

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

U.S. Courthouse
Brooklyn, New York

December 20, 2006

4:00 p. m.

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

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 APPEARANCES:

2
3 For the Plaintiffs:4 LANIER LAW FIRM, PLLC
5 Tower 56
6 126 East 56th Street, 6th Floor.
7 New York, New York 10022
8 BY: EVAN M. JANUSH, ESQ.
9 RICHARD D. MEADOW, ESQ.10 ALEXANDER, HAWES & AUDET, LLP.
11 221 Main Street
12 Suite 1460
13 San Francisco, California.
14 BY: WILLIAM M. AUDET, ESQ.

15 For Eli Lilly & Company:

16 PEPPER, HAMILTON, LLP
17 3000 Two Logan Square
18 Eighteenth and Arch Streets.
19 Philadelphia, Pennsylvania 19103
20 BY: SEAN P. FAHEY, ESQ.21 LANE, POWELL
22 301 West Northern Lights Boulevard
23 Suite 301.
24 Anchorage, Alaska 99503
25 BY: BREWSTER H. JAMIESON, ESQ.

Special Master:

PETER H. WOODIN, ESQ.
280 Park Avenue
West Building, 28th Floor
New York, New York 11017

1 REPRESENTING MR. GOTTSTEIN:
2 JOHN MCKAY, ESQ.
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

23
24
25

REPORTED BY:
LISA SCHMID, CCR, RMR.
USDC - EDNY

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 THE COURT: Good afternoon. Are we
2 ready to proceed?

3 MR. FAHEY: We are, Your Honor.

4 THE COURT: All right. This is In
5 re: Zyprexa Products Liability Litigation,
6 MDL Number 1596. We are on the record. Will
7 counsel please state their appearances?

8 MR. FAHEY: This is Sean Fahey on
9 behalf of Eli Lilly and Company.

10 MR. JANUSH: Rick Meadow and Evan
11 Janush from the Lanier Law Firm, plaintiffs.

12 THE COURT: Anyone else?

13 MR. AUDET: Bill Audet, A-U-D-E-T.
14 I'm a member of the Zyprexa Plaintiffs'
15 Steering Committee.

16 MR. MCKAY: John McKay, Anchorage,
17 Alaska. I am appearing especially on behalf
18 of Mr. James Gottstein, without waiving any
19 jurisdictional objections, Your Honor.

20 THE COURT: All right.

21 MR. WOODIN: And, Judge, you have
22 Peter Woodin, Special Discovery Master.

23 MR. JAMIESON: And also, Judge, you
24 have Brewster Jamieson with Lane, Powell,
25 local counsel for Eli Lilly in Anchorage,

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 Alaska.

2 THE COURT: Mr. Fahey, why don't we
3 start with you? Tell me where we are.

4 MR. FAHEY: Your Honor, with your
5 permission, I would like to have Special
6 Master Woodin provide an update on the
7 compliance with Your Honor's order of Monday.

8 THE COURT: That's fine.

9 MR. WOODIN: Your Honor, Judge, this
10 morning, as of this morning, I had not
11 received from Mr. Gottstein the documents that
12 he had been ordered to return to me. I had
13 not received a list of parties to whom he's
14 disseminated the documents, and I had not
15 received any information about the particular
16 documents that were given to the individuals
17 or organizations. All three of those things
18 in your order, you directed him to provide to
19 me, either immediately or within 24 hours.

20 I sent him an email. Actually, I
21 sent his counsel an email and copied him and
22 counsel for both the PSC and Lilly on that
23 email, requesting -- noting that I had not
24 received any of these materials or
25 information, and asking Mr. Gottstein's

1 counsel to either inform me whether or not
2 Mr. Gottstein intends to comply with the
3 order, and if so, when I could expect
4 compliant. I have had no further update with
5 respect to that email. So, I pass it on, Your
6 Honor.

7 THE COURT: All right. Before we
8 hear from Mr. McKay, anyone else need to be
9 heard?

10 MR. FAHEY: No, Your Honor.

11 THE COURT: All right. Mr. McKay,
12 you're sounding like you're coming through a
13 lot clearer than last time we spoke, and I'm
14 glad to hear that.

