c=US,
o=Law Project for Psychiatric Rights,
email=jim@psychrights.org
Reason: I attest to the accuracy and integrity
of this document
Date: 2006.12.21 17:35:10 -09'00'

James B. Gottstein

D. John McKay
Law Offices of D. John McKay
117 E. Cook Ave.
Anchorage, Alaska 99501
Telephone: (907) 274-3154
Facsimile: (907) 272-5646
E-mail: mckay@alaska.net

Attorney for Non-party Respondent
James B. Gottstein, Esq., Law Project for Psychiatric Rights, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____	X	
)	
In re: ZYPREXA)	04-MDL-1596 (JBW)
PRODUCTS LIABILITY LITIGATION)	
)	
_____	X	
)	
THIS DOCUMENT RELATES TO:)	
)	
ALL CASES)	
_____	X	

DECLARATION OF JAMES B. GOTTSTEIN
IN SUPPORT OF RESPONSE TO ORDER TO SHOW CAUSE

The undersigned, James B. Gottstein, declares:

1. I am an attorney in solo private practice in Anchorage, Alaska. I am not a party to the above-litigation, but I am the respondent to an Order to Show Cause issued by this court on January 4, 2007. I have personal knowledge of the matters asserted herein.

2. I represent and advocate for individuals diagnosed with mental illness and the rights of psychiatric patients. I am the president and a founder of The Law Project for

Psychiatric Rights, Inc. (“PsychRights”), a non-profit public interest law firm whose primary mission is to undertake strategic litigation against forced drugging and electroshock. Once such case is *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238 (Alaska 2006), in which the Alaska Supreme Court last year held that it was unconstitutional to forcibly drug someone unless the trial court finds by clear and convincing evidence that it is in the person’s best interest and there are no less intrusive alternatives available. I have written and presented articles explaining my work and the approach of our organization, including *How the Legal System Can Help Create a Recovery Culture in Mental Health Systems*, attached as Exhibit 1 hereto, and *Report on Multi-Faceted Grass-Roots Efforts To Bring About Meaningful Change To Alaska's Mental Health Program*, attached as Exhibit 2 hereto.

3. In the work I have done, Zyprexa has been an important focus of concern, as it is one of the most-prescribed neuroleptic drugs, taken by an estimated two million people, according to reports I have read. In the course of doing the *Myers* case, I obtained documents concerning Zyprexa previously not generally available to the public, that Robert Whittaker, author of *Mad in America*, had gotten through FOIA requests. I had these documents analyzed by Grace E. Jackson, M.D., perhaps the most knowledgeable expert on psychopharmacology with respect to mechanisms of action of these drugs in the brain and body. I posted these Zyprexa documents and Dr. Jackson’s analysis on the PsychRights website in early 2003.

4. I continue to work on cases furthering the PsychRights mission. As set forth in the articles referred to above, I undertake cases as opportunities present themselves to do

this. *In re: Guardianship of B.B.* is one such case. I undertook representation of B.B. after being contacted by Dr. David Egilman, who was previously unknown to me, about Zyprexa documents. He was interested in the documents on our website, and told me of his work on Zyprexa and related drugs, and the fact that he had a number of Zyprexa documents due to his service as an expert in the above-referenced case. I agreed that I was interested in these documents, and he advised that they were subject to a protective order. (I later learned this order is referred to as CMO-3, a document I saw for the first time when Lilly counsel sent it to me with a letter late on December 14 that I received on December 15, after I had already disseminated the documents to various third parties.)

5. I was convinced that the Zyprexa Documents would be important in my continuing legal advocacy work described above, and also important to provide to others interested in these issues once I had obtained them. I promptly began to identify and enter into an appropriate case for these purposes, and on December 6, 2006, I entered an appearance in *In the Matter of the Guardianship of B.B.*, Alaska Superior Court Case No. 3AN-04-545 P/G and filed a petition on behalf of my client for various relief, including relief concerning the administration of psychotropic drugs. I also on that date served notices of deposition for four individuals I intended to depose in this case, including Dr. David Egilman. I served these Notices upon opposing counsel, and had subpoenas duces tecum issued for these four individuals. Per local practice, copies of subpoenas themselves are not served on opposing counsel, but the deposition notice must identify any documents sought.

6. Dr. Egilman had informed me that his obligation to comply with the protective order required that he give the producing party, Eli Lilly, written notice and a reasonable opportunity to object. I was absolutely clear on multiple occasions with Dr. Egilman that he should produce the documents in compliance with CMO-3, and I suggested he seek help from legal counsel. Dr. Egilman likewise expressed his intent to satisfy the requirements of the protective order. In fact, Dr. Egilman gave Lilly notice the same day he received the subpoena for the documents at issue, by faxing a copy of the documents I sent him to Lilly's General Counsel, Richard Armitage. Lilly counsel Brewster Jamieson later provided me with a copy of Dr. Egilman's fax to Mr. Armitage, showing Armitage's December 6 receipt stamp. See attached Exhibit 3. We discussed the fact that the protective order was unclear about what a reasonable time was. Dr. Egilman indicated that three business days could be construed as sufficient notice to comply. Dr. Egilman told me that he heard nothing from Lilly that day, or for the rest of the week, and had heard nothing from Lilly by the close of the third business day (fifth day) after he had sent notice to Lilly. The following day, he sent me the first documents.

7. I regularly disseminate important documents I obtain in the course of my legal advocacy work to those who can also make use of them, and in particular, I often post documents on my website. It has been, and remains, my understanding that there is no reason why I cannot lawfully do so. When I received the Zyprexa documents pursuant to my subpoena I promptly made copies available to a number of third parties, including the New York Times and experts I have worked with, and others. I believe the articles and editorial published by the New York Times based on these documents, as well as other

responses from those who have seen them, vindicate my belief that making these documents publicly available, as I was entitled to do, served an important public interest.

8. Lilly first asked me not to disseminate the Zyprexa Documents by letter sent late Thursday, December 14, and received by me on December 15. I did not send out any Zyprexa Documents received after receiving this request, and I declined all subsequent requests from news media, public officials and others for copies of them. I also promptly, diligently and in good faith complied with directives from the court regarding the documents, as outlined in my December 22 Certificate of Compliance and subsequent supplements, attached hereto as Exhibit 4.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is made and executed by me in Brooklyn, New York, on this 16th day of January, 2007.

James B.
Gottstein, Esq.

Digitally signed by James B. Gottstein, Esq.
DN: cn=James B. Gottstein, Esq., o=Law
Project for Psychiatric Rights, ou,
email=jim@psychrights.org, c=US
Date: 2007.01.15 22:30:54 -09'00'

James B. Gottstein

Exhibit 1

How the Legal System Can Help Create a Recovery Culture in Mental Health Systems

by
James B. (Jim) Gottstein, Esq.

of

PsychRights[®]

**Law Project for
Psychiatric Rights
<http://PsychRights.Org>**

Presented at

**Alternatives 2005
Leading the Transformation to Recovery
Phoenix, Arizona, October 28, 2005**

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II. Summary

The purpose of this paper is to show how strategic litigation can and should be a part of efforts to transform mental health systems to culture of recovery. Currently, involuntary commitment and forced drugging are by far the "path of least resistance" when society is faced with someone who is disturbing and their thinking does not conform to society's norms.¹ In other words, it is far easier for the system to lock people up and drug them into submission, then it is to spend the time with them to develop a therapeutic relationship and thus able to engage the person with voluntary humane alternatives leading to recovery.² I estimate that 10% of involuntary commitments in the United States and none of the forced drugging under the *parens patriae* doctrine³ are legally justified. This presents a tremendous opportunity to use litigation to "encourage" the creation of voluntary, recovery oriented services.⁴

In my view, though, in order to be successful various myths of mental illness need to be debunked among the general public and humane, effective recovery oriented, non-

¹ By phrasing it this way, I am not disputing that people become psychotic. I have been there. See, <http://akmhweb.org/recovery/jgrec.htm>. However, there are lots of degrees - a continuum, if you will -- and there are different ways of looking at these unaccepted ways of thinking, or altered states of consciousness. So, what I mean by this terminology is that people are faced with involuntary commitment and forced drugging when two conditions exist: One, they are bothering another person(s), including concern about the risk of suicide or other self-harm, and Two, they are expressing thoughts that do not conform to those accepted "normal" by society. Of course, this ignores the reality that a lot of both are often trumped up, especially against people who have previously been subjected to the system.

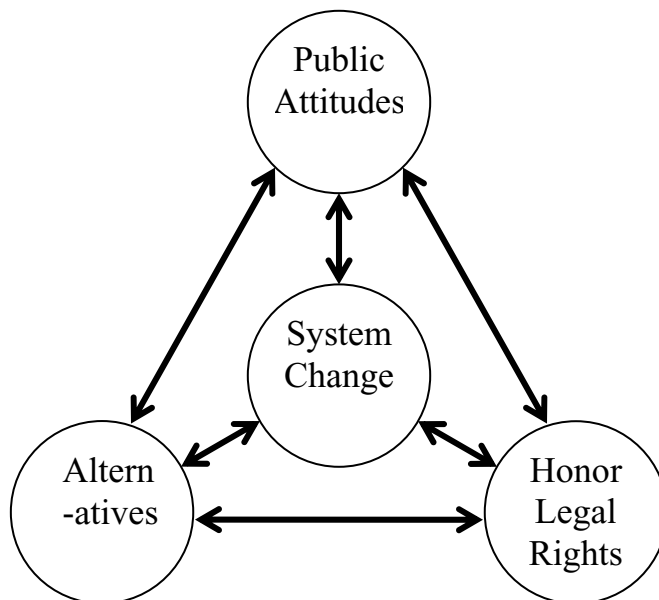
² The system believes it is also less expensive, but the opposite is actually true. The over-reliance on neuroleptics and, increasingly, polypharmacy, has at least doubled the number of people who become permanently reliant on government transfer payments. In *Anatomy of an Epidemic: Psychiatric Drugs and the Astonishing Rise of Mental Illness in America*, which is available at [http://psychrights.org/Articles/EHPPPpsychDrugEpidemic\(Whitaker\).pdf](http://psychrights.org/Articles/EHPPPpsychDrugEpidemic(Whitaker).pdf), Robert Whitaker demonstrates the rate of disability has increased six fold since the introduction of Thorazine in the mid '50s. The Michigan State Psychotherapy Project demonstrated extremely more favorable long-term outcomes for those receiving psychotherapy alone from psychotherapists with *relevant* training and experience. The short term costs were comparable to the standard treatment and the long term savings were tremendous. This study can be found at <http://psychrights.org/Research/Digest/Effective/MIPsychProj.pdf>.

³ "Parens Patriae" is legal Latin, literally meaning "parent of his or her country". Black's Law Dictionary, Seventh Edition defines it as "the state in its capacity as provider of protection to those unable to care for themselves." It is invoked with respect to minors and adults who are deemed incompetent to make their own decisions. In the context of forced drugging under the *parens patriae* doctrine, it basically is based on the notion, "If you weren't crazy, you'd know this was good for you."

⁴ At the same time there are impediments to doing so, primarily the lack of legal resources.

coercive alternatives must be made available. This conference, Alternatives, is focused on the creation of such alternatives and the thesis of this paper is that strategic litigation (and public education) are likely essential to transforming the mental health system to one of a recovery culture.

These three elements, (1) Creation of Alternatives, (2) Public Education, and (3) Strategic Litigation (Honoring Rights), each reinforce the others in ways that can lead to meaningful system change in a way that might be depicted as follows:



For example, debunking the myth among the general public that people do not recover from a diagnosis of serious mental health illness can encourage the willingness to invest in recovery oriented alternatives. Similarly, having successful, recovery oriented alternatives will help in debunking the myth that people don't recover from serious mental illness. In like fashion, judges and even counsel appointed to represent psychiatric defendants, believe the myth "if this person wasn't crazy, she would know these drugs are good for her" and therefore don't let her pesky rights get in the way of doing the "right thing," ie., forced drugging. The myth of dangerousness results in people being locked up. In other words, the judges and lawyers reflect society's views and to the extent that society's views change, the judges and lawyers' responses will change to suit. That leads to taking people's rights more seriously. The converse is true as well. Legal cases can have a big impact on public views. *Brown v. Board of Education*,⁵ which resulted in outlawing segregation is a classic example of this. Finally, the involuntary

⁵ U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

mental illness system⁶ operates largely illegally, including through its failure to offer less restrictive alternatives.⁷ Thus, litigation can force the creation of such alternatives. At the same time, as a practical matter, the availability of acceptable (to the person), recovery oriented, alternatives is necessary for anyone to actually be able to get such services when faced with involuntary commitment and forced drugging.

III. The Involuntary Mental Illness System Operates Largely Illegally

Involuntary "treatment"⁸ in the United States largely operates illegally in that court orders for forced treatment are obtained without actual compliance with statutory and constitutional requirements. One of the fundamental constitutional rights that is ignored in practice is that of a "less restrictive alternative."⁹ Thus, enforcement of this right through the courts can be instrumental in bringing about change. First, I will discuss the key constitutional principles.

A. Constitutional Protections

(1) Procedural Due Process

The 14th Amendment to the United States provides in pertinent part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." Most, if not all, states have similar provisions. Under due process, the procedures used must meet a minimum level of fairness. Three essential elements of this procedural due process are (1) a neutral decisionmaker, (2) meaningful notice and (3) meaningful opportunity to respond. These were recently reiterated by the United States Supreme Court in the case involving a United States citizen who was being detained in Cuba as an enemy combatant, as follows:

[D]ue process requires a 'neutral and detached judge in the first instance.' . . . For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an

⁶ In light of the system basically creating massive numbers of people who become categorized as chronically mentally ill, I call it the mental illness system, rather than the mental health system.

⁷ By saying the mental illness system operates largely illegally I mean that to the extent people are locked up and forcibly drugged when the statutory and constitutional requirements are not being met, that is illegal. Of course, this is done by filing paperwork and getting court orders, which looked at another way, makes it legal.

⁸ "Treatment" is in quotes because it is both (1) pretty clear the current, virtually exclusive reliance on psychiatric drugs by the public mental illness system hinders recovery for the vast majority of people, and (2) if it isn't voluntary, it isn't treatment.

⁹ See, e.g., *Sell v. United States*, 539 U.S. 166 (2003). However, not everyone agrees with my legal analysis of the right to the least restrictive alternative.

opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 2648-9 (2004)

In addition to these "procedural due process" rights, there can be "substantive due process" rights, which essentially involves balancing people's rights to life, liberty or property" against the government's interests in curtailing those rights. Thus, there are substantive constitutional due process rights with respect to both involuntary commitment and forced drugging.

(2) Constitutional Limits on Involuntary Commitment.

The United States Supreme Court has recognized for a long time that involuntary civil commitment is a "massive curtailment of liberty"¹⁰ requiring substantive due process protection:

Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."¹¹

The Supreme Court went on to say in this and other cases that involuntary commitment was permissible only when the following factors were present:

(1) "the confinement takes place pursuant to proper procedures and evidentiary standards," (2) there is a finding of "dangerousness either to one's self or to others," and (3) proof of dangerousness is "coupled ... with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'"¹²

Many states allow someone to be involuntarily committed for being "gravely disabled," but it seems this can only be constitutional if the "grave disability" means the person is a harm to self. While not ruling on this directly, in my view, the United States Supreme Court essentially said so as follows:

Of course, even if there is no foreseeable risk of self-injury or suicide, a person is literally 'dangerous to himself' if for physical or other reasons he is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends.¹³

To reiterate then, involuntary commitment is constitutional only (1) when done under proper procedures and evidentiary standards, (2) upon a finding of dangerousness

¹⁰ *Humphrey v. Cady*, 405 U.S. 504 (1972).

¹¹ *Addington v. Texas*, 441 U.S. 418 (1979).

¹² *Kansas v. Crane*, 534 U.S. 407 (2002).

¹³ Footnote 9, in *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486 (1975).

to self or others,¹⁴ and (3) the dangerousness is a result of mental illness. Being committed for being gravely disabled is only permissible if the requisite level of dangerousness is found. As will be discussed below, even leaving aside the whole issue of the validity of mental illness diagnoses, proper procedures and evidentiary standards are generally not followed and people are committed without meeting the dangerousness threshold.

(3) Constitutional Limits on Forced Drugging

The United States Supreme Court has also held a number of times that being free of unwanted psychiatric medication is a fundamental constitutional right.¹⁵ In the most recent case, *Sell*, the United States Supreme Court reiterated:

[A]n individual has a “significant” constitutionally protected “liberty interest” in “avoiding the unwanted administration of antipsychotic drugs.”¹⁶

The different contexts in which forced psychiatric drugging comes up makes a difference as to the extent of this right, however. *Sell* and *Riggins* are forced drugging to make someone competent to stand trial cases. *Harper* is a convicted person in prison case, where people have the least rights.

The only one of these cases involving forced drugging in the non-criminal (civil) context is *Mills v. Rogers*.¹⁷ There, the United States Supreme Court assumed a person has United States Constitutional protection against forced psychiatric drugging under the Due Process Clause, but held the exact extent of these protections are intertwined with state law. The same day, June 18, 1982, the Court decided *Youngberg v. Romeo*¹⁸ involving a civilly committed mentally retarded man, Nicholas Youngberg, whom all of the professionals agreed was not receiving appropriate services resulting in excessive physical restraints and the Court ruled he was entitled to the services that "professional judgment" dictated. The exact phrase the court used was "the Constitution only requires that the courts make certain that professional judgment in fact was exercised."¹⁹ A few days later, on July 2, 1982, the Court remanded another case, *Rennie v. Klein*, to the United States Court of Appeals for the Third Circuit for further consideration in light of *Youngberg*.²⁰ This has (not universally) been interpreted to mean people can be force

¹⁴ The cases are not uniform on what level of dangerousness and how imminent it must be, but it seems clear that the level of dangerousness must meet a relatively high level of seriousness and the threat has to have some immediacy to it.

¹⁵ *Mills v. Rogers*, 457 U.S. 291 (1982); *Washington v. Harper*, 494 U.S. 210 (1990); *Riggins v. Nevada*, 504 U.S. 127 (1992); and *Sell v. United States*, 539 U.S. 166 (2003).

¹⁶ *Sell v. United States*, 539 U.S. 166, 177-8 (2003), citing to the Due Process Clause, U.S. Const., amend. 5, and *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028 (1990).

¹⁷ 457 U.S. 291 (1982).

¹⁸ 457 U.S. 307 (1982).

¹⁹ *Mills* was not mentioned in this decision.

²⁰ 458 U.S. 1119 (1982).

drugged if "professional judgment" is exercised, ie., if the psychiatrist (exercising "professional judgment") says the person should be force drugged.²¹

I will get to this being an incorrect interpretation in my view and how *Sell* changes it, in any event in a bit, but as a result of the combination of *Mills* saying due process rights in state courts under the Fourteenth Amendment depends at least in part on state law and the interpretation that under *Rennie* and *Youngberg* federal constitutional protection was subject to the "professional judgment" rule, the action moved to state courts. The upshot in state courts has been mostly good, from a legal perspective, with such cases as the final result in *Mills (v. Rogers)*, being the Supreme Judicial Court of Massachusetts' ruling in *Rogers*,²² which is that people have the absolute right to decline medication unless they are incompetent to make such a decision and if they are incompetent they can not be medicated against their will except by a court made Substituted Judgment Decision that includes the following factors:

1. The patient's expressed preferences regarding treatment.
2. The strength of the incompetent patient's religious convictions, to the extent that they may contribute to his refusal of treatment.
3. The impact of the decision on the ward's family -- this factor being primarily relevant when the patient is part of a closely knit family.
4. The probability of adverse side effects.
5. The prognosis without treatment.
6. The prognosis with treatment.
7. Any other factors which appear relevant.

In *Rogers*, the Court made clear that involuntary civil commitment, in and of itself, is insufficient to conclude the person is incompetent to decline the drugs. The *Rogers* court also specifically re-affirmed an earlier decision, *Guardianship of Roe*, that "No medical expertise is required [for making the substituted judgment decision], although medical advice and opinion is to be used for the same purposes and sought to the same extent that the incompetent individual would, if he were competent." The Massachusetts Supreme Court also held because of the inherent conflicts in interest, the doctors should not be allowed to make this decision.

²¹ I do not believe this is a correct interpretation. In *Rennie*, the Supreme Court never actually held that; instead it remanded it in light of its decision in *Youngberg v. Romeo*. However, *Youngberg* involved a mentally retarded man who was being subject to physical restraints under conditions that no professional judgment would support, especially because the person could have been trained in a way to minimize or even reduce the use of restraints. Thus, in a lot of ways it was a right to appropriate treatment holding, and definitely not a case authorizing forced drugging. I think the concurring opinion of Circuit Judge Weis on remand, which was joined by two other circuit judges, is a much better way to interpret the decision. ("I fear that the latitude the majority allows in 'professional judgment' jeopardizes adequate protection of a patient's constitutional rights.") *Rennie v. Klein*, 720 F.2d 266 (CA3 1983).

²² *Rogers*, 458 N.E. 2d 308 (Mass 1983)

The fact that a patient has been institutionalized and declared incompetent brings into play the factor of the likelihood of conflicting interests. The doctors who are attempting to treat as well as to maintain order in the hospital have interests in conflict with those of their patients who may wish to avoid medication.

This extremely favorable legal ruling has, however, been turned on its head and become a "Rogers Order" assembly-line.²³

Similarly, in *Rivers v. Katz*²⁴, decided strictly on common law and constitutional due process grounds, New York's highest court held a person's right to be free from unwanted antipsychotic medication is a constitutionally protected liberty interest:

"[i]f the law recognizes the right of an individual to make decisions about . . . life out of respect for the dignity and autonomy of the individual, that interest is no less significant when the individual is mentally or physically ill"

* * *

We reject any argument that the mere fact that appellants are mentally ill reduces in any manner their fundamental liberty interest to reject antipsychotic medication. We likewise reject any argument that involuntarily committed patients lose their liberty interest in avoiding the unwanted administration of antipsychotic medication.

* * *

If . . . the court determines that the patient has the capability to make his own treatment decisions, the State shall be precluded from administering antipsychotic drugs. If, however, the court concludes that the patient lacks the capacity to determine the course of his own treatment, the court must determine whether the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments. The State would bear the burden to establish by clear and convincing evidence that the proposed treatment meets these criteria.

Just as in Massachusetts, however, in practice, people's rights are not being honored.²⁵ There are other states which have just as good legal rights and some that don't under state

²³ I wrote a memo about this in early February of 2004, which can be found at <http://psychrights.org/States/Massachusetts/RogersOrders/RogersOrdersMemo.pdf>.

²⁴ *Rivers v. Katz*, 495 N.E.2d 337, 341-3 (NY 1986).

²⁵ See, Mental Hygiene Law Court Monitoring Project: Part 1 of Report: Do Psychiatric Inmates in New York Have the Right to Refuse Drugs? An Examination of Rivers

law, but the common denominator in all of them is whatever rights people have, they are uniformly ignored. Before getting to that, I want to get back United States Constitutional law under *Sell*.

In *Sell*, decided in 2003, the United States Supreme Court held someone could not be force drugged to make them competent to stand trial unless:

1. The court finds that *important* governmental interests are at stake.
2. The court must conclude that involuntary medication will *significantly further* those concomitant state interests.
3. The court must conclude that involuntary medication is *necessary* to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.
4. The court must conclude that administration of the drugs is *medically appropriate*, i.e., in the patient's best medical interest in light of his medical condition. The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.

(italics in original) These are general constitutional principles and should apply in the civil context. Thus, for example, while in *Sell*, the "*important governmental interest*" is in bringing a criminal defendant to trial, the governmental interest in the civil context is (supposedly) the person's best interest, i.e., the *parens patriae* doctrine.²⁶

With respect to the second requirement that the forced drugging "will *significantly further*" those interests, the question in the competence to stand trial context is whether the forced drugging is likely to make the person competent to stand trial, while in the civil context, the question is whether it is in the person's best interest or is the decision the person would make if he or she were competent.

The third requirement that the forced drugging must be *necessary* and there is no less restrictive alternative is hugely important in the civil context because it is a

Hearings in the Brooklyn Court, which can be accessed on the Internet at <http://psychrights.org/States/NewYork/courtmonitoringreport.htm>.

²⁶ I say, "supposedly," because in truth, controlling the person's behavior is a primary interest. "Police power" justification, which actually is based on controlling dangerous behavior, has also been used to justify forced drugging. See, *Rivers v. Katz*, 495 N.E.2d 337, 343 (NY 1986). However, the behavior presumably has to be very extreme to invoke "police power" and is not normally the stated basis for seeking forced drugging orders. It has been suggested there is an important government interest in ending indeterminate commitment and returning the individual to society, which can be done most effectively if the person is required to take the prescribed drugs. However, this is not the basis normally asserted and I would argue it is not a sufficient interest to override a person's rights to decline the drugs, particularly in light of the physical harms they cause.

potential lever to require less restrictive (ie., non-drug, recovery oriented alternatives). It is important to note here that failure to fund these alternatives does not give the government the right to force drug someone. If a less restrictive alternative could be made available, the forced drugging is unconstitutional.²⁷

New York Law School professor, Michael L. Perlin agrees this is so:

The Supreme Court's decisions in *Washington v. Harper*, *Riggins v. Nevada*, and, most recently, *Sell v. United States*, make it clear that: a qualified right to refuse medication is located in the Fourteenth Amendment's Due Process Clause; the pervasiveness of side effects is a key factor in the determination of the scope of the right; the state bears a considerable burden in medicating a patient over objection, and the "least restrictive alternative" mode of analysis must be applied to right to refuse cases.²⁸

The fourth requirement is also very important because it essentially requires the state to prove the drugging is in the person's best interest and not merely recite "professional judgment."