15 Why don't you tell me where we are
16 with regard to compliance with the order?

17 MR. MCKAY: Thank you, Your Honor.
18 My understanding of the nature of this hearing
19 is simply to visit the status on the nature of
20 compliance with the order, is that correct?

21 THE COURT: That's correct.

22 MR. MCKAY: Your Honor, what I can
23 tell you is that -- and for the record, I'll
24 just note the continuing objection that
25 Mr. Gottstein has concerning the issue of

1 jurisdiction over him in this matter. That it
2 is his intention to fully cooperate with the
3 Court and the parties in responding to your
4 order, and he has been, and continues to, and
5 so if I can let you know exactly what he has
6 been doing, and any remaining issues, I will
7 do that.

8 First of all, after the hearing,
9 the form of proposed order was circulated, and
10 I attempted to comment on that, and also to
11 offer a stipulated agreement, after discussion
12 with counsel, that would resolve these issues,
13 but basically was told that my comments were
14 not -- no one was interested in comment from
15 me, and there was nothing to discuss.

16 So, without waiting for the
17 issuance of a formal order, my client
18 communicated with those with to whom he had
19 disseminated the materials. My understanding
20 is that he had sent copies to a number of
21 people. He communicated with them, asked that
22 they be turned over to the Special Master,
23 with directions on how to do that. And he
24 also copied the Special Master and counsel
25 with these communications.

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 So while it may be technically
2 correct that Mr. Woodin has not been provided
3 a list, in list form, Mr. Gottstein has been
4 doing other things, using his time to try to
5 comply with the order. He's provided the
6 information that will be on the list, that
7 he's trying to prepare for the Special Master,
8 but he's already provided the names. He just
9 has not provided them to him in list form, as
10 opposed to providing him with copies of all
11 the communications that went to all of these
12 people identifying who they were, because that
13 has already been done.

14 THE COURT: Mr. McKay, let me
15 interrupt you, so I'm sure I understand.
16 You're saying he has sent Mr. Woodin emails or
17 copied him on emails containing the names of
18 the people who got the information, so your
19 position is that Mr. Woodin, in fact, has the
20 names of those people?

21 MR. MCKAY: Yes, Your Honor. He did
22 that. He did that first, so that any further
23 possibility of things being out there that
24 might Lilly might feel has prejudiced their
25 position would be taken care of.

1 MR. WOODIN: Your Honor, if I may
2 interject -- this is Peter Woodin. I did
3 receive -- I was copied on about ten or 12
4 emails that Mr. Gottstein sent to various
5 individuals.

6 THE COURT: Okay.

7 Continue, Mr. McKay.

8 MR. MCKAY: And to his knowledge, he
9 has contacted everyone to whom he sent these.
10 I can tell you that I discussed it with him
11 thoroughly, and that he believes in good faith
12 that he has done that. If, by chance, he
13 thinks of anybody else, he will obviously
14 immediately do the same with them, and contact
15 counsel and the Special Master, but it's not
16 like he's fully satisfied that, and done that.

17 In addition to that, after the
18 hearing, Your Honor, before Your Honor on
19 Monday, counsel stayed on the phone with the
20 Discovery Master, and had a brief discussion,
21 and in that discussion, it was agreed that
22 instead of Mr. Gottstein in Anchorage sending
23 documents to Mr. Woodin -- I believe in New
24 York -- that instead, we could provide them
25 Mr. Jamieson here in town, who is local

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 counsel for Eli Lilly in Anchorage. And
2 shortly after the hearing, I put in a call to
3 Mr. Jamieson to talk about making arrangements
4 for doing that and to address a couple of
5 questions that he needed to be answered in
6 connection with that. He didn't have an
7 opportunity to call me back. I followed up
8 with a later call, and in fact, to this day, I
9 have not received a return call on that.

10 Nonetheless, Mr. Gottstein has now
11 gone ahead, without waiting for an answer,
12 that he has delivered to Mr. Jamieson's office
13 copies of DVDs containing the documents that
14 he has. There are a couple of remaining
15 copies that he has in electronic form, which
16 I'll address in a minute, but any copies that
17 he has -- he basically had copies in three
18 different formats. One was documents that
19 Dr. Egilman had sent to him. As I understand
20 it, these documents came in two different
21 days, two days in row, partly in one day and
22 partly on another day. He has those documents
23 on a DVD, and sent them in that form, I
24 believe, to these people that he contacted to
25 get them returned. He had apparently one or

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 two documents from that that he had put on a
2 flash drive, you know. Is Your Honor familiar
3 with what that is?