The take away message is, in my view, people are constitutionally entitled to non-coercive, non-drugging, recovery oriented alternatives before involuntary commitment and forced drugging can occur and even then forced drugging can only constitutionally occur if it is in the person's best interest. There are a couple of ways to look at this since the reality is so far from what the law requires. One is to see it as a tremendous opportunity to improve the situation. The other is that there are forces operating to totally defeat people's rights. Both are true and this paper suggests there are actions that can be taken to have people's rights honored that can play a crucial part in transforming the mental health system to one of a recovery culture.

B. Proper Procedures and Evidentiary Standards

Mentioned above is the United States Supreme Court rulings that involuntary commitment can occur only pursuant to proper procedures and evidentiary standards. In contrast to this legal requirement, involuntary commitment and forced drugging

²⁷ There are likely limits on this, such as there being no requirement for Herculean efforts or where the cost is prohibitive. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

²⁸ Perlin, "And My Best Friend, My Doctor/Won't Even Say What It Is I've Got": *The Role And Significance Of Counsel In Right To Refuse Treatment Cases*, 42 San Diego Law Review 735 (2005)

proceedings can quite fairly be characterized as a sham, a farce, Kangaroo Courts, etc., in the vast majority of cases.²⁹

(1) Proper Procedures

Ex Parte Proceedings. It will be recalled that the hallmarks of procedural due process are meaningful notice and meaningful opportunity to be heard (respond). There are a few situations, such as search and arrest warrants where prior notice are not required because giving warning would defeat the purpose. Proceedings where the person isn't given notice or an opportunity to respond are called "*ex parte*."³⁰ However, the mental illness system regularly takes people into custody without any advance notice and no opportunity to respond when there is no emergency that justifies the failure to notify and denial of any opportunity to respond. The Washington Supreme Court has explicitly ruled "The danger must be impending to justify detention without prior process."³¹ However, I don't believe the legitimacy of *ex parte* procedures has been challenged much around the country, leading to what I believe are pervasive violations of due process rights in this regard.

There are many other ways in which proper procedures are not utilized in the various states and these should also be challenged.³²

(a) Proper Evidentiary Standards.

As set forth above, involuntary commitment is constitutionally permissible only if the person is a harm to self or others as a result of a "mental illness." In *Addington v. Texas*³³ the United States held that this has to be proven by "clear and convincing evidence," which is less than "beyond a reasonable doubt," but more than the normal "preponderance of the evidence"³⁴ standard in most civil cases.

There are essentially two different evidence standards regarding expert witness testimony. The older "Frye"³⁵ standard is basically whether it has gained "general

²⁹ An example is described in the recent Alaska Supreme Court brief we filed in *Wetherhorn v. Alaska Psychiatric Institute*, which can be found on the Internet at <http://psychrights.org/States/Alaska/CaseFour/WetherhornBrief.pdf>.

³⁰ *Ex Parte*, is Latin for "from the part" and Black's Law Dictionary, Seventh Edition defines it as "On or from one party only, usually without notice to or argument from the adverse party."

³¹ *In re: Harris*, 654 P.2d 109, 113 (Wash. 1982)

³² I have identified a number of them in Alaska and intend to raise them in appropriate cases.

³³ 441 U.S. 418 (1979)

³⁴ "Preponderance of the evidence," means more likely than not or, put another way, it only requires the balance to be slightly more on one side than the other. Yet another way to look at it is it just has to be more than 50% likely.

³⁵ *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923)

acceptance in the particular field." The more modern standard, *Daubert*,³⁶ which was adopted by the United States Supreme Court for the federal courts and by many state courts, recognizes that "generally accepted" methods may not be valid and methods which have not yet gained general acceptance can be extremely valid, and therefore the proper focus is on scientific reliability.

Because psychiatry bases its "treatments" and pronouncements on scientifically dubious bases, but they are generally accepted within the field, the *Daubert* standard is better for challenging psychiatric practices in court, but there are still ways to get at them under the *Frye* standard. In practice, both standards are ignored and psychiatrists are allowed to offer opinions without satisfying either *Daubert* or *Frye*.

The truth is psychiatric testimony as to a person's dangerousness is highly unreliable with a high likelihood of over-estimating dangerousness.

The voluminous literature as to the ability of psychiatrists (or other mental health professionals) to testify reliably as to an individual's dangerousness in the indeterminate future had been virtually unanimous: "psychiatrists have absolutely no expertise in predicting dangerous behavior -- indeed, they may be less accurate predictors than laymen -- and that they usually err by overpredicting violence."³⁷

This is the primary reason why I estimate only 10% of involuntary commitments are legally justified. If people were only involuntarily committed when it can be shown, by clear and convincing evidence, under scientifically reliable methods of predicting the requisite harm to self or others, my view is 90% of current commitments would not be granted. One doesn't need to get into the legitimacy of mental illness diagnosing.

With respect to forced drugging, one of the pre-requisites is the person must be found to be incompetent to decline the drug(s). Here, too, psychiatrists, to be kind, over-estimate incompetence.

[M]ental patients are not always incompetent to make rational decisions and are not inherently more incompetent than nonmentally ill medical patients.³⁸

³⁶ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

³⁷ Michael L. Perlin, *Mental Disability Law: Civil and Criminal*, §2A-4.3c, p. 109 (2d. Ed. 1998), footnotes omitted. See, also, Morris, Pursuing Justice for the Mentally Disabled, 42 San Diego L. Rev 757, 764 (2005) ("recent studies confirm[] that psychotic symptoms, such as delusions or hallucinations, currently being experienced by a person, do not elevate his or her risk of violence.")

³⁸ Perlin, "And My Best Friend, My Doctor/Won't Even Say What It Is I've Got: The Role And Significance Of Counsel In Right To Refuse Treatment Cases," 42 San Diego Law Review 735, 746-7 (2005), citing to Thomas Grisso & Paul S. Appelbaum, *The*

Not even the competency test against competency developed by Paul Appelbaum for the MacArthur Foundation³⁹ is used. Thus, psychiatric testimony concerning this threshold question of competency is very often invalid. However, this is not why I suggest no forced drugging in the civil context is legally justified.

The reason why I believe no forced drugging in the civil context is legally justified is it simply can not be scientifically proven it is in a person's best interest.⁴⁰ It would make this paper even more too long than it already is to fully support this assertion, but some will be presented. First, there is really no doubt the current over-reliance on the drugs is at least doubling the number of people becoming defined by the system as chronically mentally ill with it recently being estimated it has increased the rate of disability due to "mental illness" six-fold.⁴¹ In the case where we litigated the issue in Alaska, the trial court found

The relevant conclusion that I draw from [the evidence presented by the Respondent's experts] is that there is a real and viable debate among qualified experts in the psychiatric community regarding whether the standard of care for treating schizophrenic patients should be the administration of anti-psychotic medication.

* * *

MacArthur Treatment Competence Study. III: Abilities of Patients to Consent to Psychiatric and Medical Treatments, 19 Law & Hum. Behav. 149 (1995).

³⁹ Thomas Grisso & Paul S. Appelbaum, *MacArthur Competence Assessment Tool-Treatment (MacCAT-T)*, Professional Resources Press (1998). My view is this test is at least somewhat biased against competency because disagreement with a diagnoses of mental illness is a basis for finding incompetence. I personally don't believe in that level of infallibility of psychiatric diagnosis and credit people's own interpretations more than psychiatrists tend to. I will allow, however, that this may be my own bias.

⁴⁰ While I believe this is true in the forced drugging context in terms of meeting the legal burden of justifying overriding a person's right to decline the medications, and I know this paper comes off as a polemic against psychiatric drugs, I absolutely believe people also have the right to choose to take them. I do think people should be fully informed about them, of course, which is normally not done, but that is a different issue. Not surprisingly, in a study of people who have recovered after being diagnosed with serious mental illness, those who felt the drugs helped them, used them in their recovery and those that didn't find them helpful, didn't use the drugs in their recovery. "How do We Recover? An Analysis of Psychiatric Survivor Oral Histories," by Oryx Cohen, in *Journal of Humanistic Psychology*, Vol . 45 No. 3, Summer 2005 333-35, which is available on the Internet at

http://12.17.186.104/recovery/oryx_journal_of_humanist_psych.pdf.

⁴¹ Anatomy of an Epidemic: Psychiatric Drugs and the Astonishing Rise of Mental Illness in America, by Robert Whitaker, *Ethical Human Psychology and Psychiatry*, Volume 7, Number I: 23-35 Spring 2005, which can be accessed on the Internet at

[http://psychrights.org/Articles/EHPPPpsychDrugEpidemic\(Whitaker\).pdf](http://psychrights.org/Articles/EHPPPpsychDrugEpidemic(Whitaker).pdf).

[T]here is a viable debate in the psychiatric community regarding whether administration of this type of medication might actually cause damage to her or ultimately worsen her condition.⁴²

A recent study in Ireland concluded the already elevated risk for death in schizophrenia due to the older neuroleptics was doubled with the newer, so-called "atypical" neuroleptics, such as Zyprexa and Risperdal.⁴³ More information on these drugs can be found on PsychRights' website at <http://psychrights.org/Research/Digest/Researchbytopic.htm>.

In sum, my view is the state can never (or virtually never) actually meet its burden of proving forced drugging is in a person's best interest (assuming that is required) because of the lack of long-term effectiveness and great harm they cause. Again, this raises the question of why forced drugging is so pervasive and what might be done about it. In other words, it is an opportunity for strategic litigation playing a key role in a transformation to a recovery oriented system.

(2) Corrupt Involuntary Mental "Treatment" System

As set forth above, people are locked up under judicial findings of dangerousness and force drugged based on it being in their best interests without any legitimate scientific evidence of either dangerousness or the drugs being in a person's best interests. As Professor Michael Perlin has noted:

[C]ourts accept . . . testimonial dishonesty, . . . specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." . . .

Experts frequently . . . and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment . . .

This combination . . . helps define a system in which (1) dishonest testimony is often regularly (and unthinkingly) accepted; (2) statutory and case law standards are frequently subverted; and (3) insurmountable barriers are raised to insure that the allegedly "therapeutically correct"

⁴² Order, in *In the Matter of the Hospitalization of Faith Myers*, Anchorage Superior Court, Third Judicial District, State of Alaska, Case No. 3AN-03-277 PR, March 14, 2003, pp. 8, 13, which can be accessed on the Internet at <http://psychrights.org/States/Alaska/CaseOne/30-Day/Order.pdf>.

⁴³ Prospective analysis of premature mortality in schizophrenia in relation to health service engagement: a 7.5-year study within an epidemiologically complete, homogeneous population in rural Ireland, by Maria G. Morgan, Paul J. Scully, Hanafy A. Youssef, Anthony Kinsellac, John M. Owens, and John L. Waddington, *Psychiatry Research* 117 (2003) 127–135, which can be found on the Internet at <http://psychrights.org/Research/Digest/NLPs/MM-PsychRes2003.pdf>.

social end is met . . . In short, the mental disability law system often deprives individuals of liberty disingenuously and upon bases that have no relationship to case law or to statutes.⁴⁴

In other words, testifying psychiatrists lie,⁴⁵ the trial (but generally not appellate) courts don't care, and lawyers assigned to represent defendants in these cases, are "woefully inadequate--disinterested, uninformed, roleless, and often hostile. A model of "paternalism/best interests" is substituted for a traditional legal advocacy position, and this substitution is rarely questioned."⁴⁶ Counsel appointed to represent psychiatric defendants are, more often than not, actually working for the other side, or barely put up even a token defense, which amounts to the same thing.⁴⁷

No one in the legal system is taking psychiatric defendants' rights seriously, including the lawyer appointed to represent the person. There are two reasons for this: The first is the belief that "if this person wasn't crazy, she'd know this is good for her." The second is the system is driven by irrational fear. All the evidence shows people who end up with psychiatric labels are no more likely to be dangerous than the general population and that medications increase the overall relapse rate, yet society's response has been to lock people up, and whether locked up or not, force them to take these drugs.⁴⁸

⁴⁴ *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?* Journal of Law and Health, 1993/1994, 8 JLHEALTH 15, 33-34.

⁴⁵ "It would probably be difficult to find any American Psychiatrist working with the mentally ill who has not, at a minimum, exaggerated the dangerousness of a mentally ill person's behavior to obtain a judicial order for commitment." Torrey, E. Fuller. 1997. *Out of the Shadows: Confronting America's Mental Illness Crisis*, New York: John Wiley and Sons, page 152. Dr. Torrey goes on to say this lying to the courts is a good thing. Of course, lying in court is perjury. Dr. Torrey also quotes Psychiatrist Paul Applebaum as saying when "confronted with psychotic persons who might well benefit from treatment, and who would certainly suffer without it, mental health professionals and judges alike were reluctant to comply with the law," noting that in "'the dominance of the commonsense model,' the laws are sometimes simply disregarded."

⁴⁶ Perlin, "And My Best Friend, My Doctor/Won't Even Say What It Is I've Got": *The Role And Significance Of Counsel In Right To Refuse Treatment Cases*, 42 San Diego Law Review 735, 738 (2005)

⁴⁷ This is a violation of professional ethics. For example, the Comment to the Model Rules of Professional Conduct for attorneys, Rule 1.3, includes, "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

⁴⁸ "Kendra's Law" in New York is a classic example of this. There a person who had been denied numerous attempts to obtain mental health services pushed Kendra in front of a moving subway and when he was grabbed, said something like "now maybe I will get some help." The response was to pass an outpatient commitment law requiring

(3) Legal Representation: This Is Where the Legal System is Broken.

I analogize the current situation of pervasive coercion to water seeking the path of least resistance and by making it hard enough to obtain involuntary commitment and forced drugging orders, it will no longer be the path of least resistance and the involuntary system will find other ways to deal with the people that come to its attention. As things stand now, obtaining involuntary commitment and forced drugging orders is by far the easiest thing for the system to do. It takes about 15 minutes of psychiatrist time in Alaska, for example. In California, in a study of 63 involuntary commitment hearings, which are not even done by the courts, eight hearings were one minute or less in duration; nineteen were between one and two minutes; nine were between two and three minutes in duration and only nine hearings were more than eight minutes in duration.⁴⁹

As has been noted by New York Law School professor Michael L. Perlin, the lawyers appointed to represent psychiatric defendants are not doing their job.

The assumption that individuals facing involuntary civil commitment are globally represented by adequate counsel is an assumption of a fact not in evidence. The data suggests that, in many jurisdictions, such counsel is woefully inadequate—disinterested, uninformed, roleless, and often hostile. A model of "paternalism/best interests" is substituted for a traditional legal advocacy position, and this substitution is rarely questioned. (at 738, footnotes omitted)

* * *

The track record of lawyers representing persons with mental disabilities has ranged from indifferent to wretched; in one famous survey, lawyers were so bad that a patient had a better chance of being released at a commitment hearing if he appeared pro se. (at 743, footnote omitted)

* * *

A right without a remedy is no right at all; worse, a right without a remedy is meretricious and pretextual—it gives the illusion of a right without any legitimate expectation that the right will be honored. . . . "Empirical surveys consistently demonstrate that the quality of counsel 'remains the single most important factor in the disposition of involuntary civil commitment cases.'" (at 745-6, footnotes omitted)

people to take psychiatric drugs or be locked up in the hospital. This is a characterization, but when this was challenged, New York's high court ruled Kendra's Law didn't require people to take the drugs; that all it did was subject people to "heightened scrutiny" for involuntary commitment if they didn't. *See, In the Matter of K.L.*, 806 N.E.2d 480(NY 2004).

⁴⁹ Morris, Pursuing Justice for the Mentally Disabled, 42 San Diego L. Rev 757, 759-60 (2005).

* * *

Without such [adequate] counsel, it is likely that there will be no meaningful counterbalance to the hospital's "script," and the patient's articulated constitutional rights will evaporate. (at 749)⁵⁰

In a companion article to Professor Perlin's 2005 article in the San Diego Law Review, Professor Grant Morris states:

If Michael Perlin spoke in a forest, and no one heard him speak, would he still make a sound? That is the question I ask you to consider as I respond to Michael's article.

Lawyers who represent mentally disabled clients in civil commitment cases and in right to refuse treatment cases, Michael tells us, are guilty of several crimes. They are inadequate. They are inept. They are ineffective. They are invisible. They are incompetent. And worst of all, they are indifferent. Is Michael right in his accusations? You bet he is!⁵¹

Professor Morris then goes on to note that this is a violation of lawyers' professional ethics.

The only case that has really come to grips with this issue is *KGF* out of Montana:⁵²

As a starting point, it is safe to say that in purportedly protecting the due process rights of an individual subject to an involuntary commitment proceeding—whereby counsel typically has less than 24 hours to prepare for a hearing on a State petition that seeks to sever or infringe upon the individual's relations with family, friends, physicians, and employment for three months or longer—our legal system of judges, lawyers, and clinicians has seemingly lost its way in vigilantly protecting the fundamental rights of such individuals.⁵³

⁵⁰ Perlin, "And My Best Friend, My Doctor/Won't Even Say What It Is I've Got: The Role and Significance of Counsel in Right to Refuse Treatment Cases," 42 San Diego Law Review 735 (2005)

⁵¹ Morris, Pursuing Justice for the Mentally Disabled, 42 San Diego L. Rev 757, 757-8 (2005).

⁵² However, PsychRights currently has a case before the Alaska Supreme on this issue. See, <http://psychrights.org/States/Alaska/CaseFour.htm>,

⁵³ *In re: K.G.F.*, 29 P.3d 485 (Mont. 2001). This case can be found on the Internet at <http://www.lawlibrary.state.mt.us/dscgi/ds.py/Get/File-11399/00-144.htm>.

The court in *KGF* then went on to lay down some very good requirements for the performance of the lawyers. However, it appears these have been largely ignored in practice.⁵⁴

IV. The Requirement and Necessity of Alternatives

Hopefully it is apparent from the foregoing that people should be allowed (less restrictive) alternatives when they are faced with forced drugging. The same is basically true of involuntary commitment.⁵⁵ These alternatives, I suggest, should primarily include non-coercive, for sure, and non-drug alternatives that are known to lead to recovery for many people.⁵⁶ The reality is likely a "which came first, the chicken or the egg?" situation, because judges will be reluctant to deny petitions for forced drugging on the basis that a less restrictive alternative could be made available, but in fact is not available. Thus, the actual availability of alternatives is important. However, where sufficient legal pressure is applied, the courts will simply not be able to order forced drugging. I know these are contradictory statements, but that is why they reinforce each other as set forth above (and below).

This can be illustrated by the situation involving Advance Directives. As set forth above, everyone has the absolute constitutional right to decline psychiatric drugs, with one exception, which is if they are incompetent to do so. Currently, the competency determinations are not legitimate. One reason I would posit, is that the system simply does not know what else to do with people so the system deals with it by finding people incompetent when they are not.

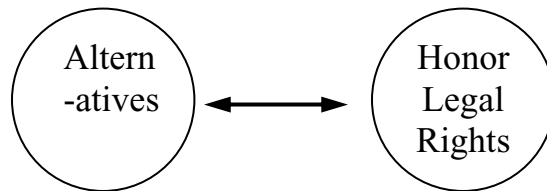
More legal trouble for the system comes in if people were to have Advance Directives that were made when they were certifiably (I would even suggest certified) competent at the time they made them. The system still doesn't know what to do with them, so it has to come with some way to ignore them, but it is a lot harder to come up with a pretext for the forced drugging. This presents at least the theoretical possibility of getting the judge (or jury) to essentially say, "well since you can't force drug this person, you had better figure out something else to do." Again, however, having the alternatives available will immeasurably help in enforcing people's legal rights to them. Litigation can also support the economic viability of the alternatives, because people faced with involuntary commitment and forced drugging can argue since they have the right to the less restrictive alternative the state must pay for it. Thus, the way the availability of

⁵⁴ See, February 28, 2005, letter from James B. Gottstein to the Chief Justice of the Montana Supreme Court, which can be accessed on the Internet at <http://psychrights.org/States/Montana/CJGrayLtr.pdf>.

⁵⁵ Many state statutes certainly require it, and I would suggest it is constitutionally required as well.

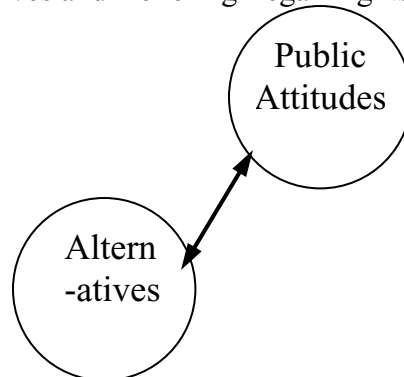
⁵⁶ See, Effective Non-Drug Treatments, which can be found on the Internet at <http://psychrights.org/Research/Digest/Effective/effective.htm>, for some specific examples.

recovery oriented alternatives and litigation reinforce each other can be broken out separately from the figure above as follows:



V. The Importance of Public Opinion

It is perhaps easier to see the same sort of process involved between Public Education and the Availability of Alternatives. Alternatives to the hopelessness driven, medication only, stabilization oriented, system are not available because our society believes it is the only possibility, in spite of all kinds of evidence to the contrary. Thus, to the extent effective alternatives become known to society in general, these alternatives will become desired by society because they produce much more desired outcomes. Not only do people get better, but huge amounts of money will be saved by more than halving the number of people who become a permanent ward of government. At the same time, having successful Alternatives will show society that they are viable. Thus, as with the Availability of Alternatives and Honoring Legal Rights, they reinforce each other:

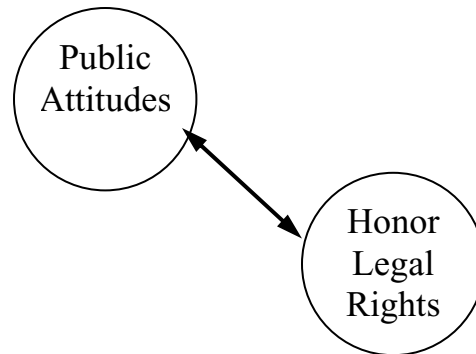


VI. Interplay Between Public Education and Honoring Legal Rights

As set forth above, the judges and even the lawyers representing people facing forced psychiatry accept the current societal view that people need to be locked up and forcibly drugged for society's and the person's own safety and best interests. To the extent society becomes aware this is not true, the judicial system will reflect that and be much more willing to honor people's rights. Perhaps harder to see, and maybe even a weaker link, is the extent to which successful litigation can impact public opinion. In order to illustrate that, however, I draw back upon *Brown v. Board of Education*,⁵⁷ which outlawed legal segregation and was one of the instrumental factors in changing public

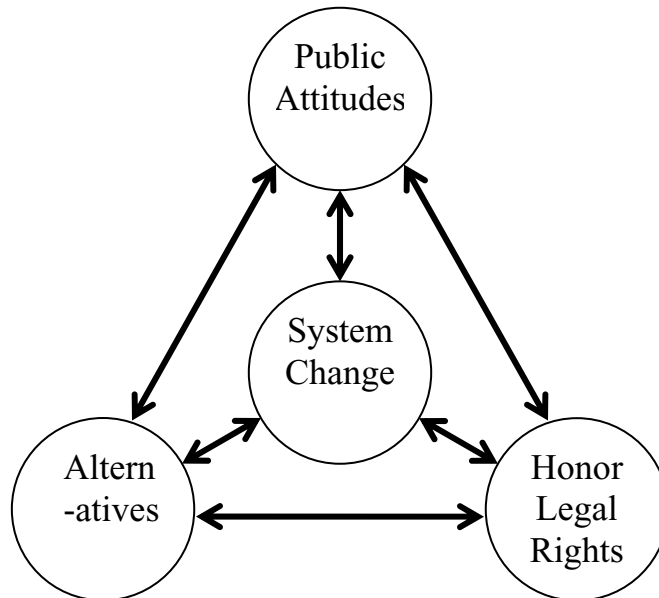
⁵⁷ U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

opinion from accepting segregation to one of finding it unacceptable. Thus, Public Attitudes and Honoring Legal Rights also reinforce each other.



VII. The Role of Litigation in Creating a Recovery Culture in Mental Health Systems

Putting these pieces together, we have the original figure set forth at the outset.



This is why I believe working on all three of these areas is important in transforming mental health systems to a recovery culture. Strategic litigation has an important, but not exclusive, role in this.

VIII. Requirements for Successful Litigation -- Attorneys & Expert Witnesses

The building blocks for mounting successful strategic litigation are recruiting attorneys who will put forth a serious effort to discharge their ethical duties to their clients and expert witnesses who can prove the junk science behind current "treatment" and the effectiveness of recovery oriented alternatives.

IX. Types of Legal Actions

There are a number of types of cases that can be brought to bear. All of these involve taking appeals where appropriate -- the appellate courts tend to take people's rights in these cases far more seriously than the trial courts. The following is by no means an exhaustive list.

A. Establishing the Right to Effective Assistance of Counsel

If people's rights were being honored, the problem of forced psychiatry would be mostly solved and this would absolutely force society to come up with alternatives -- hopefully recovery oriented. Thus, challenges to the effectiveness of counsel should be made. In light of the current state of affairs, there seems little downside to trying to get the United States Supreme Court to hold it is a right under the United States Constitution. I also believe that ethics complaints should be brought against the attorneys who do not discharge their duty to zealously represent their clients. If every involuntary commitment and forced drugging hearing were zealously represented, each case should take at least half a day. In my view it takes that long to fully challenge the state's case and present the patient's. This, in itself, would encourage the system to look for alternatives (the "path of least resistance" principle).

B. Challenges to State Proceedings.

States that proceed under the "professional judgment" rule should be challenged. The right to state paid expert witnesses should be pursued. The right to less restrictive alternatives should be pursued. Challenges to "expert witness" opinion testimony regarding dangerousness and competence should be made. Challenges to *ex parte* proceedings should be made. There are a myriad of challenges that can be made in the various states, depending on the statutes and procedures utilized in them.⁵⁸

C. 42 USC §1983 Claims

The federal civil rights statute, 42 USC §1983, often known simply as "Section 1983" provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this

⁵⁸ For example, I have identified a lot of things under Alaska law where I think valid challenges to what is going on can and should be made.

section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This statute allows people to go into federal court and obtain injunctions against the constitutional violations that have been outlined here as well as money damages. This is a potentially very fruitful avenue, especially with respect to states where their supreme courts are not honoring people's constitutional rights.⁵⁹

X. Organizing Legal Challenges

At the Action Conference for Human Rights in Mental Health put on by MindFreedom in Washington, DC, last spring,⁶⁰ the Legal Track decided it would focus on fighting forced treatment as a single action item that outweighed everything else and certainly a large enough task.⁶¹ It was further decided to establish a State Coordinator system whereby the various states (& countries) would have a single person (or group) that would coordinate efforts for such states with PsychRights offering assistance and over-all coordination as able. There are currently coordinators for eight states and two countries,⁶² and coordinators for the other states are wanted. There is not a huge amount going on in any state except Alaska because of the problem of finding an attorney(s) willing to really work zealously on these types of cases, but some progress has been made.

A. Alaska

Since I get to represent people in Alaska and have been active for twenty years, I have been able to pursue the types of actions laid out here, with two challenges to what is going on currently in the Alaska Supreme Court and serious efforts being made to establish effective, recovery-oriented alternatives.⁶³ A report on these activities as of August 2, 2005, is available on the Internet at <http://akmhcweb.org/News/AKEfforts.pdf> and if there are any significant developments by the time I present this information at NARPA in November in Hartford, they will be presented there.⁶⁴ The two Alaska Supreme Court cases are *Myers v. Alaska Psychiatric Institute*, in which we are seeking to establish that the State must prove forced drugging is in the person's best interest and people have the right to the least restrictive alternative, neither of which are contained in

⁵⁹ One can ask the United States Supreme Court to take cases where a state supreme court does not honor people's federal constitutional rights, but very few cases are heard. By utilizing 41 USC §1983, direct access to the federal courts is possible.

⁶⁰ See, the Final Report of the Conference, which can be found on the Internet at <http://psychrights.org/Education/2005ActionConference/FinalReport.pdf>.

⁶¹ See, the web page for the Legal Track at <http://psychrights.org/Education/2005ActionConference/Legal.htm>.

⁶² See, <http://psychrights.org/States/Coordinators.htm> for a list of current states (& countries) with coordinators.

⁶³ Descriptions of such alternatives can be found on the Internet at <http://psychrights.org/Research/Digest/Effective/effective.htm>.

⁶⁴ For information on the NARPA conference, see, <http://www.narpa.org/narpa.2005.htm>.

Alaska Statutes.⁶⁵ *Wetherhorn v. Alaska Psychiatric Institute* dramatically illustrates the sham nature of civil commitment and forced drugging proceedings and seeks to establish the right to effective assistance of counsel.⁶⁶

B. Massachusetts

Massachusetts has the very active Freedom Center,⁶⁷ which is doing a lot of effective work through its grass roots organizing. Aby Adams from the Freedom Center is the Massachusetts State Coordinator. As mentioned above, in February of 2004, I wrote a memo on how the *Rogers* case has been turned on its head and become a forced drugging assembly line.⁶⁸ Next month, Robert Whitaker, author of *Mad in America*, Grace Jackson, MD, author of *Rethinking Psychiatric Drugs: A Guide to Informed Consent*, Dan Kreigman, a local psychologist, Will Hall of the Freedom Center, and I will be presenting a Continuing Legal Education (CLE) program to lawyers representing people in these types of proceedings. I feel changing these lawyers' attitudes is more important than the legal information, which is why the other people presenting are so key.

It turns out that just last week, I was contacted by someone in a Massachusetts hospital and faced with an involuntary commitment and forced drugging petition. I was trying to jack up his attorney and sent her an e-mail with the following:

Do you have a good expert(s) lined up? Are you going to take the doc's deposition? Any others? In Alaska I just asserted the right to take depositions and got away with it (I think I have the right). Do you know what the asserted grounds of dangerousness are? Have you thought about challenging the proposed guardian, if there is one and suggesting someone else who will be more likely to follow what _____ wants with respect to the drugs? Are you going to move to dismiss the petition? Are you going to make any constitutional challenges? Have you talked to the hospital about what it might take to let him out? I have found here that really challenging what they are doing by these types of steps and especially by taking depositions, they become much more willing to consider a discharge.

Apparently, hospital staff saw the patient's copy of this e-mail and decided to discharge him. The patient believes this was instrumental in his release and supports the concept that making it harder to commit and force drug people, in itself, can be a successful strategy. Here, just contemplating facing a real challenge was enough to have the person released.

⁶⁵ See, <http://psychrights.org/States/Alaska/CaseOne.htm>.

⁶⁶ See, <http://psychrights.org/States/Alaska/CaseFour.htm>.

⁶⁷ See, <http://www.freedom-center.org/>.

⁶⁸ <http://psychrights.org/States/Massachusetts/RogersOrders/RogersOrdersMemo.pdf>.

C. Minnesota

In Minnesota, we have a State Coordinator, Lousie Bouta, other interested people and a psychiatrist who is willing to testify as an expert witness. We are working on obtaining some good legal assistance and then putting together a case(s).

D. New York

In New York, we have a State Coordinator, Anne Dox and there has recently been some other organizing. We have identified a couple of good attorneys -- especially one -- but financing, as always, is a problem. It seems like we should be able to put something together there.

E. Other States

As mentioned, we also have state coordinators in other states and want them in the states that don't have them.⁶⁹

XI. Public Attitudes

Even though this paper is about the court's potential role in transforming mental health systems to a recovery culture, it seems worthwhile to also make a few comments about changing public attitudes. There is an historic opportunity right now to make substantial inroads against the Psychopharmacology/Psychiatric hegemony because of the revelations in the media regarding dangerous, ineffective drugs, but this must be seized or it will be lost. **A serious public education program must be mounted.**

A. An Effective Public Relations Campaign

In the main, perhaps unduplicated for any other issue, the power of the Psychopharmacology/Psychiatric Hegemony has so controlled the message that the media tends not to even acknowledge there is another side. For most issues, the media will present at least one spokesperson from each side. However, when the latest bogus breakthrough in mental illness research or "treatment" is announced, the other side is not even presented. One might want to pass this off as Big Pharma advertising money infecting the news departments, but I think that is way too simplistic and perhaps even largely untrue.

In order to get our side presented, we need to have established relationships before stories break so they know who to call. An illustration of this is that David Oaks, the Executive Director of MindFreedom, was recently quoted in a recent, important Washington Post article about the NIH study finding "atypical" neuroleptics are neither more effective, nor safer than the older ones.⁷⁰ David has worked on his relationship

⁶⁹ See, <http://psychrights.org/States/Coordinators.htm> for a list of current states (& countries) with coordinators.

⁷⁰ The article in which David was quoted was "New Antipsychotic Drugs Criticized: Federal Study Finds No Benefit Over Older, Cheaper Drug," *Washington Post*, Tuesday,

with Shankar Vedantam, the person who wrote the story, educating him to the issues, and the result was that when the story broke, David was one of the people Mr. Vedantam called.

There should be an organized, ongoing and sustained public relations effort. There needs to be a person who is able to spend a considerable amount of their time devoted to organizing and coordinating this effort. I've mentioned establishing relationships so that the media will know who to call. As part of this there needs to be a list of potential speakers. These folks are often referred to in the media as "talking heads." Stories also need to be promoted.

B. Potential Talking Heads

The following is a list of people, I believe would be good spokespeople for the major media outlets. It is by no means comprehensive and I apologize in advance to people I no doubt should have included. Also, I don't know everyone on the list well and there may be some people listed, who perhaps would serve the effort better in another capacity(ies). Very importantly, everyone can and should position themselves as spokespeople in their own communities.

Psychiatrists/MDs	Ph.D.s		Survivors*	Attorneys
Peter Breggin	David Cohen	Al Galves	David Oaks	Michael Perlin
Grace Jackson	Bert Karon	Paula Caplan	Judi Chamberlin	Jim Gottstein*
David Healy	Ron Bassman*	Rich Shulman	Celia Brown	Susan Stefan
Joseph Glenmullen,	Bruce Levine	Sarah Edmonds	Laurie Ahern	William Brooks
Dan Fisher*	Larry Simon	Gail Hornstein	Darby Penny	Tom Behrendt
Dan Dorman	Al Siebert*	John Breeding	Pat Deegan	Kim Darrow
Kurt Langsten	Ann Blake Tracy	John Read	Bill Stewart	Dennis Feld
Ann Louise Silver	Barry Duncan	Cloe Madanes	Pat Risser	Maureen Gest
Stuart Shipko	Dominick Riccio	Edward Albee	Francesca Allan	Grant Morris
Ron Leifer	Jonathon Leo	Courtenay Harding	Krista Erickson	
Thomas Szasz	Jay Joseph	David Antonuccio	Linda Andre	
Fred Baughman	Diane Kern	Dathan Paterno	Oryx Cohen	
Karen Effrem	Keith Hoeller	Toby Watson	Catherine Penney	
	Tomi Gomory		Will Hall	

*People in other categories who are also self-identified survivors, are designated with an asterisk. I may have missed some.

C. Promoting and Making Stories

In addition to establishing relationships, and in fact also a way to establish relationships, is to pitch, promote and make stories. The 2003 Fast for Freedom in

September 20, 2005. The study, itself, can be found at <http://psychrights.org/Research/Digest/NLPs/NEJoMAtypicalsnobetter.pdf>.

Mental Health put on by MindFreedom was an example of making a story.⁷¹ The most significant coverage it received was in the Washington Post and the LA Times Magazine, but there were a number of other stories and op ed pieces.⁷² The Hunger Strike was incredibly successful in one way, which was the brave fasters actually got the American Psychiatric Association to admit it has no evidence for psychiatry's claims that mental illness is a biologically based brain defect.⁷³ Ultimately, though, the Hunger Strike should have garnered much more media and the reason it didn't was that the prior relationship building had not been done.⁷⁴

XII. Alternatives

It also seems worthwhile to spend a little bit of space here on creating alternatives. Ultimately, in order to be successful, alternatives need to be funded by the public system.⁷⁵ One argument in its favor that should be attractive to government (but has not heretofore been) is the current system is breaking the bank. As Whitaker has shown, the disability rate for mental illness has increased six-fold since the introduction of Thorazine.⁷⁶ Making so many people permanently disabled and financially supported by the government, rather than working and supporting the government, is not only a huge human tragedy, but is also a massive, unnecessary governmental expense.

One of the simplest, but very important things that should be done is to compile a readily accessible, accurate, list of existing alternatives and efforts to get them going. I have seen lists of alternatives, but then I hear that this program or that is really not a true non-drugging and/or non-coercive alternative. It would be extremely helpful for there to be a description of each such program with enough investigation to know what is really happening. The following are some of the current alternatives and efforts to get more going:

- INTAR⁷⁷
- Action Conference⁷⁸
- Alaska -- Soteria-Alaska, CHOICES, Peer Properties⁷⁹

⁷¹ See, <http://mindfreedom.org/mindfreedom/hungerstrike.shtml>.

⁷² See, <http://www.mindfreedom.org/mindfreedom/hungerstrike22.shtml>.

⁷³ See, <http://mindfreedom.org/mindfreedom/hungerstrike1.shtml>.

⁷⁴ This is not a criticism at all. From my perspective the Hunger Strike was wildly successful.

⁷⁵ However, I am also in favor of non-system alternatives and especially "Underground Railroad" and "Safe Houses" types of efforts to which people facing involuntary commitment and forced drugging can escape.

⁷⁶ See, *Anatomy of an Epidemic: Psychiatric Drugs and the Astonishing Rise of Mental Illness in America*, which is available at [http://psychrights.org/Articles/EHPPPPsychDrugEpidemic\(Whitaker\).pdf](http://psychrights.org/Articles/EHPPPPsychDrugEpidemic(Whitaker).pdf).

⁷⁷ See, <http://intar.org/>

⁷⁸ See, Choices Track at

<http://psychrights.org/Education/2005ActionConference/FinalReport.pdf>

⁷⁹ <http://akmhweb.org/News/AKEfforts.pdf>.

- Arizona -- Meta Services⁸⁰
- California -- Golden State Psychological Health Center⁸¹
- Illinois -- Associated Psychological Health Services⁸²
- Massachusetts -- Freedom Center -- Soteria-New England, Zuzu's Place⁸³
- New Hampshire -- The Cypress Center⁸⁴
- Washington -- Ani'sahoni Consulting (Dr. David Walker)⁸⁵
- Wisconsin -- Associated Psychological Health Services⁸⁶

XIII. Conclusion

A final word about the importance of the potential role of the courts and the forced psychiatry issue. While it is true that many, even maybe most, people in the system are not under court orders at any given time, it is my view that the forced psychiatry system is what starts a tremendous number of people on the road to permanent disability (and poverty) and drives the whole public system. Of course, coercion to take the drugs is pervasive outside of court orders too, but again I see the legal coercion as a key element. If people who are now being dragged into forced psychiatry were given, non-coercive, recovery oriented options, they would also become available for the people who are not subject to forced psychiatry. I hope this paper has conveyed the role that strategic litigation can play in transforming mental health systems to a culture of recovery.

⁸⁰ See, <http://metaservices.com/>. They have done a lot of very interesting things, although at this point a lot of their clients are medicated.

⁸¹ See, <http://www.gsphc.net/>.

⁸² See, <http://www.abcmefree.com/>.

⁸³ See, <http://www.freedom-center.org/>.

⁸⁴ See, <http://psychrights.org/States/NewHampshire/NewHampshire.htm>.

⁸⁵ See, <http://www.anisahoni.com/about/>.

⁸⁶ See, <http://www.abcmefree.com/>.

Exhibit 2

REPORT

MULTI-FACETED GRASS-ROOTS EFFORTS TO BRING ABOUT MEANINGFUL CHANGE TO ALASKA'S MENTAL HEALTH PROGRAM

by

Jim Gottstein
August 2, 2005
with some updates to
September 29, 2006

The August 2, 2005 version of this Report was updated in February, 2006 and again in August and September of 2006, because of significant developments. Both Soteria-Alaska and CHOICES, Inc., have received funding since the original report was issued and the Alaska Supreme Court decided the *Myers* case in June, 2006. Some other minor updates have occurred, such as to the *Wetherhorn* case description, but a comprehensive review and update has not been made.

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II. INTRODUCTION

A number of people both in and out of Alaska have heard of various efforts in Alaska which attempt to create alternatives to the current virtually exclusive reliance on medication for people diagnosed with serious mental illness and have asked for a description of these efforts. I have also been thinking for quite a while that I should describe the various efforts I, along with others, are working on in Alaska. This will not be entirely new to everyone because in 2005 Jeff Jessee, the Executive Director of the Alaska Mental Health Authority (Trust Authority) called me into a meeting where he basically asked what the heck the idea was for four recently formed non-profits: CHOICES, Inc., Soteria-Alaska, Peer Properties and the Law Project for Psychiatric Rights (PsychRights®).¹ Thus, the basic vision was conveyed to the group of people at that meeting. Also, I have described it at Consumers Consortium meetings, where it has been met uniformly with great enthusiasm. I hope it will be helpful to have it laid out in writing.²

The four non-profits serve complementary roles in the effort to create alternatives to our mental illness system's³ virtually exclusive focus on the administration of psychiatric drugs for "treatment" of people diagnosed with serious mental illness. The drugs are of dubious, at best, over all effectiveness, are extremely harmful, and are at least halving the number of people who recover from a diagnosis of serious mental illness. Another way to put it is our system is creating large numbers of people⁴ who become seriously and persistently mentally ill,⁵ most of whom become permanent burdens on government financial resources. More importantly from my perspective, they lead much less satisfying, shorter, and less fulfilling lives than they otherwise could.

There is a huge debate over this assertion and it is not my purpose to engage in that debate here⁶ because the efforts described here are to allow choice. I know people who find the drugs helpful and some who feel they saved their lives. I think people who want the drugs should have access to them.⁷ By the same token, those who do not want the drugs should be given the choice to decline them. And they should have support for this choice. Each of the four non-profits is designed to play a role in this, although one of them, Soteria-Alaska, could be rolled into CHOICES, Inc., depending on timing and funding.

¹ Due to sustainability problems, multiplicity of administrative departments, and human resources constraints, both the Trust and the Rasmuson Foundation, which is the largest private foundation in Alaska, are discouraging the proliferation of non-profits.

² This Report suffers from speaking to different audiences. For example, the section on Alaska isn't necessary for people in Alaska and the names are of no relevance to people outside of Alaska. Hopefully, it will be sufficient unto the day for all readers.

³ Because of the way what we call the "mental health system" channels people into chronic mental illness, I think it is more fairly described as a mental illness, rather than a mental health system.

⁴ At least doubling.

⁵ Also known as "chronically mentally ill."

⁶ However, there are references and links which demonstrate these are the facts.

⁷ I do think the truth about them should be disclosed, though.

The purpose of this Report then is to describe the strategy, history, progress to date and current prospects for this effort in Alaska⁸ to improve the outcomes of people diagnosed with serious mental illness by making available alternatives to the coercive, substantially illegal, essentially exclusive, over-medication regime now in effect.

It can not be over emphasized this effort is about honoring people's right to make choices regarding whether or not to take the risks associated with these drugs in the hope of achieving their perceived benefits, or to try something else.

The report is extensively footnoted for those who wish to explore the topics in greater depth, and a glossary is included to define unfamiliar terms and acronyms.

III. BACKGROUND

The underlying premise is the mental illness system's over-reliance on medication is at least doubling the number of people who become seriously and persistently mentally ill and causing great harm to a great number of people,⁹ including death,¹⁰ and that by offering various alternatives to medication, many of which have been proven to work,¹¹ substantially better outcomes will result.¹² That the over-reliance on psychiatric drugs is not only worsening outcomes, but creating great harm, makes involuntary medication (Forced Drugging) particularly abhorrent. Legal proceedings in the US for involuntary commitment and medication are

⁸ I live in Alaska and as will be described below, it has some unique potential advantages, which makes it a good place to attempt to effect the type of meaningful change described here. The general ideas, however, can be used by people around the country (and to a certain extent, around the world) and I am also working with people around the country on various such efforts.

⁹ It would unacceptably increase the length of this Report to support this statement here, and readers are directed to the Scientific Research by Topic section of the PsychRights website, <http://psychrights.org/Research/Digest/Researchbytopic.htm> as well as its Suggested Reading webpage, <http://psychrights.org/Market/storefront.htm>, for such support. I have no doubt about the accuracy of the statement. If only one book is to be read on this topic, *Mad in America: Bad Medicine, Bad Science and the Enduring Mistreatment of the Mentally Ill*, by Robert Whitaker is recommended. *Toxic Psychiatry*, by Peter Breggin would be the next one.

¹⁰ See, e.g., Prospective analysis of premature mortality in schizophrenia in relation to health service engagement: a 7.5-year study within an epidemiologically complete, homogeneous population in rural Ireland, *Psychiatry Research*, 117 (2003) 127–135, which can be found at <http://psychrights.org/Research/Digest/NLPs/MM-PsychRes2003.pdf>. This study concluded: "On long-term prospective evaluation, risk for death in schizophrenia was doubled on a background of enduring engagement in psychiatric care with increasing provision of community-based services and introduction of second-generation antipsychotics." In other words the death rate doubled over the already elevated rate with the introduction of the so-called "atypical" neuroleptics, such as Zyprexa and Risperdal.

¹¹ See, e.g., the material at Effective Non-Drug Treatments, <http://psychrights.org/Research/Digest/Effective/effective.htm>.

¹² The current system essentially channels people into becoming permanently disabled and thus a permanent financial burden on government. One of the side benefits of the change envisioned here is a substantial number of people can get off, or never get on the disability rolls, thus not only having much better lives, but decreasing the cost to government.

essentially a sham¹³ and the lack of efficacy and the serious harm caused by the medications (and other treatments, such as electroshock) eliminate the justification for the prevailing paternalistic attitude that "we can't let these pesky rights get in the way of what we know is in the person's best interests."

If people's rights were actually honored, my sense is *at least* 90% of court orders for Forced Drugging would not occur.¹⁴ However, it is recognized (a) that society will not tolerate just letting people go who come to the attention of authorities in a way that invokes the involuntary "treatment" mechanisms, and (b) such people often really can benefit from (and want) a safe, nurturing and helpful environment to get through their acute problems. Thus, even with respect to legal rights to be free from illegally imposed forced "treatment," it is absolutely essential that alternatives to the current, essentially medication only treatment regime must become available.

The four non-profits are designed to offer the choice to pursue a non-medication approach in four distinct functional areas: Acute Care, Community Based Services, Housing, and Honoring the Legal Right to Choose. As mentioned previously, acute and community based services could be performed by one agency. There would be a number of benefits to this, the most important perhaps being that people would not lose the community based support system they have when they need acute services and *vice versa*. In other words, they can continue working with the people whom they have grown to trust.

IV. ALASKA ATTRIBUTES

There are several attributes in Alaska that are fairly important in perhaps making it a more favorable place to accomplish the goals presented here than other places.

A. Small Population

Alaska has a very small population, which makes it easier for one person or a relatively small group of people to impact things. Policy makers are generally much more accessible than in most places. I have been involved in mental health policy development for a long time, know many of the key players, and have a certain amount of credibility and respect. As will be evident, however, while all of this may be true, the goals are still not easy to accomplish.

B. Alaska Mental Health Trust Authority

A totally unique attribute of Alaska is the Trust Authority, which was created as a result of the settlement of litigation (Trust Settlement) over the state of Alaska stealing one million

¹³ See, Section VI. D(3) below.

¹⁴ This is based on the premise that people may not constitutionally be Force Drugged unless it can be scientifically proven it is in their best interests and there is no less restrictive alternative that could be made available. Involuntary commitments are perhaps legally justified a greater percentage of the time under the current state of the law, but not therapeutically.

acres of land granted in trust for Alaska's mental health program (Trust).¹⁵ The Trust now has about \$300 million in cash corpus, makes some money off its land corpus, and spends about \$20 million a year on what it considers innovative programs and to facilitate major initiatives, such as constructing a new state hospital. In addition to people diagnosed with mental illness, the Trust's beneficiaries include chronic alcoholics with psychosis, the mentally retarded and mentally defective, and people with Alzheimer's Disease and related dementias. The influence and ability of the Trust Authority to impact Alaska's mental health program far exceeds the relatively small amount of money it has to spend on it and should not be underestimated.¹⁶

C. Alaska Mental Health Board

Under the Trust Settlement, four state boards, each representing one of the four groups of Trust beneficiaries, provide recommendations to the Trust Authority regarding mental health program funding. The Alaska Mental Health Board provides recommendations with respect to people diagnosed with mental illness. The quality and influence of the Mental Health Board has waxed and waned over the years depending on its personnel and the political climate. At least one half of the members of the Alaska Mental Health Board must be people with a mental disorder or members of their family, which potentially gives excellent representation for Consumers' interests in policy development.¹⁷ Appointments to the board are by the Governor, though, and are thus political to a greater or lesser extent.¹⁸

D. Consumers Consortium

In 2002, all of the Consumer run programs in the state got together and formed the "Consumers Consortium" to provide a united voice to policy makers.¹⁹ See, <http://akmhcweb.org/Announcements/2002rfr/consortiumproposals.htm> for its initial set of proposals. It seems worth quoting its organizational statement:

Consumers Consortium came together when disparate and exhausted consumer run organizations discovered their common problems and began looking for common solutions. The consortium has the assumption of commonness rather than the assumption of separation. We believe that it will be

¹⁵ See, <http://www.touchngo.com/lglcntr/spclint/mht.htm>. I was one of the four plaintiffs' attorneys in that case. The Trust Settlement was valued at \$1.1 billion by the trial court and consisted of \$200 million in cash and a little under 1 million acres of land, approximately half of which was mineral estate only, such as the oil and gas rights.

¹⁶ Having said that, the current state Administration is generally disinterested in any outside input, which has diminished the Trust's influence since 2003.

¹⁷ See, AS 47.30.662(b), which can be accessed at <http://www.touchngo.com/lglcntr/akstats/Statutes/Title47/Chapter30/Section662.htm>

¹⁸ I was on the Mental Health Board from 1998 to 2004, but was not reappointed after I sued the State regarding the interpretation of the Trust Settlement. See, <http://psychrights.org/States/Alaska/4bdSuit/4bdSuit.htm>. Being re-appointed under the Murkowski Administration was always unlikely because I was not of the right political party.

¹⁹ A Consumer membership organization, Mental Health Advocates of Alaska (MHAAC), was formed in 2004/05 with the intent of representing Consumers (as contrasted with Consumer run programs) statewide to policy makers. It is too early to tell if it will attract enough members to legitimately claim such status.

much easier for the MH system to respond effectively to us as a group, working together. In that spirit, we have come together to build a consensus around the mental health system in response to the Board's call for input into the budget building process.

From 2002 until 2005, the Consortium's members were able to reach a consensus on how available funds for Consumer run programs should be allocated. However, for the state fiscal year starting in July, 2005, funding was cut so much²⁰ this was no longer possible, which resulted in the more typical free-for-all competition process with winners and losers.