4 THE COURT: I am.

5 MR. MCKAY: All right. And when we
6 were talking to make sure that he was
7 completely retrieving these from every
8 possible place that he might have copies of
9 these documents, he brought this up. He
10 remembered that he had a copy of a document on
11 that, and he believe he's copied that document
12 on a DVD for the plaintiffs, as well.

13 And then the other thing is that he
14 has a copy on his computer. The copies that
15 were not on his computer have been turned over
16 to local counsel for Lilly. One of the
17 questions I was trying to get answered from
18 Lilly's attorney, that I would like to so
19 acknowledge and get an opportunity, but I
20 haven't been able to do it before that, is
21 whether it's sufficient to simply certify for
22 him to erase these from his computer, certify
23 that that's been done, or whether he wants
24 another copy of what's on the computer, which
25 he's already gotten on DVD form to be made,

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 before he erases it from the computer. So
2 that's one question. So you know that there
3 is still a copy that we still need to address
4 that's on his computer.

5 The other thing is that, in
6 addition, Mr. Gottstein is aware that his
7 computer system is routinely backed up, and
8 he's taken steps to reach a technician.
9 Mr. Gottstein is -- there's a long-scheduled
10 trip that he was about to leave on, so he's
11 been diligently working to get this taken care
12 of before he goes -- but he contacted a
13 computer technician -- and I don't know if the
14 parties had even thought of this -- but he's
15 trying to make sure if there is any backup
16 copy of this in existence, that that is also
17 wiped clean. So he's taking steps to do that.
18 He has not been able to do that himself, and
19 he so far, has not been able to get the
20 technician to do that, but he is taking good
21 faith steps to set that in motion, and it will
22 be done.

23 And then in addition, there's a
24 document that he had started that he believes
25 that he started to create. He's a solo

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 practitioner, and I can tell you that he is
2 working many long hours to try and do this, to
3 the disadvantage of other commitments. He's
4 been doing what he can. But he believes that
5 he started a document sometime in the past,
6 before all this came up, trying to create for
7 himself a word-searchable version of this
8 document, PDF document. He went on his
9 computer to try to find that document, in the
10 interest of making sure he had everything that
11 was being sought. And at that time -- at this
12 time, he's still been unable to locate it on
13 his computer. Assuming that it does exist and
14 assuming he can find it, he will destroy that
15 document. But I want you to know that it may
16 exist, and he has not -- if it does exist,
17 he's not yet located it.

18 And then finally, the biggest
19 difficulty that he's encountered at this point
20 is an apparently conflicting provision of the
21 order which requires him to immediately turn
22 over any copies that he has, and any related
23 documents, and at the same time, to give an
24 accounting in the form of an identifying
25 documents by Bates Stamp Number. There are

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 two problems with this, Your Honor. He does
2 not have any sort of an index of these
3 documents by Bates Stamp, and apparently, my
4 understanding is there are over 800 files, and
5 it's an enormous task to try to identify these
6 documents by Bates Stamp. In addition, it
7 would require that he retain a copy in order
8 to be able to do this. He is undertaking to
9 comply, but this is one of the problems, that
10 he can't both immediately have given this back
11 and be using it to try to comply with the
12 order, to try to identify it by Bates Stamps.
13 It seems like there are simpler ways of doing
14 this, than to identify documents by a Bates
15 Stamp system, that he has not had any reason
16 to initiate himself, that he doesn't have an
17 index for.

18 So I would suggest that perhaps the
19 Court could clarify that either it's not
20 necessary to do that, or that he could order
21 to parties to provide him a Bates Stamped
22 index that would facilitate compliance with
23 that part of the order.

24 THE COURT: All right. Let he hear
25 from either Mr. Woodin or Mr. Fahey on this.

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 MR. FAHEY: Your Honor, I just want
2 to take the issues in the order that they were
3 presented by Mr. McKay.

4 THE COURT: This is Mr. Fahey, right?

5 MR. FAHEY: With respect to the
6 contact to individuals that Mr. Gottstein
7 might have further disseminated these
8 documents to, on that issue -- there is two
9 issues I would like to follow up on.

10 The first is that a number of the
11 email addresses that Mr. Gottstein has emailed
12 to do not identify the recipient. It might be
13 something like "Jen" or "Mad" at something,
14 where there's really no description of who was
15 the recipient of the document, who the
16 intended recipient of the document was. So I
17 still think that, despite the emails that
18 Mr. Gottstein has sent out, we do still need a
19 list to understand who the intended recipients
20 of these documents were.

21 Second of all, I would like -- and
22 I think it's necessary for Mr. Gottstein at
23 some point, hopefully by the end of the day,
24 to certify that he has sent out emails to all
25 the people he is currently aware of. We

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 received another series of emails yesterday.
2 morning, and then received another one today.
3 And so, up until Mr. McKay just said what he
4 said, we had no idea when this list would stop
5 being generated.

6 The second issue, which I think is
7 more concerned to the compliance with the
8 order, is that when Mr. Gottstein contacts the
9 individuals who he has sent the materials to,
10 he expresses concern about whether the order
11 is appropriate, whether it's binding on him,
12 tells the recipient that he disagrees with it.
13 The most recent email, it says -- he said,
14 "And it seems inevitable we will be taking
15 steps to challenge the order's validity," and
16 then he says, "But in the meantime, it should
17 be complied with." So we're concerned that
18 the message that the recipient of these
19 disseminated documents is receiving is that
20 mixed message, quite frankly, Your Honor, and
21 we would like there to be no confusion about
22 what this Court ruled, and we, briefly, don't
23 think there's any confusion that this Court
24 clearly has jurisdiction over Mr. Gottstein,
25 based on his conduct.

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 The second issue relating to the
2 materials -- if Mr. Gottstein has a third
3 party that is doing the deletion of his backup
4 files, we would like them to -- Mr. Gottstein
5 can immediately delete the documents from his
6 computer, and we would like the third party to
7 certify that that deletion has occurred, and
8 also certify once the backup materials are
9 eliminated, that that has also occurred.

10 You know, we were just notified,
11 you know, minutes before this call that the
12 documents had, in fact, that were in hard copy
13 were sent to our local counsel's office, and
14 I'm pleased to hear that.

15 MR. JAMIESON: Sean, Brewster
16 Jamieson. I have only received copies of CDs.
17 I did not receive any hard copy documents.

18 MR. MCKAY: I don't believe there are
19 any hard copy documents.

20 MR. FAHEY: That's what I understood.
21 I understood that.

22 And then, Your Honor, with your
23 permission, I would address the question of
24 Mr. McKay. It may be able to cut through the
25 Bates label issue.

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 THE COURT: Why don't you?

2 MR. FAHEY: If Mr. Gottstein was able
3 to give us an understanding of what he sent to
4 each of these recipients -- if he sent
5 different things to each recipient, then we
6 may still have the issue with Bates labeling.
7 If all he did was copy the universe of
8 documents to all recipients, then that may be
9 something that can be handled in a different
10 way.

11 THE COURT: Mr. McKay, do you know
12 the answer?

13 MR. MCKAY: I think so, for our
14 purposes, Your Honor, and I appreciate that.
15 That was why I was trying to contact
16 Mr. Jamieson, see if we could cut through
17 this.

18 My understanding is that the
19 documents -- Dr. Egilman sent some documents
20 to him on day one, and that some additional
21 documents, some additional portion of the
22 documents on day two.

23 MR. FAHEY: Day one is which day?

24 MR. MCKAY: The reason I'm saying
25 that is I'm not entirely sure which day it

1 was.

2 OPERATOR: The following participant
3 has joined the conference: Unknown caller.

4 THE COURT: Well, Mr. Unknown Caller
5 --

6 MR. JANUSH: This is -- sorry, Judge.
7 This is Evan Janush. I had gone into my own
8 office and left Mr. Meadow. I apologize.