E. Ionia

In 1987, a group of what I think of as refugees from the mental illness system in Massachusetts founded the community and non-profit, Ionia, in Kasilof, Alaska. They pooled their resources and created a lifestyle that totally works for them.²¹ They now have over 40 people living there, including many children. I don't think they have had a psychiatric crisis in well over ten years, perhaps not since the community was founded. They built their own log houses, eat a strict macrobiotic diet, growing and gathering much of their own food, and meet every morning for as long as it takes to work through any issues. A few years ago, they needed some grant funding to expand their agricultural operation and build a community building they call the "Longhouse." The grant application brought what they were doing to the attention of policy makers, and Ionia became an example of a group of people who, after being pronounced hopelessly and permanently mentally ill, created their own environment, and proved it is possible to recover from a diagnosis of serious mental illness and thrive.

V. GENESIS OF EFFORT

While I have been involved in mental health policy in Alaska for quite a long time in various capacities²² and had a pretty good sense of the failure of the mental illness system to truly help most people diagnosed with serious mental illness, this particular effort arose out of my reading *Mad in America* in late 2002. It is an excellent, very readable and enjoyable, yet extremely alarming book in that it revealed vast numbers of people are being greatly harmed by the current "treatment" paradigm.²³ Of course, there have actually been many books documenting the same thing, including Dr. Peter Breggin's seminal book *Toxic Psychiatry*. *Toxic Psychiatry* is also a compelling and well documented indictment of the current system, but I found it was when people read *Mad in America* that they really "got" on an almost visceral level the scientific and moral bankruptcy of the current system and the scope of the harm being done.

²⁰ The Trust Authority doubled the amount of money it had previously allocated for what was called Consumer run programs, but expanded eligibility to include all four of its beneficiary groups in what it now calls its "Trust Beneficiary Group Initiative" or "TBGI."

²¹ See, <http://akmhweb.org/recovery/ioniaadn.html> and <http://ionia.org/>.

²² A brief bio can be found at <http://psychrights.org/about/Gottstein.htm>.

²³ This is one of the reasons why I often put "treatment" in quotation marks. Another is the idea that if it isn't voluntary it isn't treatment.

I was on the Alaska Mental Health Board at the time and sent every member of it, as well as every member of the Trust Authority, a copy of *Mad in America*, exhorting them to take action to improve the outcomes for people diagnosed with serious mental illness by providing alternatives to medication.²⁴ PsychRights brought Bob Whitaker, the author of *Mad in America*, to Anchorage in December 2002, to give a presentation to the Alaska Mental Health Board. While he was here, Whitaker also spoke to the Alaska Psychiatric Institute and to the state-wide organization of community mental health centers. The Mental Health Board's reaction was mostly positive, though with state personnel and NAMI-Alaska members on the Board tending to be negative. However, there was general agreement people ought to have the choice to pursue a non-medication approach. No such changes to Alaska's mental health program have occurred.

In the Spring of 2003, as chair of the Mental Health Board's Finance Committee, I convened a Budget Summit, which produced a report which can be found at <http://akmhcweb.org/Docs/AMHB/2003BudgetSummitReport.pdf>. This report was formally adopted by the whole board in August of 2003. A couple of quotes from it are:

There were discussions of . . . whether it was clear enough from the data that the current reliance on psychiatric medications substantially increases chronicity. These and similar items are referred to the full Board/Planning Committee for further development and consideration. (p.1)

The Mental Health System currently relies heavily on psychiatric medications. It is recommended that further research on how the use of these medications impact desired results should be conducted. (p.10)

I think it is fair to say there has been little, if any, follow-up on this, although I can't say for sure because I am no longer on the board. Much of this can be attributed to the animosity of the Murkowski administration to the Alaska Mental Health Board and to its attempts to enfeeble the board by reducing its funding and combine it with the Alaska Board on Alcoholism and Drug Abuse.²⁵

The four non-profit effort is designed to work within existing mechanisms to make non-coercive, non-medication options available in Alaska.

²⁴ The transmittal to the members of the Alaska Mental Health Board can be found at <http://psychrights.org/states/alaska/2002/MadInAmericatxttoMHBltr4Web.pdf>. In March of 2003, I also transmitted a copy of *Mad in America* and other materials to the Commissioner of the Alaska Department of Health and Social Services exhorting him to address the situation. This transmittal letter can be found at <http://psychrights.org/alaska/DMHDD/3-24-03jgtogilbertson.pdf>.

²⁵ When the Administration discovered it could not do this without breaching the Trust Settlement, it accomplished much the same thing by forcing the Alaska Mental Health Board and the Alaska Board on Alcoholism and Drug Abuse to share staff and hold joint meetings and by refusing to appoint the person they selected as their joint Executive Director.

VI. SPECIFIC EFFORTS: STATUS & PROSPECTS

A. Acute Care: Soteria-Alaska

Dr. Loren Mosher's Soteria-House project and study in the 1970's proved that people who are in acute psychiatric crisis, who would normally be hospitalized, can be at least as successfully treated and have better long term outcomes (lives) if they are allowed to get through their initial psychotic episode(s).²⁶ The Michigan State Psychotherapy study proves the same thing.²⁷ The Michigan study also shows that in the short term there are significant cost savings and the long-term cost savings are enormous.²⁸

Soteria-Alaska, Inc. was incorporated in January of 2003 as a vehicle to create a Soteria-like program in Alaska.²⁹ Shortly thereafter, Jerry Jenkins came to Alaska to be the Executive Director of Anchorage Community Mental Health Services (ACMHS), the largest community mental health center in the state, and he was (and continues to be) very supportive of people being given non-medication choices. The decision was made that it would be easier to try and develop a Soteria-like program through ACMHS, and therefore Soteria-Alaska, Inc., as a separate entity trying to do so was put on hold. However, as the 15 month deadline approached for filing for tax exempt status approached with no concrete progress towards ACMHS establishing a Soteria-like program, Soteria-Alaska filed its application for tax-exempt status in the spring of 2004 in order to be in a position to move forward, itself.³⁰

In the summer of 2004, there was an indication of interest in Soteria-Alaska from at least one member of the Trust Authority, and it was suggested a proposal should be put together for

²⁶ See, "Soteria and Other Alternatives to Acute Psychiatric Hospitalization, A Personal and Professional Review," by Loren R. Mosher, M.D., *The Journal of Nervous and Mental Disease*, 187:142-149, 1999, which can be found at <http://psychrights.org/Research/Digest/Effective/soteria.pdf> and the other studies located at <http://psychrights.org/Research/Digest/Effective/effective.htm>. In addition, Dr. Mosher's book, *Soteria: Through Madness to Deliverance* (published posthumously) is an incredibly good book about Soteria and gives one the feeling of what Soteria House was like.

²⁷ See, *The Michigan State Psychotherapy Project*, by Bertram P. Karon and Gary R. VandenBos, which can be found at <http://psychrights.org/Research/Digest/Effective/MIPsychProj.pdf>. Also, see, *Psychotherapy of Schizophrenia: The Treatment of Choice* (Jason Aronson, 1996), by Bertram P. Karon and Gary R. Vandenbos, which has the most complete description of the Michigan study.

²⁸ One of the things that happens is that people who get caught by the system are channeled onto SSI/SSDI/Medicaid as a way to get them basic living funds and medical insurance. However, as the Budget Summit Report points out, "the Medicaid/SSDI/SSI eligibility and funding mechanism is essentially a one way ticket to permanent disability and poverty." <http://akmhweb.org/Docs/AMHB/2003BudgetSummitReport.pdf>, page 8. This approach is part and parcel of the erroneous view that people don't recover from serious mental illness, especially a diagnosis of schizophrenia. This means droves of people unnecessarily become permanent financial burdens on the government.

²⁹ Soteria-Alaska was not envisioned as necessarily being a Consumer run program, which is in contrast to CHOICES, Inc., described below.

³⁰ Probably the biggest concern with ACMHS implementing a Soteria-like program is whether it would remain faithful to Soteria precepts. As a traditional community mental health center, it has historically been very oriented toward requiring its clients to take medication, which is its corporate culture.

presentation to the Alaska Mental Health Board for its recommendation. The Consumers Consortium had a modest amount of funding available for planning and an agreement was made with Dr. Aron Wolf for assistance in preparing such a proposal.³¹ A proposal was prepared and submitted to the Alaska Mental Health Board, which recommended it for funding to the Trust.³² The prospect of a Soteria-Alaska has generated a lot of interest and support from outside Alaska. For example, psychiatrists Ann- Louise Silver,³³ Peter Stastny,³⁴ Dan Dorman,³⁵ Luc Ciompi,³⁶ Nathaniel Lehrman,³⁷ and Grace Jackson,³⁸ all of whom have experience in treating people without drugs have indicated a willingness to help. Non-psychiatrist experts who also indicated a willingness to help include Alma Menn,³⁹ the administrator of the original Soteria-House project, John Bola, who collaborated with Dr. Mosher in a number of studies and papers and Judy Schreiber, Dr. Mosher's widow. In addition to myself, Eliza Eller of Ionia and Andrea Schmook currently comprise Soteria-Alaska's board of directors.

In October of 2005, Soteria-Alaska was granted \$10,000 from the Trust, to continue the planning. This enabled it to make another proposal to the Trust in January of 2006 and the Trust granted \$78,000 to support further development of the Soteria-Alaska program in preparation for

³¹ Dr. Wolf has been Ionia's psychiatrist for many years, has been practicing psychiatry in Alaska since 1967, was the Regional Medical Director of Providence Health System, and holds a Masters of Medical Management Degree, which is the equivalent of a Masters of Business Administration for medical management. Especially exciting from our perspective is Dr. Wolf had experience at Chestnut Lodge in Maryland, which pioneered psychotherapeutic treatment of people diagnosed with serious mental illness. Dr. Wolf's CV can be found at <http://choices-ak.org/grants/05TBGIOperating/AWolfCV.pdf>.

³² A copy of the proposal can be found at <http://soteria-alaska.com/Soteria-Alaskawapdx.pdf>. The initial business plan can be found at <http://soteria-alaska.com/grants/05TBGI/SoteriaInitialBizPlan.pdf>

³³ Dr. Silver practiced at Chestnut Lodge when it did not use medications and has written a number of articles about treating people with psychosis without drugs. For example, she has reported that when she first worked at Chestnut Lodge, her schizophrenic patients were not medicated. Later, all of her patients were medicated as a matter of policy. In the premedication days, she had patients who got romantically involved, got married, had children, and related to their spouses and children. None of her medicated patients ever formed a new relationship. See, <http://psychrights.org/Articles/KaronMedication.htm>.

³⁴ Dr. Stastny is a driving force behind the international effort to create more programs like Soteria-House through an organization known as International Network of Treatment Alternatives for Recovery (INTAR). See, <http://www.intar.org/>.

³⁵ Dr. Dorman has treated people diagnosed with serious mental illness without drugs for many years and is the author of the fantastic book, *Dante's Cure*, a true account of a young woman's descent into psychosis and then, through hard work, understanding and most importantly, having a psychiatrist willing to spend the time and have a true caring relationship, her journey back from madness into full recovery.

³⁶ Dr. Ciompi has run Soteria-Berne in Switzerland for a long time.

³⁷ Dr. Lehrman is the former Clinical Director, Kingsboro Psychiatric Center, Brooklyn, NY and has published extensively on successful non-medication treatment. See, e.g., *The Rational Organization of Care for Disabling Psychosis - "If I Were Commissioner,"* which can be accessed at <http://akmhweb.org/articles/iflehrmancommissioner.htm>. Dr. Lehrman identifies having the same person involved in both the community and acute settings as being extremely important.

³⁸ Dr. Jackson was described by Dr. Mosher as the most knowledgeable person he knew of about the actual effects of psychiatric drugs. Her book definitive book on the topic, *Rethinking Psychiatric Drugs: A Guide to Informed Consent* has just been published.

³⁹ Ms. Menn is currently a consultant to the project.

a full business plan presentation to the Trust in September, 2006.⁴⁰ Susan Musante was hired as the Project Manager⁴¹ and the Business Plan was submitted on August 4, 2006.⁴² Because the long-term viability of Soteria-Alaska depends on State of Alaska financial participation and there are a number of other hurdles, making it hard to determine when Soteria-Alaska might be ready to open, the Trust staff recommended the Trust fund continued planning and pre-development efforts with the idea that it will fund the start-up when all of the pieces are in place, including inclusion in the state's budget. This recommendation was accepted and on September 6, 2006, the Trust passed a motion approving the following:

Fiscal Year 2007 (ending June 30, 2007)

\$120,000 in Trust Funds for continued development work.

Fiscal Year 2008 (ending June 30, 2008)

\$160,000 in Trust Funds.

Recommendation that \$220,000 in State of Alaska General Fund/Mental Health (GF/MH) be appropriated for Soteria-Alaska operations.

Fiscal Year 2009 (ending June 30, 2009)

\$160,000 in Trust Funds.

It doesn't appear the Trust actually passed a motion regarding FY 2009 GF/MH, but it is understood the plan is if the State does appropriate the \$220,000 in FY 2008, that it would go up to \$470,000 in FY 2009

The key then, to opening Soteria-Alaska is getting the Legislature to include it in the state budget. Because of all of the support for it the chances are reasonable for that to happen. In addition to the Trust's support, the Alaska Division of Behavioral Health is supporting state funding as is the Executive Director of the state hospital. It appears the earliest Soteria-Alaska could possibly open would be January or February of 2008, and that is probably too optimistic.

B. Community Based Services: CHOICES, Inc.

CHOICES, Inc., which stands for Consumers Having Ownership In Creating Effective Services (hereafter referred to as CHOICES), was formed at the same time as Soteria-Alaska to provide an alternative to the drug-only treatment modality in the community. It is a Consumer run program. On its website, CHOICES describes its program as follows:⁴³

⁴⁰ The planning proposal funded by the Trust can be found at <http://soteria-alaska.com/grants/FY06-07PreDev/TrustFinanceCmtee4Feb7-806.pdf>.

⁴¹ Ms. Musante has proven to be terrific. A brief bio can be found at <http://soteria-alaska.com/Info/AnnounceSMusante.htm>

⁴² A copy of the Business Plan can be obtained from <http://soteria-alaska.com/Grants/FY06-07PreDev/SoteriaSept06BizPlan.pdf>

⁴³ See, <http://choices-ak.org/>.

C	Consumers	CHOICES, Inc., was formed to provide alternatives in the community to the current medication dominated mental health system. Tax exempt status was received on March 15, 2005, and CHOICES is now able begin operations.
H	Having	CHOICES is what is known as a Consumer Run program, where "consumer" means someone who has been labeled with a serious mental illness and is a past or present recipient of mental health services. More specifically, Article III, §2, of the Bylaws requires, "at least 2/3rds of the members of the Board of Directors shall be a past or present recipient of mental health services of such a nature that inpatient care may have been necessary."
O	Ownership	
I	IN	The philosophy behind CHOICES is reflected in both its name and the words which create the acronym CHOICES -- C onsumers H aving O wnership I n C reating E ffective S ervices -- which is people having options of their own creation and choosing.
C	Creating	CHOICES anticipates three primary modes of operation. The first is to provide people the types of services or other resources they choose to help them recover. The second is to develop and provide, to the extent possible, the types of community mental health services described by Loren Mosher and Lorenzo Burti in Chapter 9 of their excellent book, Community Mental Health: A Practical Guide. The third is to be a conduit for "pass-through" grants to other Consumer Run programs that do not have tax exempt status or the administrative wherewithal to do so themselves.
E	Effective	
S	Services	

To reiterate, there are three basic components to the CHOICES program as currently envisioned:

- (1) Helping people (and parents of younger children) get what they want.
- (2) Providing the types of services Loren Mosher describes in Chapter 9 of his and Lorenzo Burti's excellent book, Community Mental Health: A Practical Guide, which can be found at <http://choices-ak.org/grants/05TBGIOperating/Ch9.pdf> (9 Megabytes).
- (3) Being a conduit for pass-through grants for consumer run programs that have not obtained 501(c)(3) status.

It is not envisioned that Soteria-Alaska would provide community services, but there are scenarios where CHOICES could/would run a Soteria-like program. In other words, if CHOICES is able to commence operations and moves to a position to accomplish it, it could establish a Soteria-like program as part of its programming. As mentioned above, this would have the major advantage of more easily allowing people to retain the support people they have come to trust, even when they move between acute and non-acute situations.⁴⁴

⁴⁴ It should be pointed out here, however, that the goal and expectation is that people will recover and come to rely on the mental health system much less, if at all.

Andrea Schmook, who has tremendous, successful experience with consumer run programs and is currently working on ACMHS' consumer driven section,⁴⁵ serves as CHOICES' initial executive director on a part-time basis under contract from ACMHS. In addition to myself, Eliza Eller of Ionia and Michele Turner currently comprise CHOICES' board of directors.

CHOICES is designed to access current financing mechanisms, such as Medicaid, which would make it self-sustaining. CHOICES has received a \$150,000 grant to provide Independent Case Management and Flexible Support Services.⁴⁶ It is hoped that this grant will be the start to allow CHOICES to become a self-sustaining part of Alaska's mental health system.

CHOICES also serves as "pass-through" agency or "fiscal agent" for a number of organizations and grants.

C. Housing: Peer Properties

Peer Properties, Inc., was formed by myself and Katsumi Kenaston to provide housing for people diagnosed or diagnosable with serious mental illness and homeless, at risk of homelessness or in a bad living situation. Peer Properties does not provide services, but operates on the peer support principle. The peer support principle is relationships based upon shared experiences and values, and characterized by reciprocity, mutuality, and mutual acceptance and respect. The helper's principle, a corollary of the peer principle, is that working for the recovery of others facilitates personal recovery.

It has long been recognized that being homeless or in a bad living situation contributes to psychiatric symptoms and prevents recovery.⁴⁷ It has more recently been recognized that linking housing to services can be counterproductive. There is a rather pervasive policy of community mental health centers requiring "compliance" with medication and/or utilizing certain services as a condition to receiving and/or being allowed to remain in housing. Peer Properties neither encourages nor discourages the use of psychiatric medications; instead, it supports its tenants' choices in the matter.

In 2004, Peer Properties received a capital grant of approximately \$190,000 from the Trust, which combined with a \$25,000 grant from the Rasmuson Foundation enabled the purchase of a four bedroom house.⁴⁸ After some initial difficulties, four women now share the house and it is operating very well, although finances are very tight.

⁴⁵ Ms. Schmook's resume can be found at <http://choices-ak.org/grants/05TBGIOperating/ASchmookResume-9-24-04.pdf>.

⁴⁶ Both Independent Case Management and Flexible Support Services were in the Consumers Consortium 2002 package of budget proposals (<http://akmhcweb.org/Announcements/2002rfr/casemanagement.pdf> and <http://akmhcweb.org/Announcements/2002rfr/flexible.pdf>).

⁴⁷ In the *Myers* case described below, Dr. Mosher testified (by affidavit), that "Without adequate housing, mental health 'treatment' is mostly a waste of time and money." See, <http://psychrights.org/States/Alaska/CaseOne/30-Day/ExhibitRLRMosherAff.htm>, emphasis in original.

⁴⁸ See, <http://peerproperties.org/Properties/outside.jpg>

In 2004, Peer Properties was also awarded a pre-development grant to apply for a Special Needs Housing Grant (SNHG). Peer Properties teamed up with a very sophisticated and experienced developer, the Venture Development Group, and submitted an application under the SNHG program as well as for Low Income Housing Tax Credits. Peer Properties was awarded both a SNHG Grant and tax credits to build an 11 unit apartment building, including one for a resident manager (called "Peer One"), aimed at housing people who repeatedly cycle through the Alaska Department of Corrections and the Alaska Psychiatric Institute (API). Unfortunately, this project proved just too difficult to pull off.

Peer Properties is currently operated entirely by its volunteer board of directors, Andrea Schmook,⁴⁹ Mel Henry,⁵⁰ Barry Creighton and myself. In the final analysis, the Peer One Project proved too complicated and/or ambitious for Peer Properties' organizational capacity at that time and it is no doubt a good thing that the project was abandoned rather than have it built and become a failure. Such a failure would certainly have been a black eye for Peer Properties and also a blow to Consumer run programs in Alaska, generally. Many people worked with good faith on the project and no one should be blamed that it was not completed. Nor should people cease working on providing housing for the very challenging population it was intended to serve. Peer Properties is willing to increase the housing it is providing, but only if there is sufficient capacity and operating support.

D. Legal: Law Project for Psychiatric Rights (PsychRights)⁵¹

PsychRights is a non-profit, tax exempt, 501(c)(3), public interest law firm whose mission is to bring fairness and reason into the administration of legal aspects of the mental health system, particularly unwarranted court ordered psychiatric drugging. Its purpose is to promote and implement a legal campaign in support of psychiatric rights and against unwarranted court ordered psychiatric medication akin to what Thurgood Marshall and the NAACP mounted in the 40's and 50's on behalf of African American civil rights. When one has a situation such as exists now in the mental illness system where entrenched and well-financed interests support an illegal system, litigation may very well be an essential element of reform.⁵²

In addition to myself, Don Roberts and Chris Cyphers serve on its board of directors.⁵³ I donate all my services *pro bono publico*.

(1) Development

Prior to reading *Mad in America*, while I had a general sense of what was happening with Forced Drugging, I didn't feel I had anything in particular to contribute. In addition to *Mad in*

⁴⁹ Ms. Schmook's resume can be found at <http://choices-ak.org/grants/05TBGIOperating/ASchmookResume-9-24-04.pdf>.

⁵⁰ Dr. Henry's Resume can be found at <http://peerproperties.org/grants/05TBGI/MHenryResume.pdf>.

⁵¹ Since this Report is about Alaska efforts, PsychRights' efforts in other states is not covered.

⁵² The article How the Legal System Can Help Create a Recovery Culture in Mental Health Systems, which can be found at <http://psychrights.org/Education/Alternatives05/RoleofLitigation.pdf> describes in some detail how strategic litigation, combined with influencing public opinion and the creation of alternatives to medication is a key component in system change.

⁵³ Bios of the board of directors and other key personnel can be found at <http://psychrights.org/about.htm>.

America being a great book, to me it was a litigation roadmap for marshalling the scientific evidence against Forced Drugging. It turned out the NARPA conference that November, 2002, included as keynote speakers: (1) Bob Whitaker, the author of *Mad in America*, (2) Loren Mosher, M.D., of Soteria House fame, and (3) Professor Michael Perlin, the author of "the" treatise on mental health disability law and over 150 legal articles on the subject.

I wrote the articles Unwarranted Court Ordered Medication: A Call to Action,⁵⁴ and Psychiatry: Force of Law,⁵⁵ attended the November 2002, NARPA conference and arranged for an off-agenda presentation.⁵⁶ There I met Mr. Whitaker, Dr. Mosher and Michael Perlin. Mentioned above is bringing Bob Whitaker to Alaska in December, 2002. I also asked him to send me all of the articles cited in *Mad in America*. These articles were scanned and posted on the Internet to make them more accessible, and particularly so other attorneys could download and attach them as exhibits when fighting Forced Drugging cases.⁵⁷

(2) Finances

PsychRights has a general policy against taking government funding because it is felt one can not seriously challenge what the government is doing with its money. This has certainly proven to be true with respect to other government funded attorneys in the arena. However, because of the unique nature of the Trust Authority, \$5,000 in funding has been accepted from it to help present a seminar on Mental Health Disability Law in September of 2003 by Professor Perlin and Robert Whitaker⁵⁸ and a \$10,000 Small Project grant for representation expenses, such as filing fees, deposition costs, expert witness fees, etc. Otherwise, PsychRights is entirely sustained by private donations.⁵⁹ PsychRights submitted a TBGI systems change grant application to fund one attorney and assistant, which was not awarded.⁶⁰ PsychRights' finances are completely transparent, with financial information being posted at <http://psychrights.org/about.htm>.

(3) The Role of Litigation for System Change

Litigation as a means for changing systems is a proven strategy. The civil rights litigation by Thurgood Marshall and the NAACP in the 1950's and '60's overturning segregation is a classic example. In Alaska, in addition to the Mental Health Trust Lands litigation, we have had the Molly Hootch case for rural education and the Cleary case for prison administration. In situations such as currently exists with our mental illness system, where governmental policies are supported by large economic interests, litigation is often a necessary element in eliminating the abuses.

⁵⁴ <http://psychrights.org/calltoaction.htm>.

⁵⁵ http://psychrights.org/force_of_law.htm.

⁵⁶ PsychRights provided a number of free copies of *Mad in America* to people who could not afford to purchase it, which helped with attendance.

⁵⁷ <http://psychrights.org/Research/Digest/Chronicity/NeurolepticResearch.htm>

⁵⁸ See, <http://psychrights.org/Education/ak03CLE/Brochure.htm>.

⁵⁹ Regular financial statements may be found at <http://psychrights.org/about.htm#financial>.

⁶⁰ The operating grant application can be found at <http://psychrights.org/grants/05tbgi/PsychRightsOperating.htm> and the companion capital grant application at <http://psychrights.org/grants/05tbgi/PsychRightsCapital.htm>.

The Introduction mentions that Forced "Treatment" proceedings are essentially a sham. This is well known to those involved. Psychiatrists, with the full understanding and tacit permission of the trial judges, regularly lie in court⁶¹ to obtain involuntary commitment and forced medication orders:

[C]ourts accept . . . testimonial dishonesty, . . . specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." . . .

Experts frequently . . . and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment . . .

This combination . . . helps define a system in which (1) dishonest testimony is often regularly (and unthinkingly) accepted; (2) statutory and case law standards are frequently subverted; and (3) insurmountable barriers are raised to insure that the allegedly "therapeutically correct" social end is met . . . In short, the mental disability law system often deprives individuals of liberty disingenuously and upon bases that have no relationship to case law or to statutes.⁶²

The psychiatric profession explicitly acknowledges psychiatrists regularly lie to the courts in order to obtain forced treatment orders. E. Fuller Torrey, M.D., one of the most outspoken proponents of involuntary psychiatric "treatment" says:

It would probably be difficult to find any American Psychiatrist working with the mentally ill who has not, at a minimum, exaggerated the dangerousness of a mentally ill person's behavior to obtain a judicial order for commitment.⁶³

Dr. Torrey goes on to say this lying to the courts is a good thing. Dr. Torrey also quotes psychiatrist Paul Applebaum as saying when "confronted with psychotic persons who might well benefit from treatment, and who would certainly suffer without it, mental health professionals and judges alike were reluctant to comply with the law," noting that in "'the dominance of the commonsense model,' the laws are sometimes simply disregarded."⁶⁴

⁶¹ This is perjury, a crime.