9 THE COURT: Thank you, Mr. Janush.

10 MR. MCKAY: Your Honor, what I was
11 explaining was that the question was what
12 documents -- my understanding is that
13 whichever date they came in -- I think it was
14 Monday and Tuesday, whether it could have been
15 Tuesday and Wednesday, whatever day they came
16 in, on the first day the documents came in,
17 Mr. Gottstein sent -- I think created a DVD
18 from the documents that had come
19 electronically, and sent them out to some
20 people.

21 On the second day, he sent
22 documents to some other people. At that time,
23 some additional documents had come from
24 Dr. Egilman. So those were included on the
25 DVDs that went to the second round of people.

1 So my understanding is that the
2 DVDs came either in one batch of documents or
3 the other batch of documents. One would be
4 the universe, the other, what had come in the
5 first day. I think it's easy enough to
6 identify them in that fashion, without going
7 through, you know, hours or hundreds of hours
8 of recording thing with Bates Stamps that may
9 or may not correspond to something you already
10 have, and seems like an unnecessary exercise.
11 If we could agree on that, that would be
12 helpful.

13 MR. FAHEY: There's nothing that we
14 have. We still don't know what documents were
15 disseminated, so if you can identify which
16 recipients received a portion of the documents
17 and which recipients received the bolus of
18 documents, and we can confirm, based on the
19 DVDs you sent over, which is which, we may be
20 able to alleviate the issue of the Bates
21 Numbers.

22 MR. MCKAY: Let me say this,
23 Mr. Fahey. I don't know whether it will be
24 possible to do that, and I simply don't know
25 because I don't know if Mr. Gottstein knows.

1 To the best of his ability, he will give you
2 that information. If he doesn't know or
3 remember exactly who got which one, you know,
4 that's something that we'll just to have deal
5 with, but what I can tell you is that what we
6 can tell you is that these are the recipients,
7 and to answer your question about the list,
8 we're happy to provide you and will provide
9 you with the list. And I understand that your
10 comment that some of the emails addresses may
11 not be clear, and we'll certainly remedy that
12 promptly. He's working on this, and he is one
13 person, and trying to do the things that he
14 can here.

15 But I can guess what I'm saying is
16 that what we can tell you is that he can
17 identify to the best of his ability, which
18 people got which documents, but I don't think
19 the additional requirement of identifying the
20 documents that one set or the other of these
21 people got by Bates Stamp Number is going to
22 be necessary or productive, and hopefully, we
23 can agree on that. We can say this set of
24 documents went to some people. This set of
25 documents went to other people. To the best

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 of our knowledge, these are the people to whom
2 those two different sets of documents went.
3 Is that adequate?

4 MR. FAHEY: I think so. The other
5 issue, though, is we're aware that I believe
6 at least someone from the New York Times had
7 access to a database remotely. So we would
8 need to know the recipients or anybody who
9 accessed that database remotely and could have
10 downloaded documents to their own servers.

11 MR. MCKAY: That's correct, and I
12 am -- the short answer is, we will get you
13 whatever information there is to be gotten to
14 you, we will get that to you. And I
15 understand that -- I will find out from
16 Mr. Gottstein what the data was that was
17 available for the Judge.

18 Judge, for your information, my
19 understanding is that there was a set of these
20 documents on a computer that was accessible by
21 someone at the New York Times, through
22 Mr. Gottstein. For your information, it was
23 not put on the computer on the way that it was
24 available to the public. It required a
25 password to get in. It was something that was

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 not generally available. My understanding is
2 that it's not something that might have been
3 accessed by anybody in the world, and to the
4 extent that there is a record of who accessed
5 it, we're attempting to obtain that
6 information for you, as well.

7 THE COURT: All right. Anything
8 further?

9 MR. FAHEY: No. I think, Your Honor,
10 it just leaves the issue of the mixed message
11 that we believe Mr. Gottstein is sending in
12 his communication relating to compliance with
13 the paragraph of the order requiring him to
14 take all necessary steps to obtain the
15 documents' return.

16 THE COURT: Yes. I understand that
17 concern. I'm not sure what you propose we do
18 about it. It does seem to me that, whether
19 stemming from that or just stemming from the
20 original dissemination of the documents, you
21 may have monetary relief that you want to seek
22 from Mr. Gottstein at some point.