⁶² "The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?" by Michael L. Perlin, *Journal of Law and Health*, 1993/1994, 8 JLHEALTH 15, 33-34

⁶³ Torrey, E. Fuller. 1997. *Out of the Shadows: Confronting America's Mental Illness Crisis*. New York: John Wiley and Sons. 152.

⁶⁴ In other words, "we can't let people's rights get in the way of us doing to them what we know is good for them."

It is also well known that:

Traditionally, lawyers assigned to represent state hospital patients have failed miserably in their mission.⁶⁵

The sham nature of Forced "Treatment" proceedings, supported by the meretricious and overwhelming financial juggernaut of the pharmaceutical industry, has resulted in Forced Drugging being by far the "path of least resistance."⁶⁶ In the *Myers* case described below, Dr. Loren Mosher testified by affidavit that as a therapeutic principle, "Involuntary treatment should be difficult to implement and used only in the direst of circumstances".⁶⁷ PsychRights' goal is to accomplish this therapeutic goal by making Forced "Treatment" more trouble than the more helpful alternatives that are currently eschewed. In that way, PsychRights hopes to create an environment in which these more helpful, more humane alternatives can flourish.

Of course, to the extent the system recognizes people have the right to decline medication⁶⁸ and provides the choices to which they are entitled before they can legally be forced to take these drugs, litigation would/will not be necessary. In the absence of this, however, there has been some litigation already undertaken and other contemplated.

(4) Undertaken Litigation

(a) Myers -- Forced Drugging

PsychRights' first case, *Myers v. Alaska Psychiatric Institute*,⁶⁹ directly challenging Alaska's Forced Drugging procedures, was decided by the Alaska Supreme Court on June 30, 2006.⁷⁰ In *Myers*, the trial court, after receiving expert testimony from Dr. Loren Mosher and Grace Jackson, as well as the State's psychiatrists, found as a factual matter:

⁶⁵ *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, Michael L. Perlin, Houston Law Review, 28 Hous. L. Rev. 63 (1991).

⁶⁶ While court ordered involuntary psychiatric drugging is the most dramatic, coercion to take these harmful drugs is pervasive. As mentioned before, people are told they will not get or will lose their housing if they don't "comply." Other services will be denied. People will be "violated" on parole (i.e., sent back to prison to complete their sentences) if they do not comply. Children are taken away from their parents if they are not given drugs. Children are taken away from parents if the parent(s) don't take the drugs and then they are taken away because the parent takes the drugs and becomes too mentally ill. And, of course, all of the current financing systems are primarily for medications.

⁶⁷ See, <http://psychrights.org/States/Alaska/CaseOne/30-Day/ExhibitRLRMosherAff.htm>.

⁶⁸ One normally sees this phrased as the right to "refuse" medication, but I find that a misleading and pejorative term that assumes exercising the right is a bad thing. People have the right to decline a medication recommendation and it should be phrased that way, in my view.

⁶⁹ See, <http://psychrights.org/States/Alaska/CaseOne.htm> for more information on this case, including the briefs and transcripts of some of the hearings. A video of the oral argument before the Alaska Supreme Court is also available upon request.

⁷⁰ 138 P.3d 238. A copy of the Decision is available at <http://psychrights.org/States/Alaska/CaseOne/MyersOpinion.pdf>.

[T]here is a real and viable debate among qualified experts in the psychiatric community regarding whether the standard of care for treating schizophrenic patients should be the administration of anti-psychotic medication

and

[T]here is a viable debate in the psychiatric community regarding whether administration of this type of medication might actually cause damage to her or ultimately worsen her condition

yet ordered involuntary drugging because the relevant statute only requires a finding of incompetence to decline the medication.⁷¹ We argued the Alaska and US constitutions require at least that there must be a finding the medication is in the person's best interest. More importantly for changing the system, we also argued involuntary medication can only be constitutionally administered if no less restrictive alternative could be offered.

The Alaska Supreme Court agreed, holding:

[B]efore a state may administer psychotropic drugs to a non-consenting mentally ill patient in a non-emergency setting, an independent judicial best interests determination is constitutionally necessary to ensure that the proposed treatment is actually the least intrusive means of protecting the patient.⁷²

This decision, of course, is very good. It respects people's rights and has created the legal foundation for the creation of alternatives by not allowing people to be locked up and forcibly drugged as easily as they are now. However, this is not enough. As discussed above, people's rights in these types of proceedings are dishonored as a matter of course. Unless legal rights are honored, the only impact of the *Myers* decision is likely to be the addition of two sentences to the forced drugging petition forms and court orders reciting it is in the person's best interests and there is no less restrictive alternative available. In order for *Myers* to be meaningful people need at least a reasonable level of legal representation.

(b) Wetherhorn -- Ineffective Assistance of Counsel

The *Wetherhorn* appeal is primarily about such representation, although there are a couple other issues in the case.⁷³ If people actually had vigorous representation, only a small fraction of those currently subjected to Involuntary Commitment and Forced Drugging would lose their cases. We are hoping to establish some minimum standards for the performance of counsel, and also that people are entitled to have an "expert witness" paid for, because without an "expert witness" to counter the state's "expert witness" (the psychiatrist), it is not a fair process. Other issues include the legally insufficient nature of the proceedings and the unconstitutionality of part of Alaska's "gravely disabled" grounds for Involuntary Commitment. We are also attempting to establish the right to attorneys fees in the event the State does not prevail on its petition(s) for involuntary commitment and/or forced drugging because if we can do so, it will

⁷¹ See, <http://psychrights.org/States/Alaska/CaseOne/30-Day/Order.pdf>, pages 8 and 13.

⁷² 138 P.3d at 250.

⁷³ More information on this case can be found at <http://psychrights.org/States/Alaska/CaseFour.htm>.

encourage members of the private bar to take some of these cases and adequately represent their clients.

(c) Bavilla -- Forced Drugging in Prison

In the *Bavilla* case, which challenges the procedures for Forced Drugging in prison, the Alaska Department of Corrections admitted to facts constituting violations of the United States Constitution.⁷⁴ However, the trial court dismissed the case on sovereign immunity grounds, meaning we should have sued the Commissioner of the Department of Corrections, rather than the state. It is very unclear the judge was correct about this, but we had successfully prevented Ms. Bavilla's Forced Drugging up to that point, the prison was putting intense pressure on her in its attempt to "break" her, and Ms. Bavilla declined to file an appeal or recommence the case. However, at an opportune time when we have the resources and a client, we have the admissions of the State regarding their illegal procedures and can commence a new case challenging Forced Drugging in prison here.

(5) Prospective Litigation

We also have a number of prospective issues identified for system changing litigation.

(a) Kids in Custody/Out of State Placements

The state takes custody of a large number of children, and is paying for over 400 in out of state facilities.⁷⁵ Based on what is happening in other states, one can assume well over half are being subjected to psychiatric drugging. Polypharmacy, which has never been approved, is rampant with kids as well as adults and most of the drugs have never even been approved for pediatric use. We know these drugs create structural changes in the brain,⁷⁶ but no one has any idea what these drugs are doing to the developing brains of our children. Whenever children are given drugs, they are being Force Drugged because they have no choice. It is especially egregious that those responsible for the well-being of children are blaming the children and subjecting them to the horrors of psychiatric drugging. When the resources are available to litigate, an appropriate case to challenge child in custody drugging practices may present itself. For example, is it legal for the state to drug kids in its custody with drugs that are not approved for pediatric use?

⁷⁴ More information on this case can be found at <http://psychrights.org/States/Alaska/CaseThree.htm>.

⁷⁵ See, <http://www.mhtrust.org/documents/BringtheKidsHome.pdf>. The Trust has instituted a "Bring the Kids Home" initiative, but if that just means locking them up and drugging them in Alaska, rather than somewhere else, it is not a real solution.

⁷⁶ In fact most of the neuroimaging used by proponents of the drugs for the proposition that people with mental illness have brain differences really show the effects of the drugs. See, e.g., Broken Brains or Flawed Studies? A Critical Review of ADHD Neuroimaging Research, by Jonathon Leo and David Cohen, *The Journal of Mind and Behavior*, Winter 2003, Volume 24, Number 1, pp 29-56, which can be accessed at <http://psychrights.org/Research/Digest/NLPs/criticalreviewofadhd.pdf>.

(b) In-State Residential Treatment Centers

In addition to kids who are in out of state residential treatment centers, many children are drugged on inpatient units or other residential settings in Alaska. North Star here in Anchorage is notorious for heavily drugging kids and engaging in polypharmacy. An appropriate case to challenge such practices when the resources are available to do so may present itself at any time. For example, is it child abuse to medicate kids with drugs that are not approved for pediatric use in the way it is now done?

(c) Elder Drugging Abuses

It has become increasingly common around the country for the elderly to be so medicated they can't get out of bed. It is likely that this occurs in Alaska also and an appropriate case may present itself when resources are available.

(d) Informed Consent

A choice to take psychiatric drugs is truly voluntary only if people are told the truth about the drugs. This is called informed consent. The truth, however, is uniformly not told, which constitutes a lack of informed consent. Alaska has a relatively explicit statute on informed consent in an inpatient setting.⁷⁷ We have had a complaint against API drafted for over two years now waiting for a suitable plaintiff.⁷⁸

(6) 42 USC 1983 Civil Rights Action(s)

Under the federal law, 42 USC §1983, it is illegal for anyone "acting under color of law" to deprive someone of their legal rights.⁷⁹ This law grants the right to injunctions and damages. In other words, API and its psychiatrists are liable for the way they violate the rights of their patients and an injunction against such violations should be available.⁸⁰ To the extent these illegal behaviors are not corrected through the other efforts outlined here, resort "Section 1983" in federal court to seek redress will be indicated. Challenging forced drugging in Alaska's prisons, for example, might be brought as such a civil rights case.

(7) Ethics Complaints.

It is apparent that the public defenders assigned to represent psychiatric respondents in Involuntary Commitment and Forced Drugging cases are violating their ethical obligations. If

⁷⁷ See, AS 47.30.837, which can be accessed at

<http://touchngo.com/lglcntr/akstats/Statutes/Title47/Chapter30/Section837.htm>.

⁷⁸ See, <http://psychrights.org/States/Alaska/CaseTwo/draftInformedConsentComplaint.htm>.

⁷⁹ This is a simplification and more information about "Section 1983" rights can be found at <http://psychrights.org/Research/Legal/1983/1983.htm>.

⁸⁰ Yesterday PsychRights filed a Reply re: Motion for Attorney's Fees, which detail such illegal deprivation of rights in that case. This can be found at <http://psychrights.org/States/Alaska/CaseFour/AttysFees/attyFeeReply.pdf>. It is apparent such violations of rights are pervasive at API.

other means to obtain effective representation are not successful, it is likely ethics complaints will be filed.

(8) Strategy/Attorney Recruitment

The cases described above are designed to set precedent and consequently be system changing in that way. In addition to this, however, just having one serious representation of an API inmate⁸¹ per week, or even per month will substantially increase demands on state resources to involuntarily commit and Force Drug its inmates. In other words, make Forced "Treatment" not necessarily the path of least resistance. Serious representations involve depositions of the psychiatrist(s) and other treating personnel as well as potentially other witnesses, filing motions, etc. I make it a practice to elect the hearing be held in a real courtroom under AS 47.30.735(b)⁸² and, in my view, a jury trial should be demanded under AS 47.30.745(c)⁸³ for every 90-day commitment petition. The trials should last at least hours, if not days, rather than the approximately 15 minutes they do now. Objections should be made to unfavorable Probate Master recommendations.⁸⁴ Requests for emergency stays against Forced Drugging should be made.⁸⁵ Appeals should be taken when appropriate.⁸⁶ In 2004, I met with the Public Defender and the Assistant Public Defenders who normally handle these cases.⁸⁷ I gave them copies of *Mad in America* and informed them what I thought it took to adequately represent psychiatric defendants. It does not appear anything changed and when the opportunity arose, PsychRights appealed an involuntary commitment and Forced Drugging Order to try and obtain more than sham representation.⁸⁸

I think it is fair to say the all-out, four month legal battle that was the *Myers* case at the trial court⁸⁹ has had at least a minor impact. I have gotten people out or stopped Forced Drugging with a phone call or an e-mail in a few situations since then by suggesting the person

⁸¹ The American Heritage Dictionary, Fourth Edition, defines "inmate" as "A resident of a dwelling that houses a number of occupants, especially a person confined to an institution, such as a prison or hospital."

⁸² See, <http://www.touchngo.com/lglcntr/akstats/Statutes/Title47/Chapter30/Section735.htm>.

⁸³ See, <http://www.touchngo.com/lglcntr/akstats/Statutes/Title47/Chapter30/Section745.htm>.

⁸⁴ Under Alaska Statutes, the State must go to the Superior Court for involuntary commitment and Forced Drugging Orders. However, under the Alaska Court Rules, they can be assigned to a "Master" to conduct the hearings. (See, Alaska Probate Rule 2 & 2(b)(2)(C), which can be accessed at <http://www.state.ak.us/courts/prob.htm#2>. The Master, however, has limited authority, which is primarily to make recommendations that have to be approved (or not) by a Superior Court judge. The recommendations can be objected to (See, Probate Rule (2)(e)&(f)). It appears these recommendations are virtually never, if ever, objected to by the Public Defenders.

⁸⁵ Under Alaska Probate Rule 2(b)(3)(D), a Master's Forced Drugging order is effective prior to approval by the Superior Court, but under Alaska Probate Rule 2(f)(2) a stay may be requested. I question whether it is proper to make a Forced Drugging recommendation effective without a proper Superior Court order and this is a possible subject of appeal.

⁸⁶ An example of the lack of representation provided by the Public Defenders office is they have never appealed any involuntary commitment or Forced Drugging order.

⁸⁷ A copy of the discussion points for this meeting is available at <http://psychrights.org/states/Alaska/CaseFour/PDONotes.pdf>.

⁸⁸ See, <http://psychrights.org/States/Alaska/CaseFour.htm>.

⁸⁹ See, <http://psychrights.org/States/Alaska/CaseOne.htm>.

did not meet the legal criteria in a way that let the hospital know I would be getting involved in the case if they proceeded. If even a relatively small number of cases were vigorously defended, it could go a long way toward changing the "path of least resistance" to support choice.

There is, of course, a limit to what I can do by myself.

(a) Alaska *Pro Bono* Program

The Alaska Bar Association has a program to recruit *pro bono* attorneys to represent indigent people or people who otherwise can not afford legal representation. We have established contact with the Alaska *Pro Bono* Program, but time constraints have limited my ability to follow-up.

(b) Private Bar

In my view, psychiatrists and organizations who are harming people through their prescribing practices, including not telling the truth about the drugs, should be held accountable for such harm. The Internal Revenue Service does not consider damages cases (suing for money) to be a "charitable activity" appropriate for PsychRights and has indicated if I took such cases in my own law practice they would consider that I was using PsychRights' tax exempt status to further my own financial interests. In essence, I am prohibited from representing people in such cases. However, I can encourage and even assist other members of the private bar to do so.

(c) Attorney's Fees.

In the Wetherhorn case, which is an involuntary commitment and Forced Drugging case, we are asking for enhanced or full attorney's fees to try and establish that as a precedent as a way to discourage API's illegal practices and encourage other attorneys to take these cases.⁹⁰

(9) Educational Programs

Part of PsychRights' program is to provide information and education to attorneys, mental health system personnel, and the public.

(a) Website

PsychRights' website is very deep with information, including posting full articles and studies for use by attorneys and other people. Its Scientific Research by Topic⁹¹ and Articles⁹² web pages are particularly replete with important information from accepted sources. There are many other sections of the website, which is hopefully organized in a user-friendly manner and includes a section with information about various states.⁹³

⁹⁰ See, <http://psychrights.org/states/Alaska/CaseFour/FeeAppeal/Brief.pdf>.

⁹¹ <http://psychrights.org/Research/Digest/Researchbytopic.htm>.

⁹² <http://psychrights.org/Articles/articles.htm>.

⁹³ <http://psychrights.org/States/States.htm>.

(b) Mental Health Disability Law Conference

In September of 2003, with support from the Trust Authority, PsychRights brought up Robert Whitaker, author of *Mad in America*, and Professor Michael Perlin for a two day seminar on Mental Health Disability Law.⁹⁴ This seminar was well attended with a mix of mental health providers, mental health lawyers, judges and psychiatric survivors participating.

VII. FINAL THOUGHTS, ACKNOWLEDGMENTS, AND PERSONAL NOTES

This Report seems far too much "me, me, me," "I did this" and "I did that" and I fear it doesn't adequately credit all of the other terrific people who have been tirelessly working on these issues and projects, such as Michele Turner, Susan Musante, Andrea Schmook, Barry and Cathy Creighton, Eliza and Ted Eller, George Stone, Dr. Aron Wolf, Alma Menn, Mel Henry, Carl Ipock, Kelly Behen and Scot Wheat, Don Roberts, Esther Hopkins, Jamie Dakis, Roslyn Wetherhorn, Aleen Smith, Jerry Jenkins and Richard Rainery. I have no doubt failed to mention people that I should have.

I hope this Report conveys the urgency of addressing the situation. The scale of harm being done every day is enormous. Having become aware of this great harm, I am personally unwilling to stand by and am resolved to do everything I can to reduce, or better yet, eliminate it. The gross violations of rights contribute greatly to the problem, because it is the initial involuntary commitment and Forced Drugging that channel so many people into lifelong disability, largely caused by the debilitating drugs they are authoritatively, but erroneously told they must take for the rest of their lives. The failure of the system to address the problem reminds me of the reaction of the Alaska State Legislature in the late 70's when we told them, their "redesignation" (theft) of Mental Health Trust Lands was illegal. Their response was essentially "We don't care if it is illegal -- sue us." We did. This situation is far more important.

Of course, litigation is not a goal, it is a means to achieve a goal -- the goal of honoring people's right to choose a non-medication alternative to drugs that so many find debilitating, harmful and counter-productive. Instead of litigation, it is greatly preferable to work cooperatively towards achieving this goal. CHOICES and Soteria-Alaska are directly aimed at achieving this goal with Peer Properties playing more of a supporting role. It is my fervent hope we can begin taking these enormously important actions sooner rather than later. The stakes are too high, the human toll too great, to fail to do so.

⁹⁴ See, <http://psychrights.org/Education/ak03CLE/Brochure.htm>.

VIII. GLOSSARY

- "ACMHS" stands for Anchorage Community Mental Health Services, also known as Southcentral Counseling Center.
- "AHFC" stands for the Alaska Housing Finance Corporation.
- "Alaska Mental Health Board" is "the planning and coordinating agency for the purposes of federal and state laws relating to the mental health program of the state of Alaska. The purpose of the board is to assist the state in ensuring an integrated comprehensive mental health program." *See*, AS 47.30.661, which can be accessed at <http://www.touchngo.com/lglcntr/akstats/Statutes/Title47/Chapter30/Section661.htm>. The Alaska Mental Health Board is one of the four boards which provide funding recommendations to the Alaska Mental Health Trust Authority. *See*, AS 47.30.666, which can be accessed at <http://www.touchngo.com/lglcntr/akstats/Statutes/Title47/Chapter30/Section666.htm>.
- "Alaska Mental Health Trust Authority" *See* "Trust Authority" below.
- "API" stands for the Alaska Psychiatric Institute, which is the sole state psychiatric hospital.⁹⁵
- "Beneficiaries" means the beneficiaries of the Mental Health Lands Trust, which include (1) the mentally ill, (2) the mentally defective and retarded, (3) chronic alcoholics suffering from psychoses, and (4) senile people who as a result of their senility suffer major mental illness.⁹⁶
- "Budget Summit Report" is the report by the Budget Committee of the Alaska Mental Health Board, adopted by the full board in August of 2003. *See*, <http://akmhweb.org/Docs/AMHB/2003BudgetSummitReport.pdf>.
- "Consumer" means someone who is or has received mental health services, normally after being diagnosed with a serious mental illness.
- "Consumers Consortium" is the statewide group consisting of all Consumer run programs in the state. *See*, <http://akmhweb.org/Announcements/2002rfr/consortiumproposals.htm> for its initial set of proposals to the Alaska Mental Health Board.
- "Corpus" as employed herein is the principal amount of the Trust's endowment, as contrasted to the earnings or income. The corpus is not to be spent.

⁹⁵ There are, however, some "designated beds" in other hospitals and psychiatric units at other hospitals in Anchorage, Fairbanks and Juneau.

⁹⁶ *See*, AS 47.30.056(b)&(c), which can be accessed at <http://www.touchngo.com/lglcntr/akstats/Statutes/Title47/Chapter30/Section056.htm>. *See*, also http://mhtrust.org/index.cfm?section=about_trust&page=Beneficiaries.

- "C/S/X" stands for Consumers of mental health services, Survivors of Psychiatry and eX-psychiatric patients and refers to people who have received mental health treatment. There has never been a consensus on what term should be used. Other terms that have been used include "users," "recipients," "patients," and "psychiatrized." In Alaska, because of the Mental Health Lands Trust, they are often called "beneficiaries."
- "Department" means the Alaska Department of Health and Social Services.
- "Mental Health Board." *See* Alaska Mental Health Board.
- "Mental Health Lands Trust Litigation" refers to the 15 year long litigation over the state of Alaska's "redesignation" (theft) of the one million acres of land granted to it in trust for Alaska's mental health program. <http://www.touchngo.com/lglcntr/spclint/mht.htm>.
- "MHAAK" stands for Mental Health Advocates of Alaska, a new member organization for Consumers intended to have substantial statewide membership.
- "NAMI" stands for the National Association for the Mentally Ill, which touts itself as "the Nation's Voice on Mental Illness." NAMI was founded by parents of people diagnosed with serious mental illness, is heavily financed by the pharmaceutical industry and vigorously pushes for more Forced Drugging.
- "NAMI-Alaska" is the statewide Alaska affiliate of NAMI. A majority of its board is currently Consumers, which allows it to access funding for Consumer run programs. NAMI-Alaska, as most of NAMI's affiliates, does not understand the extent to which NAMI is controlled by pharmaceutical funding nor the extent to which NAMI pushes Forced Drugging.
- "NARPA" stands for National Association of Rights Protection and Advocacy. *See*, <http://www.narpa.org/>.
- "Polypharmacy" is defined as the use of several drugs or medicines together in the treatment of disease, suggesting indiscriminate, unscientific, or excessive prescription. *See*, <http://classes.kumc.edu/som/amed900/polypharmacay/polypharmdrug.htm>.
- "Rasmuson Foundation" is the largest private foundation in Alaska and has made a number of mental health related grants. *See*, <http://rasmuson.org/>.
- "RECA" stands for Recovery Education Center for Alaska, which was formed to teach Mary Ellen Copeland's WRAP (Wellness Recovery Action Plan) program in Alaska. *See*, <http://copelandcenter.com/whatiswrap.html>.
- "RFP" means Request for Proposal, which is a notice of opportunity to apply for a grant.
- "Section 8 Vouchers" are United States Department of Housing and Urban Development low income housing subsidies.

- "SNHG" stands for Special Needs Housing Grant, which is funded by the Trust Authority and administered by the Alaska Housing Finance Administration.
- "Trust Authority" stands for the Alaska Mental Health Trust Authority, which was created in the settlement of the litigation over the Alaska Mental Health Lands Trust. *See*, <http://mhtrust.org/>.
- "TBGI" stands for Trust Beneficiary Group Initiative, which is an expansion by the Trust Authority of eligibility for funding of Consumer run programs formerly restricted to beneficiaries classified as mentally ill.
- "Trust Settlement" refers to the settlement of the litigation over the state of Alaska "redesignating" (i.e., "stealing") the one million acres of land granted in trust to Alaska's mental health program by the federal government. *See*, <http://www.touchngo.com/lglcntr/spclint/mht.htm>.

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



**IN RE ZYPREXA PRODUCTS
LIABILITY LITIGATION**

**AFFIRMATION OF
RICHARD D. MEADOW**

(04-MD-1596) (JBW)

X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD D. MEADOW, ESQ., an attorney duly admitted to the Courts of the State of New York and to the Eastern District of New York hereby affirms the following to be true under the penalties of perjury.

1. I am the Managing Attorney of The Lanier Law Firm, PLLC ("LLF"), which has been retained by Plaintiffs to prosecute claims against Defendant Eli Lilly & Company (hereinafter "Lilly" or "Defendant").

2. In August of 2006, I was recommended to be appointed to the Zyprexa II Plaintiffs' Steering Committee ("PSC II").

3. As of August 10, 2006, LLF had informally sought the expert consulting help of David Egilman, M.D., MPH ("Dr. Egilman"). Dr. Egilman sought access to the PSC database and on August 10, 2006, asked us to forward his signed confidentiality order to Blair Hahn at Richardson, Patrick, Westbrook and Brickman, LLP ("RPWB"), the law firm maintaining the PSC Zyprexa database). The e-mail request by Dr. Egilman is attached as Exhibit A. At this point, I believed that Dr. Egilman had executed a Protective Order.

4. Because we were in settlement discussions, LLF did not have Dr. Egilman do serious Zyprexa work at this time, though by late September we did send him documents on CDs.

5. By October 23, 2006, it became apparent that discovery was necessary because settlement discussions were ongoing but not adequately progressing. On such date, I then instructed Dr. Egilman to directly begin helping us. Dr. Egilman then sought access to the database. We were unable to locate Dr. Egilman's Protective Order referenced in his August 10, 2006 e-mail so I had him execute another one.

6. On November 10, 2006, Dr. Egilman sent over an executed Protective Order in which numerous and substantive deletions and edits were made. See Exhibit B, attached hereto. I contacted Dr. Egilman and conveyed the seriousness of the Protective Order, the reason it is required and the fact that he would need to re-execute another Protective Order without the edits he previously submitted.

7. On November 14, 2004, Dr. Egilman executed another Protective Order. See Exhibit C, attached hereto. On this Order, Dr. Egilman made one edit to the second paragraph of the form Protective Order in which he represented that he would abide by the Protective Order "unless this conflicts with any other sworn statements." I inquired of Dr. Egilman as to why he made this edit. Dr. Egilman explained that if he were to be subpoenaed by the FDA or Congress, he wanted to ensure that the Protective Order would not preclude providing testimony concerning Zyprexa. Since that explanation did not conflict with my understanding of the purposes behind the Protective Order, nor did it conflict with my understanding that the Protective Order would not – in any event – have precluded such testimony by Dr. Egilman, and because Dr. Egilman assured me that he understood the Protective Order, I accepted this Protective Order.

8. Thereafter, I communicated to the RPWB law firm that Dr. Egilman had executed a Protective Order, and, at some point in time thereafter, Dr. Egilman was granted access to the PSC-maintained database of Zyprexa-related discovery materials.

9. On December 13, 2006, I first learned that Dr. Egilman had been served with a document subpoena calling for the production of Zyrpexa-related documents on December 20, 2006. I spoke with Dr. Egilman and told him to "not do anything" (i.e. do not surrender documents). Dr. Egilman responded, "Yes. Ricky." It was not until later in the business day on December 15, 2006, that I first learned from reading Dr. Egilman's own narrative timeline that an amended subpoena had been issued by James Gottstein, Esq., calling for the production of Zyprexa-related documents prior to December 20, 2006. It was also on December 15, 2006 that I first learned that Dr. Egilman had produced the Zyprexa-related documents to the requesting party beginning on December 12, 2006.

10. The entirety of the facts surrounding the subpoena that was served upon Dr. Egilman, LLF's knowledge of the subpoena, and LLF's contemporaneous actions taken after learning about the subpoena are addressed in my December 15, 2006 letter to Lilly's counsel, Andrew Rogoff, Esq. That letter is annexed hereto as Exhibit D and all of the facts recited therein are hereby incorporated into this sworn statement.

11. Finally, after learning of Dr. Egilman's disclosure to Mr. Gottstein of documents on December 15, 2006, LLF demanded the return of all documents in his possession. We thereafter terminated his involvement as a consultant in this matter.

Dated: New York, New York

January 2, 2007


RICHARD D. MEADOW

EXHIBIT A

Richard D. Meadow

From: David Egilman [degilman@egilman.com]

Date: Thursday, August 10, 2006 4:05 PM

Richard D. Meadow

Subject: Send my zyprexa confidentiality order to bhahn@rpwb.com thanks

Egilman MD, MPH

Assistant Associate Professor Of Community Medicine

Harvard University

77 Avenue Louis Pasteur

Boston, Massachusetts 02115

degilman@egilman.com

Phone: 508-226-5091

Fax: 425-699-7033

Cell: 508-472-2809

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

MDL No. 1596

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ENDORSEMENT OF PROTECTIVE ORDER

I hereby attest to my understanding that information or documents designated Confidential are provided to me subject to the Protective Order ("Order") dated 8/3, 2004 (the "Protective Order"), in the above-captioned litigation ("Litigation"); that I have been given a copy of and have read the Order, and that I agree to be bound by its terms. I also understand that my execution of this Endorsement of Protective Order, indicating my agreement to be bound by the Order, is a prerequisite to my review of any information or documents designated as Confidential pursuant to the Order.

I further agree that I shall not disclose to others, except in accord with the Order, any Confidential Discovery Materials, in any form whatsoever, and that such Confidential Discovery Materials and the information contained therein may be used only for the purposes authorized by the Order, *unless this conflicts with any other sworn statements.*

I further agree to return all copies of any Confidential Discovery Materials I have received to counsel who provided them to me upon completion of the purpose for which they were provided and no later than the conclusion of this Litigation.

I further agree and attest to my understanding that my obligation to honor the confidentiality of such discovery material will continue even after this Litigation concludes.

I further agree and attest to my understanding that, if I fail to abide by the terms of the Order, I may be subject to sanctions, including contempt of court, for such failure. I agree to be subject to the jurisdiction of the United States District Court, Eastern District of New York, for the purposes of any proceedings relating to enforcement of the Order.

I further agree to be bound by and to comply with the terms of the Order as soon as I sign this Agreement, regardless of whether the Order has been entered by the Court.

Date:

11/11/06

By:

Dial Gil

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

2 -----x

IN RE:

3
4 ZYPREXA LITIGATION,

5 MDL 04 1596

6 United States Courthouse
Brooklyn, New York

7 -----x

8 January 16, 2007
2:00 p.m.

9
10 TRANSCRIPT OF HEARING

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

12 APPEARANCES

13 Attorneys for Plaintiff:

14 DOUGLAS & LONDON, ESQ.

111 John Street

15 Suite 1400

New York, N.Y. 10038

16 BY: MICHAEL A. LONDON, ESQ.

17 THE MILLER FIRM

18 The Sherman Building

108 Railroad Avenue

19 Orange, Virginia 22960

BY: MICHAEL J. MILLER, ESQ.

20
21
22 FRED VON LOHMANN, ESQ.

Attorney for Electronic Frontier Foundation

23 454 Shotwell Street

San Francisco, Ca 94110

1 Attorneys for Defendant:
2 PEPPER HAMILTON
Attorney for Eli Lilly
3 3000 Two Logan Square
Eighteenth and Arch Streets
4 Philadelphia, Pa 19103-2799
BY: SEAN P. FAHEY, ESQ.
5 GEORGE A. LEHNER, ESQ.
NINA M. GUSSACK, ESQ.
6 ANDREW R. ROGOFF, ESQ.
7
8
9 McCARTER ENGLISH
Attorneys for Eli Lilly & Company
10 245 Park Avenue
New York, N.Y. 10167
11 BY: SAMUEL J. ABATE, JR., ESQ.
12
13 SHERMAN, SILVERSTEIN, KOHL, ROSE & PODOLSKY
Attorneys for Vera Sharav, David Cohen, AHRP
14 4300 Haddonfield Road
Suite 311
15 Pennsauken, New Jersey 08109
BY: ALAN C. MILSTEIN, ESQ.
16
17
18 KOOB & MAGOOLAGHAN
Attorneys for Dr. Eagleman
South Street Seaport
19 19 Fulton Street
New York, N.Y. 10038
20 BY: ALEXANDER A. REINERT, ESQ.
21
22 EDWARD HAYES, ESQ.
Attorney for Mr. Gottstein
23
24 JOHN McKAY, ESQ.
Attorney for Mr. Gottstein
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Allan R. Sherman, CSR, RPR
225 Cadman Plaza East
Brooklyn, New York 11201
Tel: (718) 260-2529 Fax: (718) 254-7237

Proceedings recorded by mechanical stenography, transcript
produced by computer.

THE COURT: Mr. McKay, are you admitted in this
district?

MR. McKAY: Your Honor, I have a pro hac vice
application. I have the certificate with me and the check
but.

THE COURT: Mr. John McKay is admitted for the
purposes of this case. We're very pleased to have such a
distinguished attorney join us here.

MR. McKAY: Thank you, your Honor.

THE COURT: Any other applications for admission.

MR. MILSTEIN: Alan Milstein.

THE COURT: You are admitted where?

MR. MILSTEIN: New Jersey, Pennsylvania, Southern
District of New York.

THE COURT: And you are applying for admission for
purposes of this case?

MR. MILSTEIN: Correct, your Honor.

THE COURT: You are admitted. We're very pleased to
have you.

MR. VON LOHMANN: Fred Von Lohmann of the Electronic

1 Frontier Foundation.

2 Your Honor was very kind enough to sign my
3 application last week.

4 THE COURT: Very pleased to have you. You are
5 admitted where?

6 MR. VON LOHMANN: Northern District of California,
7 Southern District of California, Ninth Circuit.

8 THE COURT: Has everybody who wishes a notice of
9 appearance done so?

10 THE CLERK: Civil cause for order to show cause In
11 Re Zyprexa Products Liability Litigation.

12 Do we have any counsel on telephone for
13 the 2:00 Zyprexa order to show cause?

14 MR. OAKS: I'm not counsel. This is David Oaks.
15 Our counsel is Ted Chabasinski.

16 THE COURT: Restate your name, sir.

17 MR. OAKS: My name is David Oaks, O A K S. I'm
18 director of MindFreedom International.

19 THE CLERK: Anyone else?

20 THE COURT: What is your attorney's name, sir?

21 MR. OAKS: Ted Chabasinski.

22 THE COURT: Spell it, please.

23 MR. OAKS: C-H-A-B-A-S-A-N -- I-N-S-K-I, I hope I
24 got it right.

25 Do you want to read that one back.

1 MR. CHABASINSKI: I'm on the line now. Who is
2 asking for this information?

3 THE COURT: The Court.

4 MR. CHABASINSKI: My name is spelled
5 C-H-A-B-A-S-I-N-S-K-I.

6 THE COURT: Are you admitted in this district?

7 MR. CHABASINSKI: I've been appearing in this matter
8 for several hearings now.

9 THE COURT: Where are you admitted?

10 MR. CHABASINSKI: I'm admitted to practice in all
11 courts in California including the federal courts but my
12 participation has not been questioned up to now.

13 THE COURT: You are admitted for the purposes of
14 this case. We're pleased to have you.

15 MR. CHABASINSKI: Is this Judge Weinstein speaking?

16 THE COURT: It is.

17 When any of you speak, would you please give your
18 name and the people who are present here will do the same so
19 that you'll know who is speaking and I'll try to do the same
20 because we have a reporter.

21 Whose application is this?

22 MR. FAHEY: Your Honor, it's our application for an
23 order to show cause with respect to Mr. Gottstein's deposition
24 and connected document production.

25 THE COURT: Is Mr. Gottstein present?

1 MR. GOTTSTEIN: Yes, your Honor.

2 MR. McKAY: Your Honor, I am Mr. Gottstein's
3 attorney.

4 THE COURT: Yes, I know, but he is present
5 physically?

6 MR. McKAY: Yes.

7 THE COURT: We're going to take evidence as needed
8 on this matter.

9 Now, since he has come down to New York, I suggest
10 that it might be useful to either have him give his deposition
11 today and tomorrow morning or skip the deposition and have him
12 testify and we'll take his testimony as part of the deposition
13 and direct testimony so that he is saved the inconvenience of
14 either having to come down twice or having to also give a
15 deposition in Alaska.

16 MR. McKAY: May I speak to that, your Honor?

17 THE COURT: Yes.

18 MR. McKAY: I realize that everybody has been
19 leaving you with I don't know if it's a lot of paper.

20 THE COURT: Give you name.

21 MR. McKAY: This is John McKay speaking, attorney
22 for Jim Gottstein.

23 Your Honor, may I ask if you have had a chance to
24 review the response to the order to show cause by Mr.
25 Gottstein?

1 THE COURT: I have read everything that has come
2 into the courthouse.

3 MR. MCKAY: Thank you. Then I appreciate
4 your Honor's suggestion concerning the deposition and perhaps
5 no need to do that and I guess what I was going to suggest is
6 that I believe our position is that by the end of the hearing
7 today on the injunction, which was the principal purpose for
8 this, that it may appear that there is no reason to go further
9 and that we can take up at that point whether there is any
10 need to go any further with the proceedings.

11 THE COURT: As I understood your papers, you are
12 proposing to put Mr. Gottstein on the witness stand.

13 MR. MCKAY: If need be, your Honor. I think their
14 burden is to establish that there was a violation that there
15 was an injunction that is appropriate. If we need to, we
16 will.

17 THE COURT: He is here, they can call him.

18 Since the burden is on Lilly, is there anything
19 you'd like to say before you proceed with your case?

20 MR. FAHEY: Your Honor, our request for the order to
21 show cause was for his deposition but it was also for
22 documents and the reason why we wanted the documents was
23 because up to this point the Court and the parties involved
24 are only in possession of documents that Mr. Gottstein has
25 chosen to provide the Court and the parties.

1 We believe that there are a number of communications
2 which he has disclosed in his writings which he has not
3 produced which would shed additional light on the issues
4 relating to his aiding and abetting Dr. Eagleman's breach of
5 case management order number 3.

6 While we believe the documentary evidence we
7 submitted prior to this hearing and which we could elicit
8 today would clearly demonstrate that Mr. Gottstein aided and
9 abetted Dr. Eagleman, we do not want to or we'd like to
10 reserve the right to have additional documents to further show
11 the full nature of Mr. Gottstein's contempt.

12 THE COURT: You do have a considerable number of
13 documents already. I suggest that you may want to just call
14 him as a witness and ask him about the other documents and if
15 there is a critical document, I suppose we can have it faxed
16 down or provide for it, but I'd rather proceed quickly with
17 this matter.

18 MR. McKAY: John McKay.

19 I understand there is speculation that there
20 possibly is something that might help their case but I can
21 tell you I know of nothing and so I think we can proceed as
22 you suggested and if there appears there is something that is
23 necessary, we can deal with that.

24 THE COURT: Then we'll proceed with the hearing.
25 This is an evidentiary hearing. Lilly will proceed. It has

1 the burden of proof.

2 MR. LEHNER: Thank you, your Honor.

3 This is George Lehner for Pepper Hamilton on behalf
4 of the defendant Eli Lilly and we are proceed to proceed.

5 The issue that is before the Court and that I will
6 address and which Mr. McKay suggested should be the first
7 issue we need to consider is whether or not the temporary
8 mandatory injunction that was entered first on December 29 by
9 Judge Cogan then extended and modified by this Court on
10 January 4th should be made permanent.

11 I believe the factual record for the continued basis
12 for the temporary injunction has been developed already
13 through a series of hearings before first Special Master
14 Woodin, Magistrate Mann and ultimately Judge Cogan. We have
15 for these proceedings submitted a proposed finding of fact
16 which outlines in detail the necessary factual predicate for
17 making this injunction permanent. Much of the material
18 findings of fact are documents and letters that have been
19 previously submitted to the Court. In addition, there is an
20 affidavit from the law firm, from the Lineer law firm which
21 initially retained Dr. Eagleman. And it is important to note
22 I think in the outset that the application for the injunction
23 that has been made and that is before you today is made on
24 behalf of both Lilly and the plaintiffs' steering committee
25 both of whom are party to the protective order that has been

1 violated in this case and both of them recognize the
2 fundamental interests at stake when what happened here,
3 private parties affirmatively choose to subvert and order of
4 this Court and to decide to take the law into their own hands
5 to advance their own private agenda.

6 Let me review briefly the facts that have been
7 developed to date. Then we would call Mr. Gottstein to
8 testify.

9 As the Court knows, and as I just noted, Dr.
10 Eagleman was retained by the Lineer law firm --

11 THE COURT: I have read all the papers. You now
12 have the burden of proof. If you are going to introduce
13 documents, you'll have to do it in the regular course. If you
14 are going to call witnesses, you are going to have to do it.

15 I don't really need at this point, having read all
16 of the submissions, an opening statement.

17 MR. LEHNER: Then I think we would be prepared to
18 call Mr. Gottstein to the stand and have them testify as to
19 his involvement with Mr. Eagleman and his own involvement in
20 disseminating the documents that were subject to the
21 protective order.

22 So at this time we would call Mr. Gottstein to the
23 stand, please.

24 And if I might, I would turn the microphone over to
25 my colleague, Mr. Fahey, who will conduct the examination.

1 THE COURT: Would you take the stand.

2 THE WITNESS: May I can take notes, your Honor?

3 THE COURT: You may, however any notes you take will
4 be subject to inspection by the attorneys.

5 THE WITNESS: Thank you, your Honor.

6 THE COURT: Would you swear the witness.

7 THE CLERK: Would state your name for the record.

8 THE WITNESS: James V -- Jim Gottstein,
9 G-O-T-T-S-T-E-I-N.

10 JAMES V. GOTTSTEIN, having been called as a
11 witness, first being duly sworn, was examined and
12 testified as follows:

13 DIRECT EXAMINATION

14 BY MR. FAHEY:

15 Q Good afternoon, Mr. Gottstein.

16 My name is Sean Fahey.

17 You're an attorney, correct?

18 A That's correct.

19 Q And you graduated from Harvard Law School?

20 A Yes.

21 Q You are licensed from the State of Alaska?

22 A Yes.

23 Q You've been practicing as an attorney in Alaska for over
24 20 years, correct?

25 A Correct.

1 Q As an attorney you are also an officer of the Court,
2 correct?

3 A Absolutely.

4 Q And as an attorney and officer of the Court, you have an
5 obligation to be truthful to the Court, correct?

6 A Absolutely.

7 Q That is true when you use the Court's subpoena power,
8 right?

9 A Absolutely.

10 Q You would agree that the privilege to use the Court's
11 subpoena power sets attorneys apart from most other
12 professions?

13 A The subpoena power is very powerful and I understand it.

14 Q And as an attorney, you have an obligation when using the
15 subpoena power in terms of those privileges that our
16 profession provides, correct.

17 A Yes.

18 Q With that privilege comes responsibility, correct?

19 A Yes.

20 Q It would be wrong as an attorney or officer of the Court
21 to misuse the Court's subpoena power?

22 A Yes.

23 Q It would be wrong as an attorney and officer of the Court
24 to abuse the Court's subpoena power, correct?

25 A Yes.

1 Q As an attorney and officer of the Court, you also have an
2 obligation to be truthful when you speak to the Court during
3 hearings like this, correct?

4 A Yes.

5 Q And during the hearing that you testified with Magistrate
6 Judge Mann, correct?

7 A Well, I was truthful, your Honor. I don't think I was
8 actually testifying.

9 Q You spoke to Magistrate Judge Mann and you put out your
10 position?

11 A Yes.

12 Q You had an obligation to be truthful when you spoke to
13 the Court, correct?

14 A Yes, and I was.

15 Q You were present on the hearing with Judge Cogan on
16 December 18 as well, correct?

17 A Yes.

18 Q And you heard the words that your attorneys said,
19 correct?

20 A Well, I think it was very hard to hear him at times so I
21 heard what I did hear.

22 Q Understood, but you -- at the end of the conference you
23 actually spoke up and spoke to the Court, correct?

24 A I don't recall that, actually.

25 Q Do you remember when Judge Cogan asked you whether or not

1 you submitted the December 17 letter to Special Master Woodin?

2 A I remember it was in either one or both of those
3 hearings, yes.

4 Q When you spoke up in that hearing, you had an obligation
5 to tell the Court the truth there as well?

6 A Yes.

7 Q Going back to the conference with Magistrate Judge Mann,
8 you were on that call on December 18, correct?

9 A Yes.

10 Q And you spoke to Magistrate Judge Mann, you answered her
11 questions?

12 A Yes.

13 Q And you answered them truthfully, yes?

14 A Yes.

15 Q And you posted the transcript for that telephone
16 conference on your website, didn't you?

17 A Yes.

18 Q Then you participated as we just talked about in another
19 conference with Judge Cogan, correct?

20 A Yes.

21 Q And your attorney was on that?

22 A Yes.

23 Q And there was a transcript prepared from that conference,
24 correct?

25 A Yes.

1 Q And you posted that to your website as well, didn't you?

2 A Yes.

3 Q Now, you heard the things that your attorney was saying
4 during the call subject to your ability to be able to hear
5 them, right?

6 A Yes.

7 Q And you didn't hear your attorney say anything that you
8 knew to be untruthful, did you?

9 A No, I don't recall anything. I was called onto the phone
10 right then and I said well, I better try and get an attorney
11 and we put him on hold and I called Mr. McKay right then and
12 it was demanded that we get right back on the phone and we
13 did. So that was how that came about.

14 Q Now as an attorney and officer of the Court, you also
15 have an obligation to be truthful when you submit things in
16 writing to the Court, don't you?

17 A Yes. And I seem to be hesitating.

18 Q Yes, you did.

19 A And the reason for that is you know I styled my response
20 to the special master a draft for a number of reasons. I'm
21 not really quibbling over that but it was prepared very
22 hurriedly I notice one footnote just ends.

23 Q I didn't hear you.

24 A One footnote wasn't finished when I went back and read
25 it. I'm not saying anything in there was not truthful but

- 1 that is a draft.
- 2 Q It's a draft, it's final, it's truthful, right?
- 3 A Yes.
- 4 Q And you wrote that letter to the special master on
- 5 December 17, correct?
- 6 A I believe that is true.
- 7 Q Then you posted that letter to your website?
- 8 A Yes, as it's been my practice in most of these cases that
- 9 I've been doing in this overall effort.
- 10 Q You do have a history of seeking documents in other
- 11 cases, don't you, seeking to put them on your website?
- 12 A Well, we put a lot of documents on our website so they
- 13 are not necessarily from proceedings. It's laid out, a
- 14 certain amount of that is laid out in the draft response.
- 15 Q In your draft response you talk about the history of your
- 16 desire to go out and find documents from litigation from other
- 17 sources and then make them widely available on your website,
- 18 correct?
- 19 A Correct.
- 20 Q And when you sent your letter to Special Master Woodin on
- 21 December 17, you attached a number of documents, correct?
- 22 A Correct.
- 23 Q 1 of them was a subpoena that you had issued in the case?
- 24 A Yes.
- 25 Q And the second was an amended subpoena that you had

1 issued in the case?

2 A Yes.

3 Q And the case that we're talking about is a case in
4 Alaska, correct?

5 A Correct.

6 Excuse me, may I have some water, please?

7 THE COURT: Of course. We'll get you some
8 immediately.

9 Now before we go any further, while everybody is
10 taking refreshments, is Dr. Eagleman in the courtroom?

11 MR. REINERT: I'm his counselor. My name is
12 Alexander Reinert. Mr. Hayes is also present.

13 THE COURT: His counsel is present?

14 MR. REINERT: Yes, although we both did not expect
15 to be required at this hearing and both have to leave at
16 approximately 3:30.

17 THE COURT: I would suggest that counsel for Dr.
18 Eagleman come forward and sit at the table since your client
19 may be affected by what is going on and you may want to
20 object. You do have the power to object and you may want to
21 cross-examine. And if you wish the proceedings terminated
22 because you can't be here or for some other reason, please
23 speak up.

24 MR. REINERT: We will say that we haven't received
25 any notice to this point of any initiation of any contempt

1 proceedings by Eli Lilly.

2 THE COURT: This is not a contempt proceeding. This
3 is a proceeding with respect to a mandatory injunction.

4 Do you understand that?

5 MR. REINERT: Yes, we do.

6 THE COURT: Would you gave your name.

7 MR. HAYES: Edward Hayes, 515 Madison Avenue.

8 THE COURT: I know you are admitted to this Court.

9 MR. HAYES: This is the first time I've been down
10 here in a while.

11 MR. McKAY: Let the record show my client is not
12 recalcitrant in case there are any consequences.

13 MR. HAYES: It's a joke.

14 THE COURT: Let's get back to the examination.

15 MR. FAHEY: I'm going to hand back -- actually,
16 your Honor, if I can hand the witness a document.

17 THE COURT: Of course.

18 Marked what?

19 We'll call you petitioner.

20 MR. FAHEY: This is Petitioner 1.

21 (So marked.)

22 Q Have you seen this document before, sir?

23 A Yes.

24 Q Could you tell the Court what it is?

25 A This is what I referred to earlier as the draft response.

1 Q This is a letter -- I'm sorry.

2 A That I sent to Special Master Woodin on December 17 that
3 you referred to earlier. It appears to be it.

4 MR. FAHEY: I would move Petitioner 1 in evidence,
5 your Honor.

6 THE COURT: Admitted.

7 (So marked.)

8 Q Could you turn to page 4 of the letter, please.

9 This was the letter that you wrote to Special Master
10 Woodin after you had been ordered to return the documents that
11 you had received from Dr. Eagleman, correct?

12 A Correct.

13 Q This is the letter where you attempt to describe how you
14 came into possession of the document, correct?

15 A Yes.

16 Q Could you please read into the record starting with out
17 of the blue on the bottom of page 4.

18 A For how long?

19 Q Why don't you read the whole section about how you came
20 into the possession of the documents all the way down to
21 "analysis" on page 6.

22 A "Out of the blue on or about November 29, 2006, Dr.
23 Eagleman called me to ask if I had FOIA documents pertaining
24 to Zyprexa. He identified himself as one of the plaintiffs'
25 retained experts in Zyprexa damages litigation. I directed

1 him to the location of the FOIA information available on Psych
2 Rights website and also mentioned to him the adverse events
3 database. During the course of the conversation I learned
4 that he had access to secret Eli Lilly documents pertaining to
5 Zyprexa. I told him that I wanted to access those documents
6 and would undertake a case from which to subpoena them. Dr.
7 Eagleman told me he was subject to a protective order to
8 provide notification of such a subpoena. I informed him that
9 I understood and indicated that typically forced drugging
10 hearings occur very quickly and they are often scheduled for
11 hearing the same day they are filed but that I always ask for
12 a short continuance to prepare.

13 Should I read the footnote there?

14 Footnote 14 see AS47.30.839E.

15 Q For the court reporter's benefit, I don't think you have
16 to read the footnotes for the rest of the paragraphs.

17 A I would prefer to.

18 "Since I knew at the time that I would be away from
19 Alaska from December 22, 2006 until January 15, 2007, I
20 preceded to try to acquire a suitable case in earnest and in
21 footnote 15, these efforts are chronicled at and then an URL
22 to that, a URL, which stands for uniform resource locator.

23 In spite of the impediments to doing so interposed
24 by the Alaska Psychiatric Institute I was able to acquire a
25 suitable case in the evening of December 5, 2006. This case

1 however was not within an AS4730839 Court ordered forced
2 drugging proceeding but involved the guardianship wherein the
3 public guardian, the Alaska Office of Public Advocacy, OPA or
4 OPA was granted full guardianship powers under AS 13.26.090
5 through .155, including the power to quote approve
6 administration of psychotropic medications, meaning the right
7 to agree to the forced drugging of its ward who is now Psych
8 Rights' client. The next morning I filed papers to, among
9 other things, terminate the guardianship and remove the
10 guardian's rights to consent to forced drugging. The Court
11 issued four deposition subpoenas at my request.

12 If I may, it's the clerk's office that does that,
13 the clerk's office -- including one to Dr. Eagleman setting
14 his telephonic deposition for December 20, 2006, a copy of
15 which is attached. It is my belief that Dr. Eagleman promptly
16 notified Eli Lilly of the subpoena, a belief which is
17 supported by a December 14, 2006 letter from Eli Lilly's
18 Alaska counsel, Brewster Jamison, a copy of which is enclosed,
19 footnote 16. It is noted that this letter recites a copy of
20 Dr. Eagleman's letter transmitting the subpoena which was not
21 included in either the fax or a hard copy of the letter
22 received by Psych Rights. Over the weekend, in reviewing of
23 paperwork, I realized that the subpoena's requirement for Dr.
24 Eagleman to "bring with" him the subpoenaed materials didn't
25 make any sense for a telephonic deposition. So on Monday

1 December 11th, 2006, the Court issued an amended subpoena, a
2 copy of which is enclosed, that required Dr. Eagleman to
3 deliver the subpoenaed materials to me prior to the
4 deposition. This amended subpoena, a copy of which is
5 enclosed, was served on Dr. Eagleman by E-mail which states in
6 its entirety: Dear Dr. Eagleman, I have (hopefully) attached
7 an amended subpoena. I assume that you will also accept
8 service of this amended subpoena in this manner. If not,
9 please notify me immediately. In reviewing the original
10 subpoena, I realized it did not take into account that this
11 was a telephonic deposition, therefore the amended order --
12 then it actually doesn't say you but I put it in here -- you
13 to deliver the material to me prior to the date and time set
14 for the deposition rather than bring it with you. In order
15 for the deposition to go smoothly and as efficiently as
16 possible by allowing me to review them ahead of time -- then
17 italicized, please deliver the subpoenaed materials to me as
18 soon as you can, emphasis added. I registered the internet
19 domain name or domain zyprexadocuments.net that same day
20 December 11, 2006 in order to set up a secure method via "file
21 transfer protocol" for Dr. Eagleman to deliver the subpoenaed
22 documents to me. I then so informed Dr. Eagleman. Subpoenaed
23 materials began being uploaded on December 12, 2006 but ceased
24 after I E-mailed Dr. Eagleman a copy of the afterhours Jamison
25 letter of December 14, 2006 which I received on December 15,

1 2006 and which is enclosed. Footnote 17, I E-mailed this
2 letter to Dr. Eagleman because the fax cover sheet did not
3 indicate it had been faxed to him.

4 Q Okay.

5 And I just want to review some of the things -- and
6 those are the words that you wrote to Special Master Woodin to
7 describe how you came into possession of the Zyprexa
8 documents, correct?

9 A Correct.

10 Q On page 4 of your letter you told Special Master Woodin
11 that Dr. Eagleman called you in your words out of the blue on
12 November 29, correct?

13 A I think I said on or about or something like that. Going
14 back to my records, it looks like it was November 28th.

15 Q And those are records that you have in your possession?

16 A Yes.

17 Q That you haven't submitted at this point?

18 A No.

19 Q What type of evidence are you suggesting confirms that
20 there was a communication on November 28?

21 A I have an E-mail from him.

22 Q What does the E-mail say?

23 A That E-mail at my recollection is simply his contact
24 information, nothing else.

25 Q He just sent you an E-mail with his contact information?

1 A Yes, after he had called me on the telephone.

2 Q So help me understand the phone call. He calls you out
3 of the blue and is looking for some documents that you have
4 posted on your website. How does he tell you that he has
5 access to secret documents?

6 A He says that he is a plaintiffs' expert in this
7 litigation.

8 Q And why was he telling you that in your view?

9 A Well, I mean I can kind of give my sense of that. Maybe
10 I have a pretty good sense of that. But anyway, basically he
11 -- he wanted -- he was interested in getting these documents
12 out as well. That was my sense of it.

13 Q So your sense was that Dr. Eagleman called you so that
14 you could help or he could help -- you could help him make the
15 documents public. That's what you just said, right?

16 A I'm trying to think exactly. One of the things is that I
17 had my interests and he had his interests. So I don't know
18 that I was really trying to help him at that point.

19 Q You both had an interest in publicizing the documents,
20 correct?

21 A Yes, I have my interest. I really hesitate to speak for
22 Dr. Eagleman.

23 Q But your understanding based on your conversation with
24 Dr. Eagleman was that he called you so that you could assist
25 him in disseminating the documents that were subject to a

1 protective order, right?

2 MR. HAYES: I object. It calls for a state of mind
3 of Dr. Eagleman.

4 MR. McKAY: I also object because it -- it states
5 facts that aren't in the record. That's not what he said.
6 It's predicated on a --

7 THE COURT: Excuse me. I'll deal first with the
8 Eagleman objection.

9 What is your objection?

10 MR. HAYES: My objection is that it calls for his
11 analysis of Eagleman's state of mind.

12 THE COURT: That is overruled. The state of mind of
13 the witness is what is in issue at the moment and his belief
14 as to what Eagleman wanted to do is admissible.

15 MR. HAYES: Yes, your Honor. Thank you.

16 THE COURT: Your objection, sir?

17 MR. McKAY: My objection is framing the question, he
18 misstated what Mr. Gottstein's testimony was --

19 THE COURT: Sustained.

20 Reframe your question.

21 Q Mr. Gottstein, your understanding based on the
22 conversation with Dr. Eagleman, your state of mind at the time
23 was that you understood that the -- that Dr. Eagleman was
24 calling you so that you would assist him in disseminating
25 documents that were subject to a protective order, right?

1 A I think that is probably correct. I was pretty focused
2 on my objectives not his objectives but it's hard for me to
3 say that is not accurate.

4 Q And your sense was -- we know that you wanted to get the
5 documents made public, you've already said that, right?

6 A Correct.

7 Q And your sense was that Dr. Eagleman shared your desire
8 to make them public, correct?

9 A Well, what I said is that -- it's my understanding that
10 he also had that objective, and so did he share mine? I don't
11 know but I think that was his objective.

12 Q And you are familiar with protective orders generally,
13 sir, aren't you?

14 A Somewhat. Actually, I haven't litigated that much in my
15 career.

16 Q But you understand what a protective order means in
17 litigation, right?

18 A Yes.

19 Q And you understand that a protective order is designed to
20 allow parties to share information to facilitate information,
21 correct?

22 A Yes. Well, I'm not sure that I think that is the reason
23 for a protective order. I think the reason is to protect
24 information that is produced.

25 Q Fine.

1 In litigation though, right?

2 A Yes.

3 Q And you are aware that -- and Dr. Eagleman as you
4 testified told you that there were certain restrictions that
5 he was operating under with respect to the Zyprexa documents,
6 correct?

7 A Yes, and I told him he had to comply with those.

8 Q And you never asked for a copy of the protective order,
9 did you?

10 A Actually I did ask for it.

11 Q When?

12 A Probably the first telephone call. It was pretty early
13 on in the telephone conversations.

14 Q On November 28th?

15 A I don't remember the exact day.

16 Q Was there a conversation before the 28th?

17 A No, but it might have been in subsequent phone calls.

18 Q But subsequent to Dr. Eagleman sharing the documents with
19 you, you asked for the protective order, correct?

20 A Yes.

21 Q And you didn't get it, right?

22 A He said I didn't want it and I didn't push it.

23 Q Why did he say you didn't want it?

24 A Again, we're calling for his state of mind. My kind of
25 sense of it was that if I didn't have it, then I wouldn't be

1 charged with the knowledge of it but.

2 Q And you wouldn't be here in a proceeding like this?

3 A No, I don't think that is correct because he did read the
4 relevant portions to me and I felt -- first off, I felt and do
5 feel that we followed the procedure set out in the protective
6 order; and second of all, I feel that it was Dr. Eagleman's
7 obligation to comply.

8 Now, subsequent to all of this coming out, I realize
9 that I probably should have been more insistent on getting the
10 protective order but I felt pretty confident that all I needed
11 to do was comply with my part of the process.

12 Q So essentially what you didn't know couldn't hurt you,
13 right?

14 A I really hesitate to answer that. I guess maybe that was
15 his sense of it. Mine was I wasn't really concerned about
16 that because I felt I had -- he read part of it to me.

17 Q What parts did he read to you?

18 A He read -- is it paragraph 14?

19 Q The part relating to dissemination of information?

20 A The one relating to when someone subpoenaed and he read
21 or told me about one about that notice was defined as three
22 days for one purpose and a longer period for another purpose.
23 But what I was -- anyway, I'm sorry.

24 Q So he read to you paragraph 14 of the protective order
25 which is actually in your letter, isn't it?

1 A Yes.

2 Q You recite paragraph 14 in your letter?

3 A Yes.

4 Q One of the things that paragraph 14 requires is to
5 provide the producing party, in this case Eli Lilly, and
6 Section 3 under paragraph 14 is the location -- I'm sorry,
7 number 2 is the date on which compliance with the subpoena is
8 requested?

9 A Yes, and actually I don't know if I misheard or what and
10 I recall thinking of it as required rather than requested but
11 from my perspective, that doesn't really make any difference.

12 Q And you've said before that the protective order didn't
13 make much difference to you at all, it was not a concern of
14 yours?

15 MR. McKAY: Objection. That misstates the
16 testimony.

17 A That's not what I said.

18 THE COURT: Reframe it.

19 Q Sure.

20 You understood there was a protective order
21 governing the production or dissemination of the documents
22 issued by this Court, correct?

23 A I'm sorry, could you repeat.

24 Q Sure.

25 You understood when you spoke to Dr. Eagleman that

1 this Court had issued an order, a protective order relating to
2 the dissemination of the documents produced in this
3 litigation, correct?

4 A Yes.

5 Q And you further understood that the procedures in place
6 under that protective order required the producing party, in
7 this case it would be Dr. Eagleman who wanted to share the
8 documents with you, that he had to give notice to Lilly if
9 they were Lilly's documents prior to production, correct?

10 A Yes.

11 Q And one of the things that was important for Dr. Eagleman
12 to share with Lilly was the date on which the production would
13 be made, correct?

14 A Well, I think it says requested.

15 Q Requested by you, correct?

16 A Yes.

17 Q Right.

18 And then the production date that Dr. Eagleman
19 shared with Lilly was December 20, correct?

20 A I believe that's correct.

21 Q And he never shared and you know he never shared the
22 amended subpoena that you and he concocted to prepare an
23 earlier production?

24 MR. McKAY: Objection to the question.

25 Argumentative.

1 THE COURT: Yes, reframe.

2 Q Let me back up. I'll rephrase.

3 On December 6 you sent a subpoena to Dr. Eagleman?

4 A Yes.

5 Q It was an Alaska State Court subpoena?

6 A Yes.

7 Q You didn't serve it on Dr. Eagleman properly, you sent an

8 E-mail to him?

9 A I actually did have it served.

10 Q By who?

11 A A process server. We arranged to have a Massachusetts

12 process server serve it.

13 Q That is the December 6 subpoena, the first one?

14 A Yes.

15 Q Why don't you turn to the page on -- the attachment to

16 your letter where the original subpoena is attached.

17 A Yes.

18 Q Now, before we get to the content of that subpoena, one

19 of the things that -- you and Dr. Eagleman had a problem on

20 November 29, didn't you, you didn't have a case that you could

21 use the subpoena the documents, right?

22 A Did you say November 28, I guess it would be.

23 Q November 28. But on November 28 when you knew that you

24 wanted the Zyprexa documents so that you could publicize them,

25 you had a problem because you didn't have a case that you

1 could issue a subpoena from that would allow you to subpoena
2 the documents?

3 A I don't know if I would characterize it as a problem but
4 it was necessary to have an appropriate case in order to do
5 that.

6 Q Right, because you can't just send out subpoenas without
7 a case, right?

8 A Correct.

9 Q And you are supposed to use a subpoena for the purposes
10 of the case, right?

11 A You know, actually, I researched this before I did it
12 because I wasn't really concerned about the protective order
13 because -- for reasons why I said and probably that will come
14 out that I considered that Dr. Eagleman's responsibility. I
15 advised him to comply with it and in fact to maybe foreshorten
16 it, I told him repeatedly that he should give Eli Lilly the
17 amended subpoena. But what I was concerned --

18 Q Let's just stop there.

19 A Can I answer your question?

20 THE COURT: Finish your answer.

21 A But I was concerned about this issue of whether it would
22 be proper to issue a subpoena in a case that had dual
23 purposes, one in the case, and the other for this
24 dissemination. And I satisfied myself through that research
25 that it was proper.

1 Q There is no evidence that DB was ever taking Zyprexa?

2 A There is no evidence, you mean in the record here?

3 Q You haven't offered any evidence that DB was taking
4 Zyprexa on December 6 when you issued the subpoena or at any
5 time since December 6, is that correct?

6 A That's correct.

7 Q And so you found a case to issue a subpoena calling for
8 Zyprexa documents and there is no evidence that the person
9 involved in that case ever was taking Zyprexa, correct?

10 A Well, again, it hasn't been produced in this proceeding
11 yet. I'm not sure that he has never been. At this time I'm
12 not sure that he has ever been. He certainly was potentially
13 subject to it and Eli Lilly's apparently illegal marketing
14 activity was certainly relevant to the question of whether of
15 not he should be ordered to take this drug against his will.

16 Q I understand what you are saying but I just want to make
17 it clear that you have no evidence to present to the Court
18 today that at any point from December 5th through today, you
19 have no evidence to provide to the Court that DB was taking
20 Zyprexa at any time during that period, correct?

21 A Correct.

22 Q And so you issued a subpoena, you found a case with
23 someone who has no evidence of taking Zyprexa and you issued a
24 subpoena to Dr. Eagleman on December 6.

25 Dr. Eagleman told you he had Zyprexa documents,

1 right?

2 A Yes.

3 Q He didn't tell you he was an expert in any other cases
4 and had any other documents, correct?

5 A Yes.

6 Q Can you read the requested -- why don't you read the
7 attachment to your December 6 subpoena.

8 A Attachment to subpoena duces tecum (production of
9 documents) David Eagleman, MD, MPH; one, your curriculum
10 vitae; two, subject to any applicable restrictions, subject to
11 any applicable restrictions, all expert reports prepared by
12 you within the last five years pertaining to psychiatric
13 medications; subject to any applicable restrictions, all
14 documents you have in your possession or have access to,
15 including those in electronic format and have read, reviewed
16 or considered pertaining to the testing, marketing, efficacy,
17 effectiveness risks and harms of commonly prescribed
18 psychiatric drugs in the United States, including but not
19 limited to Haldol, Thorazine, Mellaril, Clozaril, Risperdal,
20 Zyprexa, Seriquil, Abiliphi, Giadon, lithium, Depakote,
21 Prozac, Paxil, Zoloft and Wellbutrin.

22 Q How many medications besides Zyprexa did you just read
23 out? I lost track.

24 A 14.

25 Q So you, 14 and then Zyprexa is the 15th?

- 1 A Zyprexa is in the middle.
- 2 Q Are you including Zyprexa in the 14 or not?
- 3 A I think you said other, so I don't think I counted it.
- 4 Q So you sent a subpoena to Dr. Eagleman asking for the
5 Zyprexa documents you knew he had plus 14 other, asking for 14
6 other drugs that you knew he didn't have, correct?
- 7 A Yes -- well, excuse me I guess I didn't know that he
8 didn't have. Although -- I mean I didn't know that for a
9 fact. It was Zyprexa that we had talked about for sure.
- 10 Q With respect to your interest to make these documents
11 public, we know you never got a copy of the protective order,
12 correct?
- 13 A Until later.
- 14 Q Did you ever ask Dr. Eagleman whether there was a way to,
15 within the court procedure to seek to dedesignate documents
16 that you wanted to publicize?
- 17 A I don't really recall that I did.
- 18 Q Did Dr. Eagleman ever tell you that there was a way that
19 the documents could be -- apply to the Court and ask for the
20 documents to be made public?
- 21 A No, I don't believe that he did.
- 22 Q Instead as you've said, you decided that you would
23 subpoena them, correct?
- 24 A Yes.
- 25 Q Dr. Eagleman understood that once they were subpoenaed,

1 that you were going to disseminate them to the individuals
2 that you later certified as having disseminated them to?

3 A Yes, I think I already said that.

4 Q Did he share with you anybody that he would like to have
5 them disseminated with?

6 A Yes.

7 Q One was Alex Berenson from the New York Times?

8 A Yes. Yes.

9 Q Who else did Dr. Eagleman ask you to send the documents
10 to after he had given them to you?

11 A For sure Steve Cha.

12 Q He is with the Senate Finance Committee?

13 A He was with at the time the House Committee On Government
14 Reform minority office which is now the majority office.

15 Q Who else?

16 A Amelia Desanto. Yes.

17 Q Who is Amelio Desanto?

18 A She I think is the chief investigator for Senator
19 Waxman's committee and that may be the finance committee. I'm
20 not sure what committee it is.

21 Q Who else?

22 A I spelled her name wrong. Snigdha Prakash.

23 My counsel probably knows how to spell it.

24 MR. McKAY: I believe it's S-N-I-G-D-H-A,

25 P-R-A-K-A-S-H.

1 Q And Ms. Prakash is with NPR?

2 A Yes, National Public Radio. I believe that is true,
3 that's what he indicated.

4 Q Did he give you these names on a phone or in an E-mail or
5 how did he communicate the names to you?

6 A I think he E-mailed Ms. Prakash's address to me. I
7 remember that. Steve Cha called me and he E-mailed Amelia
8 Desanto and copied me with that.

9 Q So he gave you some E-mails and then he copied you on
10 other E-mails to other people to provide you with the
11 information by which you could use to send these documents,
12 correct?

13 A Yes.

14 Q Did he identify anybody else?

15 A You know, I don't recall at this time. If I went through
16 the list, that might jog my memory.

17 Q And these names were given to you before you were even
18 produced documents, correct, you started sending the documents
19 out the day you got them, right?

20 A Alex Berenson, yes. I don't think any of these others
21 were before I got them.

22 Q So before you got the documents you already knew that
23 when you got them you needed to send them to Alex Berenson at
24 the New York Times?

25 A I don't know that I would say needed to but.

1 Q Dr. Eagleman had requested that you send them to Alex
2 Berenson?

3 A Yes.

4 Q Who did you decide to disseminate them to?

5 A There is Peter Bregan.

6 Q Who is Dr. Peter Bregan?

7 A He is a well-known psychiatrist, expert on psychiatric
8 drugs and psychiatric treatment, an author of many drugs -- I
9 mean many books and scholarly articles and a critic of current
10 psychiatric practices, just basically.

11 Q All psychiatric practices, not just Zyprexa?

12 A No, I wouldn't say all psychiatric practices.

13 Q He is not in favor of medicating patients with diagnosis
14 of psychiatric disease?

15 A I think that is generally true. I don't know that he
16 would say it's quite so categorically. For example, I think
17 he like another big critic who passed away a couple of years
18 ago and testified in the Meyers case feels like especially the
19 benzodiazepines might be helpful short-term to help people
20 recover, to get sleep and that will oftentimes bring them out
21 of psychosis. And so I think that he -- I'm not sure about
22 that but I think that he is not against that and then I know
23 Dr. Moser felt that even maybe Zyprexa was appropriate in some
24 circumstances when other efforts hadn't worked and you had
25 given them enough time and it might be helpful. So I'm not

1 sure what Dr. Bregan's position on that is.

2 I do know that his position is, which I believe is
3 accurate, that these drugs basically are brain damaging and
4 therefore they should be used -- and have other problems, and
5 that therefore they should be used very carefully.

6 Q Dr. Bregan was the founder of an organization, and I
7 always have trouble remembering all the initials. Do you know
8 what I'm talking about?

9 A I believe you are referring to the International Center
10 for the Study of Psychiatry and Psychology, which is known as
11 ICSPP.

12 Q Right.

13 And ICSPP, they are -- are they a sponsor or are
14 they an affiliate of MindFreedom do you know?

15 A I don't really know. Well, they are probably a sponsor.

16 Q What is a sponsor for MindFreedom?

17 A It's basically someone who supports their mission, I
18 think.

19 I don't know if it even has to involve any kind of
20 fee or anything like that.

21 Q But you share common goals and interests?

22 A Right. Mainly I think it's people have the right to not
23 be forced to take these drugs.

24 Q And who are the other people that -- can you identify the
25 other people that you decided to disseminate the documents to?

1 A Dr. Grace Jackson.

2 Q Who else?

3 A Dr. David Cohen, Judy Chamberlain, Bob Whitiker, Vera
4 Sharav. Did I say Will Hull? Laura Zigler.

5 It doesn't sound like that is enough. Is it in my
6 list?

7 Q Would your certification help you?

8 A Yes.

9 Q You mentioned Bruce Whittington?

10 A I hadn't mentioned him, yes.

11 Q Dr. Steven Kruszewski?

12 A Yes, I was going to say him but yes.

13 Q Then the two other people were Terrie Gottstein?

14 A Yes, that is right.

15 Q Is that your?

16 A And Jerry Winchester.

17 Q And Jerry Winchester lives in Alaska?

18 A Yes, his office is right next to mine.

19 Q Is there any other people that you remember disseminating
20 the documents to?

21 A No, but I mentioned Vera Sharav. I had spoken to her and
22 she wanted to get them to the Wall Street Journal and so I
23 gave her a password to access the FTP site but I don't believe
24 they did that.

25 Q They, meaning the Wall Street Journal?

1 A Yes.

2 Q So your understanding was that Vera Sharav was going to
3 provide the password to your FTP server which contained the
4 Zyprexa documents to the Wall Street Journal?

5 A Right.

6 Q What is an FTP server?

7 A FTP stands for file transfer protocol, and it's a
8 mechanism to do just that, transfer files and especially
9 multiple files over the internet more reliably for sure than
10 E-mail attachments and with -- it's a lot easier than trying
11 to do it over say a website.

12 Q It's faster?

13 A And more reliable. You can do multiple documents that
14 way. That is relatively hard if you don't have special
15 software that will like what do they call it, crawl a website
16 or something like that to retrieve everything. File transfer
17 protocol is designed to -- you can download a whole directory.

18 Q So this FTP server and the data around the FTP server was
19 built on your computers, your servers?

20 A Yes, it was on one of our servers. I don't know about
21 built but.

22 Q Let's take a step back and we've already talked about the
23 December 6th subpoena and that called for the production of
24 documents on December 20th, correct?

25 A Correct.

1 Q And you then issued an amended subpoena, correct?

2 A Correct.

3 Q And told Dr. Eagleman to start producing documents in
4 your words and I quote "as soon as possible", correct?

5 A No, it's as soon as you can and I realized since then
6 that can is ambiguous but what I meant was as soon as -- you
7 know, as soon as.

8 Q As soon as you can?

9 THE COURT: Don't interrupt him.

10 A As soon as he could under the protective order is what I
11 meant by it.

12 Q Did you say that?

13 A Well, I thought that -- that's what I intended when I
14 said that in the E-mail to him. I don't -- I don't know that
15 I communicated that separately to him.

16 Q Why did you move the date up from December 20 to as soon
17 as you can?

18 A I didn't really move the date of the deposition up.

19 Q You moved the date of the production of documents up,
20 correct?

21 A Well, I mean, what it said was -- it's like I put in the
22 E-mail, it didn't make any sense for him to bring the
23 documents with him in Attelboro, Massachusetts for me to try
24 to examine them in Anchorage, Alaska. So I had an amended one
25 that said to give it to me prior to the deposition and o give

1 it to me as soon as he could so that I would have a chance to
2 review them before the deposition.

3 Q And the E-mail that you sent to Dr. Eagleman said produce
4 the documents "as soon as you can", correct?

5 A I believe that's true.

6 Q And that same day you set up the FTP server that you are
7 talking about that allowed for the rapid and efficient
8 transfer of documents, correct?

9 A Is that what I said -- is that what I wrote -- yes, could
10 be.

11 Q Then the production of documents started the next day on
12 December 12, correct?

13 A Yes.

14 Q And it continued until in your words you received the
15 December 14th fax from Lilly's counsel on the morning of
16 December 15th, correct?

17 A If that's what I said, yes.

18 Q And earlier you said you had told Dr. Eagleman repeatedly
19 that he should send the second subpoena to Lilly, correct?

20 A Yes.

21 Q And you knew he planned not to send it to Lilly, correct?

22 A Yeah, I think -- he told me he didn't see that it made
23 any difference.

24 Q And you decided that it was not important for you to send
25 the subpoena to Lilly either, correct?

1 A My -- my position is that it was his responsibility under
2 the CMO and not mine.

3 Q As an officer of the Court, I'm just asking you, you made
4 the decision not to send the amended subpoena which called for
5 production of documents prior to December 20th to Eli Lilly,
6 correct?

7 A Correct.

8 Q And you knew at that time that Lilly had been provided
9 information that the document production would occur on
10 December 20th, correct?

11 A Yes, well, I mean that's what the subpoena says but
12 that's not -- I think it's not uncommon for documents to be
13 produced prior to the actual date.

14 Q I'm sorry, I may have interrupted.

15 A I think I was done.

16 Q Under Alaska rules, and you are an attorney in Alaska,
17 correct?

18 A Yes.

19 Q The Alaska rules for subpoenas are basically identical to
20 the Federal Rules, correct?

21 A I guess. I couldn't really say for sure.

22 Q Then let's just talk about the Alaska rule. You are
23 familiar with those rules?

24 A Yes. Like I said, I haven't done a lot but I reviewed
25 the rules before, I did.

1 Q Under the Alaska rules, a party, all interested parties
2 are supposed to be given 10 days notice prior to a production
3 occurring, correct?

4 A Well, I don't know that is entirely accurate. I think
5 what it says is that any party to whom the subpoena, something
6 like that, to whom a subpoena is directed may object within 10
7 days.

8 Q And the production in this case occurred prior to 10
9 days, correct?

10 A Right, Dr. Eagleman did not object.

11 Q Of course.

12 Now, the second subpoena that we're talking about,
13 we already confirmed that you did not send that to Lilly,
14 right?

15 A I believe I've said that a number of times, yes.

16 Q And you did not send it to Dr. Eagleman's -- the law firm
17 that retained Dr. Eagleman in the Zyprexa litigation, correct?

18 A I don't think I even knew who that law firm was but no, I
19 didn't.

20 Q And you didn't send it to the parties in the Alaska
21 litigation at that time, did you?

22 A Well, under the Alaska rules, you don't send the
23 subpoena. You are required to send a notice of deposition and
24 when I -- actually when I went to get the subpoena issued, I
25 had a certificate of service that said I'm sending notices of

1 deposition. There were three other ones and the clerk said
2 no, that's not good enough, I want to see the actual notices
3 of a deposition. So I went back and got them and brought them
4 to the clerk and showed them to her and then she issued the
5 subpoenas and that was December 6.

6 Q December 11?

7 A It was probably both actually.

8 Q But no other parties of the Alaska litigation received a
9 copy of the December 11 subpoena, correct?

10 A Right. That is not the practice.

11 Q So the only people knew that the subpoena had been
12 amended was you and Dr. Eagleman, correct?

13 A The only people?

14 I don't know if it's the only people. I didn't
15 notify Eli Lilly if that's really the question.

16 Q The question is you didn't notify anybody other than Dr.
17 Eagleman that there had been a change in the production date,
18 correct?

19 A Really, the deposition date hadn't changed.

20 Q The production date, the document production date, the
21 only person you notified of a change in the production date
22 was Dr. Eagleman, correct?

23 A I don't know about the only person. I might have told my
24 wife. I guess that is privileged, but anyway, I might have
25 told somebody else, but no, I didn't tell the other parties

1 because it didn't change -- the deposition date wasn't changed
2 so there was really no reason to tell them unless Eli Lilly
3 was already in cahoots with them or something.

4 Q I'm not sure what that means.

5 A There is no -- I mean; A, they had notice of the
6 deposition. That hadn't changed and there was no reason to
7 notify them of this as far as I was concerned.

8 Q You already told us that you told Dr. Eagleman repeatedly
9 to notify?

10 A Eli Lilly, yes.

11 Q So that --

12 A I knew that Eli Lilly had an interest in this and so I
13 really -- I suggested that Eli Lilly should be notified but
14 the other parties in the Alaska case; A, they weren't -- I
15 didn't see why they would have an interest in knowing that.
16 The deposition date hadn't changed.

17 Q When you issued the subpoena, you reason you said you
18 needed the subpoena was so that you could review the documents
19 in advance of Dr. Eagleman's deposition, correct?

20 A Yes.

21 Q And instead of reviewing the documents you start making
22 copies of them as soon as you received them, correct?

23 A Yes.

24 Q And you proceeded to make copies for the next two days
25 and send them out to the people on your and Dr. Eagleman's

1 list, correct?

2 A I made two batches.

3 Q Right, for the next two days, correct?

4 A In the next two. It wasn't for them. I didn't spend all
5 say two days doing it.

6 Q This is the question I want to make clear. You were so
7 busy making copies of these documents that you never got to
8 review them, did you?

9 A I looked at some of them. The deposition was quite -- a
10 few days off which is, I think, your complaint. So I would
11 pull up some of them and look at them and I -- and it wasn't
12 that I was so busy make copies. I had my laptop burning DVDs
13 and my main computer burning DVDs, another laptop making sure
14 that they were -- I would make them and then I would put them
15 in this other one to make sure that they came up and I don't
16 know, I don't think it took me an hour to do it each time.
17 Probably less.

18 Q And you were anxious to get them out as quickly as you
19 could, right?

20 A Anxious, yes, I thought it would be good to get them out.

21 Q Before the Court could enter an order telling you you
22 shouldn't?

23 A Well, I don't know. I mean I guess -- I don't know that
24 -- you know, I knew that Eli Lilly would want to try to stop
25 it.

1 Q Right, and you wanted to get them out as quickly as you
2 could to make that harder?

3 A Well, I would say yeah, I wanted to get them out of the
4 way that would make it impossible to get them back.

5 Q Right. And I just want to confirm that you, sir, as an
6 officer of the Court and an attorney in the State of Alaska,
7 relied on a physician to determine the legal implications of a
8 protective order, correct?

9 A No, that is not precisely true. I advised him to get
10 counsel repeatedly and I looked at it in terms of what my
11 obligations were and that I didn't have any obligations under
12 what is called CMO-3 here, I think, the protective order, that
13 I had to follow the rules. I felt that the protective order
14 essentially provided a road map of how to do it and that I
15 followed that road map.

16 Q Based on Dr. Eagleman's description of that road map,
17 right?

18 A His -- well, he read that paragraph to me.

19 Q And let me just -- and the reason why I'm asking the
20 question, you submitted a declaration to the Court this
21 morning?

22 A Yes.

23 Q In paragraph 6 of that declaration, you wrote, and these
24 are your words: Dr. Eagleman indicated that three business
25 days could be construed as sufficient notice to comply?

1 A Yes.

2 Q And you relied on Dr. Eagleman's interpretation of the
3 case management order and the procedures under which you were
4 supposed to be operating as an officer of the Court and you
5 never asked for the protective order and you never had a copy
6 of the protective order before you pursued your course of
7 action with Dr. Eagleman?

8 A There is a lot there and I'm kind of tired from
9 everything, flying all night and stuff but you said as an
10 officer of the Court. I was certainly an officer of the
11 Alaska Court and followed those rules.

12 I never did and I don't believe now that I am
13 subject to -- a party to that case management order. Now, I
14 think really the guts of the question is what was reasonable
15 notice. We discussed that and how -- actually, we discussed
16 and I know more about the law now but how ambiguous that order
17 was and so he said that he felt it could be construed that
18 way. One of the things, for example, that we discussed was,
19 and I mentioned it, that initially I assumed that I was going
20 to get one of those AS 47.30.839 proceedings where the usual
21 practice, which I think is an absolute outrage, is for the
22 hospital to file a petition sometimes only an hour before the
23 hearing and then go through and get a forced drugging order
24 then the hearing that starts an hour from when the respondent
25 was served. And that what is reasonable notice under those

1 circumstances? And what I said, and I think I put it in my
2 draft response, is that well, I'm not going to do a hearing
3 under those conditions, and I always get a continuance. And
4 so we talked about that and what it meant to be reasonable
5 notice and we talked about that but I made it clear I was not
6 his attorney and he needed to consult his own attorney and
7 that it was his obligation to comply with the order.

8 Q Did he consult with his own attorney, if you know?

9 A He gave me the name of one attorney -- the name who
10 escapes me, they are not here -- who he said and I called them
11 and that attorney said no, I'm not his attorney.

12 Q Was that the law firm that terminated him after they
13 found out what he had done in this case?

14 A No.

15 Q A different law firm?

16 A A different lawyer.

17 Q Do you remember the first name?

18 A I don't.

19 Q Do you have -- how did you get the name of the attorney
20 to call?

21 A Dr. Eagleman told me.

22 Q Was it in an E-mail?

23 A No, I don't believe it was.

24 Q Where was the attorney that you called, what part of the
25 country?

1 A I think it was in the Boston area, certainly the
2 northeast.

3 Q Is the name Tom Sobel?

4 A I don't know. It's not inconceivable but it doesn't
5 totally ring a bell.

6 Q So you had this conversation with this attorney?

7 A Yes, and that basically terminated after he said he
8 wasn't representing him.

9 Q What did you say to the attorney?

10 A I understand you are representing Dr. Eagleman and he
11 said no, I'm not, and that was pretty much it.

12 Q I wasn't on the call so I'm trying to understand how it
13 happened.

14 You picked up the phone, dialed the number, somebody
15 answered the phone, you asked to speak with the attorney that
16 you thought was representing Dr. Eagleman and that person gets
17 on the phone and what did he say?

18 A I think I already said that, that Dr. Eagleman says that
19 you are representing him with respect to this.

20 Q What is this?

21 A Documents in this case, the Zyprexa multi-district
22 litigation. I'm not sure exactly how I described it but I
23 described the case somewhat.

24 MR. HAYES: The time when this happened, judge?

25 Q This is before the documents were produced, correct?

1 A Yes.

2 Q So prior to you receiving Dr. Eagleman -- documents from
3 Dr. Eagleman, he gave you the name of an attorney that he
4 thought was representing him in connection with his
5 communications with you, correct?

6 A That he told me that he was, yes.

7 Q I'm sorry?

8 A Yeah, he told me that he was representing him.

9 Q So you called that person and said?

10 A I think I have described pretty much the whole
11 conversation except for one other thing which is that he said
12 that he, he did know Dr. Eagleman and he -- I don't know if he
13 represented him or not in other matters but he definitely said
14 he wasn't representing him in this matter.

15 Q Do you have phone records that would show who you called?

16 A I believe buried on my desk somewhere is that note. I
17 tried to bring everything with me but I have a lot of stuff at
18 my desk and so I think -- so I think it's somewhere there.

19 Q What have you brought with you today?

20 A I brought -- I tried to get on my computer basically, I
21 think, most everything that they would be interested in. I
22 did bring hard copies of the E-mails from and to Dr. Eagleman.

23 Q Phone records?

24 A It's on my computer.

25 Q Any --

1 A Not all of them. I mean I could go into why but I don't
2 think -- you might ask me a question about some of them but I
3 don't think there is anything in the phone records other than
4 his attorney's name and number. I don't know. One of the
5 things is that when I was ordered to preserve all my voice
6 mail, that actually presented a problem. And so I had my
7 secretary while I was gone take a little recorder and record
8 them before she deleted them. And then she E-mailed me the
9 records. But they would be in one E-mail. They didn't all
10 pertain to this case.

11 So where I filed them on my computer is in my law
12 office folder and so it's not here, but I can access my office
13 computer via the internet and so I could actually find that.

14 Q Did you bring anything with you that relates to your
15 communications with the people who you disseminated the
16 documents to?

17 A Well, I didn't -- there really isn't any. I mean there
18 is a, I think there is a cover letter to Mr. Cha, I believe I
19 have a copy of that.

20 I brought pretty much what I thought would be
21 responsive that I could do at the time before I left.

22 Q After you got off the call with the person that said they
23 weren't representing Dr. Eagleman for the purposes of your
24 communications, did you have any discussions with anybody else
25 who purported to be representing Dr. Eagleman?

1 A I don't believe so.

2 Q Your Honor I think at this point I just want one minute
3 to check my notes.

4 (Pause.)

5 After you received a copy of the order of this Court
6 saying that you had improperly disseminated the documents in
7 violation of CMO-3, did you communicate that fact to the
8 recipients of the documents to whom you sent them to?

9 MR. McKAY: Objection, your Honor. As Mr. Fahey
10 knows, your Honor specifically struck the word improperly from
11 that order.

12 Q You received a copy of the mandatory injunction directed
13 to you, did you not, sir?

14 A Yes.

15 Q And that document said that you aided and abetted a
16 violation of CMO-3, correct?

17 A Yes, and I strenuously objected -- tried to object to
18 that before it got issued but it got issued before we were
19 able to.

20 Q You actually objected to that on the call with Judge
21 Cogan and your attorney?

22 A That is probably true, yes. I was pretty offended by it.

23 Q Then --

24 MR. McKAY: Your Honor, I apologize but in fairness,
25 and for the record I think I misheard or misunderstood what

1 Mr. Fahey was understanding.

2 You struck the word improperly from your order. I
3 believe that he is referring to an earlier order so I
4 apologize for misunderstanding.

5 Q You communicated the fact that you were asked to
6 communicate, you were ordered to in fact communicate to
7 everyone who you disseminated the documents to and retrieve
8 them, right?

9 A Yes.

10 Q And that was on December 18 and 19, right, you started
11 doing it in the middle of the night, at least East Coast time
12 on the 18th?

13 A I think that is correct.

14 Q And by the time on the 19th, you had communicated with
15 everyone to whom you had disseminated the documents, correct?

16 A I don't think that is correct. I think -- I think I kind
17 of remembered other people and the one that comes to mind is
18 when I was preparing the -- maybe it was on the 19th,
19 preparing a compliance certificate, I came across Prakash's
20 name which I had forgotten. So then I sent her a letter so I
21 think that was the last one and maybe it was the 19th but it
22 might have been the 20th or even later.

23 Q When you communicated these documents in the first
24 instance to the recipients that you've identified, the 13 or
25 16 people, did you communicate to them that they had been

1 received pursuant with your discussions -- or strike that.

2 When you communicated with the people who had --
3 when you were disseminating the documents, did you tell them
4 that you had received them from Dr. Eagleman and they involved
5 the Zyprexa litigation?

6 A I have to look at the E-mails. You have them. You were
7 copied on those E-mails because that way you could contact
8 them immediately.

9 Q Actually, what we were copied on was your request to have
10 them returned.

11 A I thought that was the question.

12 Q No. When you originally disseminated them on the 12th
13 and 13th, did you tell them these are the Zyprexa documents I
14 got from Dr. Eagleman?

15 A No.

16 Q What did you tell them?

17 A I didn't tell them -- it depends. Some people had no
18 idea they were coming and other people did.

19 Q What how did the other people know what were coming?

20 A I called them.

21 Q What did you tell them?

22 A It varied. Bob Whitiker, I just talked to Bob Whitiker
23 and told him that they were coming.

24 Q And you told him that they were the confidential
25 documents that you received from Dr. Eagleman from the Zyprexa

1 litigation, correct?

2 A I don't know if I mentioned Dr. Eagleman by name.

3 Q But you were getting confidential documents from the
4 Zyprexa litigation?

5 A Actually at that point I did not consider they were
6 protected anymore.

7 Q But you understood that a lot of people in New York
8 thought they were protected, right?

9 A Well, I guess I didn't know that.

10 What timeframe are you talking about?

11 MR. McKAY: Your Honor, if I might object to that
12 question because it assumes facts not in evidence and it talks
13 about what people in New York unidentified thought at a time
14 when he wasn't --

15 THE COURT: Why don't you ask a more direct question
16 with respect to a specific person.

17 MR. FAHEY: Okay.

18 Q With respect to Dr. Whitiker, you said you called?

19 A He is not a doctor.

20 Q Robert Whitiker, before you sent him the documents you
21 said you had a telephone conversation with him, correct?

22 A I think I did.

23 Q And you told him these were the documents that had been
24 obtained from the Zyprexa litigation in New York, correct?

25 A I think I probably told him something like I've received

1 documents pursuant to a subpoena out of this case and that I
2 was sending them to him.

3 Q And these were the secret documents that Dr. Eagleman had
4 told you about?

5 MR. McKAY: Objection, your Honor, Mr. Gottstein has
6 previously testified that he no longer considered them to be
7 confidential or secret.

8 THE COURT: Sustained.

9 Q When you told Robert Whitiker that you were getting
10 Zyprexa documents --

11 A I think I -- I'm sorry for interrupting.

12 Q Go ahead.

13 A I think I already had them at that point. In fact, I --
14 it may have been that they were -- that they were already in
15 the mail and I told him that they were in the mail. That is
16 almost certainly the way that -- the way it happened.

17 MR. FAHEY: Your Honor, without waiver we would like
18 to stop the examination at this point and request that the
19 documents that Mr. Gottstein has described that he has brought
20 with him as well as those that are subject to the order to
21 show cause be produced.

22 THE COURT: Well, we have representatives of Dr.
23 Eagleman here and I understand they want to leave at 3:30,
24 correct?

25 MR. HAYES: Yes, judge.

1 THE COURT: It's now 3:25. I suggest that the
2 documents be made available to Dr. Eagleman and any of the
3 other parties who are present for immediate examination with
4 copies to be made by Lilly.

5 I guess you have the best access to a copier so why
6 don't you make copies for everybody that needs them, that we
7 then break the examination so that you can look at the
8 documents.

9 There will be possible cross-examination certainly
10 by Dr. Eagleman. I have a 4:00 hearing so we can't complete
11 this tonight.

12 Can you be here tomorrow?

13 THE WITNESS: Yes, your Honor.

14 THE COURT: I have a 10:00 motion. I suggest that
15 we convene again at 10:30 tomorrow, that you get all these
16 documents, immediately have them copied, return the originals
17 to the witness, make them available, whoever asks for them.
18 You can do that. If the witness would be so kind as to call
19 somebody in his office to look at his desk to get the name of
20 that -- try to get the name of that person who he called in
21 Massachusetts apparently. That would be helpful. Give that
22 to counsel.

23 Is there anything else you need before
24 10:30 tomorrow?

25 MR. FAHEY: I don't think so.

1 THE COURT: Anybody else need anything?

2 MR. McKAY: Your Honor, I will note that Lilly
3 specifically was directed to provide before the hearing today
4 notice of any documents they intended to rely on, the
5 substance of those, and of course didn't. And I understand
6 that these are documents that Mr. Gottstein has that are
7 responsive to the order to show cause, if the order to show
8 cause were to be issued, and it shouldn't. The only reason I
9 raise that is that Mr. Gottstein has done his best to have
10 available, should the need arise, these documents but I think
11 he indicated that they are in his computer. We will do our
12 best to work with counsel locally to physically get these
13 things available. And I suggest that we may, because we may
14 run into questions, for example, if their request is for
15 anything close to the breath of the show cause request, which
16 I don't understand to be relevant here, but if it is, there is
17 no question that we may have some issues that arise about
18 privilege or anything else. So I would ask whether Mr. Woodin
19 or somebody else be made available if those questions should
20 arise.

21 THE COURT: Mr. Woodin, would you stay for a little
22 while at least to do that?

23 But I understood from the witness that he had hard
24 copy of most or all of what was in his computer?

25 THE WITNESS: Oh, no, your Honor. I can look but I

1 think basically what I brought hard copies of are the E-mails
2 to and from Dr. Eagleman.

3 I've got -- I tried to like -- I copied my whole --
4 I copied all my Psych Rights E-mails. So I think -- it's an
5 unGodly amount. The other thing that I thought would be
6 fairly easy for me to do is I scanned a copy of the phone
7 records and I brought that. And if I can get a printer, I
8 think I can find that and get that out pretty quickly.

9 THE COURT: Work with counsel. They have technical
10 equipment. Your lawyer may want to look at some of these
11 documents before you turn them over.

12 You have a law office.

13 MR. LEHNER: Yes, we have a law office in New York.
14 We would be happy to make arrangements this evening for a
15 printer.

16 THE COURT: It's now 3:30. Your counsel wants to
17 look at the documents first, I'm sure.

18 MR. McKAY: Yes.

19 THE COURT: So arrange to be at the office of Lilly
20 at 5:00 this evening to turn over the documents. And if they
21 make a request for additional documents that you can easily
22 get, you'll try to get them.

23 The special master will be available immediately and
24 then by telephone. You can go back to your family tonight and
25 just be available by telephone.

1 THE WITNESS: Your Honor, can we have an outside
2 time because I really -- I'm very tired and if I'm going to be
3 here at 10:45 in the morning, I would like to at least -- if
4 we can agree to cut it off at 9:00 or something.

5 THE COURT: They will accommodate you. They will
6 probably even give you dinner since it's --

7 MR. HAYES: I have some suggestions for restaurants.

8 THE COURT: It will be within the law firm, not at a
9 restaurant.

10 MR. McKAY: And I assume we're talking about in
11 terms of the breath of the order that hasn't been addressed
12 yet, we're talking about things that are reasonably addressed
13 to the proceedings before your Honor.

14 THE COURT: I want to move this forward. Let's not
15 have a lot of unnecessary effort. The central issues are
16 fairly clear.

17 THE WITNESS: If I may, I think I can really
18 identify what I think would be most relevant.

19 THE COURT: Try to do that so we can finish this as
20 quickly as possible and you can go back to your home.

21 THE WITNESS: Thank you.

22 THE COURT: I'll see you at 10:45 and the special
23 master will tell you how he can be consulted.

24 MR. VON LOHMANN: We can then at the 10:45 hearing
25 also hear from the other nonparties -- as you Honor knows,

1 there are at least three represented non-parties who are
2 arguably named in the injunction who would like to argue the
3 motion to clarify or modify the Court's prior mandatory
4 injunction.

5 So I'm just clarifying are we on for that as well
6 after the close of evidence?

7 THE COURT: Yes, I'll hear from anybody who wants to
8 be heard. And if necessary, we'll go over to the following
9 day.

10 MR. HAYES: Thank you, your Honor.

11 THE COURT: And the day following.

12 Thank you very much, everybody.

13 (Matter concluded.)

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I N D E X

WITNESSES

Gottstein/Direct/Fahey 12

Petitioner Ex 1 20

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1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

2 -----x

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.

9 TRANSCRIPT OF HEARING

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

11 APPEARANCES

12 Attorneys for Plaintiff:

13 DOUGLAS & LONDON, ESQ.

14 111 John Street

15 Suite 1400

16 New York, N.Y. 10038

17 BY: MICHAEL A. LONDON, ESQ.

18 THE MILLER FIRM

19 The Sherman Building

20 108 Railroad Avenue

21 Orange, Virginia 22960

22 BY: MICHAEL J. MILLER, ESQ.

23 FRED VON LOHMANN, ESQ.

24 Attorney for Electronic Frontier Foundation

25 454 Shotwell Street

San Francisco, Ca 94110

1 Attorneys for Defendant:
2 PEPPER HAMILTON
Attorney for Eli Lilly
3 3000 Two Logan Square
Eighteenth and Arch Streets
4 Philadelphia, Pa 19103-2799
BY: SEAN P. FAHEY, ESQ.
5 GEORGE A. LEHNER, ESQ.
NINA M. GUSSACK, ESQ.
6 ANDREW R. ROGOFF, ESQ.
7
8
9 McCARTER ENGLISH
Attorneys for Eli Lilly & Company
10 245 Park Avenue
New York, N.Y. 10167
11 BY: SAMUEL J. ABATE, JR., ESQ.
12
13 SHERMAN, SILVERSTEIN, KOHL, ROSE & PODOLSKY
Attorneys for Vera Sharav, David Cohen, AHRP
14 4300 Haddonfield Road
Suite 311
15 Pennsauken, New Jersey 08109
BY: ALAN C. MILSTEIN, ESQ.
16
17
18 KOOB & MAGOOLAGHAN
Attorneys for Dr. Eagleman
South Street Seaport
19 19 Fulton Street
New York, N.Y. 10038
20 BY: ALEXANDER A. REINERT, ESQ.
21
22
23
24
25

1 APPEARANCES: (Continued)

2

3 EDWARD HAYES, ESQ.

Attorney for Mr. Gottstein

4

5 JOHN McKAY, ESQ.

Attorney for Mr. Gottstein

6

7

8 Allan R. Sherman, CSR, RPR

225 Cadman Plaza East

9 Brooklyn, New York 11201

Tel: (718) 260-2529 Fax: (718) 254-7237

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11 Proceedings recorded by mechanical stenography, transcript
12 produced by computer.

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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 RE-CROSS-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
25

I N D E X

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D. John McKay
Law Offices of D. John McKay
117 E. Cook Ave.
Anchorage, Alaska 99501
Telephone: (907) 274-3154
Facsimile: (907) 272-5646
E-mail: mckay@alaska.net

Attorney for Respondent James B. Gottstein

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

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

The undersigned, D. JOHN MCKAY, declares:

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

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

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

(Memo at p. 10), which states:

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

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

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

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

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

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

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

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

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

/s/D.JohnMcKay/

D. John McKay

D. John McKay
Law Offices of D. John McKay
117 E. Cook Ave.
Anchorage, Alaska 99501
Telephone: (907) 274-3154
Facsimile: (907) 272-5646
E-mail: mckay@alaska.net

Attorney for Respondent James B. Gottstein

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PRODUCTS LIABILITY LITIGATION)	
)	
_____x)	
04-MDL-1596 (JBW) [Related]		

**MOTION TO DISSOLVE DECEMBER 18, 2006, ORDER FOR MANDATORY
INJUNCTION
and
FOR RETURN OF PRODUCED DOCUMENTS**

James B. Gottstein, Esq., ("Gottstein") hereby moves to dissolve the Order for Mandatory Injunction issued against him in this action on December 18, 2006, by the Honorable Brian M. Cogan. This grounds for this motion are set forth in Respondent James B. Gottstein's Response To Eli Lilly And Company's Request To Modify And Extend The Court's January 3, 2007 Temporary Mandatory Injunction And Memorandum In Support Of Motion To Dissolve December 18, 2006, Order For Mandatory Injunction and related submissions, filed contemporaneously herewith.

Dated: February 9, 2007

Respectfully submitted,

/s/D.JohnMcKay/

D. John McKay
Law Offices of D. John McKay
117 E. Cook Ave.
Anchorage, Alaska 99501
Phone: (907) 274-3154
Fax: (907) 272-5646
E-mail:mckay@alaska.net