23 It seems clear from the way that
24 you have described the emails going out that
25 he has at least directed the people to comply,

1 and I think what you're suggesting is that
2 he's done it in a kind of backhanded way,
3 which might dissuade them from actually
4 complying, and I suppose if you want to move
5 against him because he has attempted to find a
6 way to evade the intent of the order, you can
7 do that, but since the messages have gone out,
8 what would you propose we do about it at this
9 point.?

10 MR. FAHEY: I would just ask that the
11 that perhaps the jurisdictional issue be
12 resolved. That appears to be one of the
13 largest hurdles to Mr. Gottstein's concern
14 about the validity of this order. I think the
15 Second Circuit law is very clear on the issue
16 that where a person intentionally conspires,
17 as Your Honor found, to violate an order that
18 relates to the District, then that infers
19 jurisdiction on the person.

20 MR. MCKAY: May I respond to that?

21 THE COURT: You can respond, but
22 perhaps I'll anticipate your response. You
23 know, Mr. Gottstein has preserved his
24 objection to that, but as far as I'm
25 concerned, that is not an issue. The fact of

1 the matter is, it's not just Second Circuit
2 law, it's Supreme Court law. So, you know, I
3 see my order as being effective until the
4 Second Circuit tells me otherwise, and I'm
5 not -- I see no more power I have other than
6 to say that.

7 MR. FAHEY: Thank you, Your Honor.

8 MR. MCKAY: And I would appreciate a
9 brief opportunity to respond, Your Honor.

10 THE COURT: Go ahead.

11 MR. MCKAY: First of all, I take
12 exception to any suggestion that Mr. Gottstein
13 has been doing anything other than acting in
14 complete good faith. He's not trying to
15 factor anything here. I also note for the
16 record that it is my understanding, having
17 been present at the proceedings and having
18 looked at the order that you issued, that you
19 did not make a finding that Mr. Gottstein has
20 engaged in a conspiracy. And in fact, I don't
21 believe that he did -- but the fact that you
22 didn't make a finding is a statement that was
23 just made.

24 The reason that he -- and I should
25 also note that had we been given prior notice

1 and any kind of a written application stating
2 the grounds for the relief sought, it might
3 have been easier to address some of these
4 issues.

5 But, that said, I think when
6 somebody who is not a party to your lawsuit,
7 your multi-district litigation, receives an
8 order arising out of something he did in a
9 case in Alaska, subpoenaing documents, that
10 Eli Lilly could have said to Dr. Egilman,
11 certain objections, don't provide that.
12 Obviously, there will be a question about the
13 timing of that -- but in any event, he has
14 taken action in an Alaska case to obtain
15 documents that he believes are pertinent to
16 that litigation. When, in the context of
17 that, a Judge in New York tells him that he
18 has violated an order in a New York case that
19 he not a party to, it, at least, in fairness,
20 raises a reasonable question about that issue.
21 And without --

22 THE COURT: Mr. McKay, Mr. McKay, let
23 me interrupt you, please. Okay. I understand
24 your position on the record, and I'm not going
25 to argue the legal point with you. The

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 findings I made are on the record as
2 previously stated, and they're in the
3 injunction order that was previously issued.

4 MR. MCKAY: Yes, Your Honor, and they
5 don't include any finding of a conspiracy, and
6 my sole point here is to say that, Your Honor,
7 Mr. Gottstein is not arguing with you here.
8 He is not trying to -- in fact, he is trying
9 to fully comply, and I think you can see from
10 what I have said today, that he has been,
11 fully complying with what you have ordered
12 regardless of any objections that he might
13 have. But I want to -- he did not want to
14 prejudice his position that he might still
15 wish to assert, on reflection, without waiting
16 to comply with your order, and so by sending
17 out -- are you still there.?

18 THE COURT: Still here.

19 MR. MCKAY: So without -- by sending
20 out these emails without any reference to
21 reserving his objection, he was concerned that
22 he might waive that. But he also made a it
23 very clear that there was a Court Order. I
24 think he referenced the Court Order, gave the
25 people access to the Court Order, so that it

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 was clear what the Court had done. So it was
2 not in any way an effort to keep people from
3 knowing or believing that the Court had issued
4 an order, and exactly what it said.

5 THE COURT: All right. Let me just
6 say, I don't have the emails in front of me,
7 and I'm not going to make any ruling against
8 him based on the description of the emails
9 that counsel had given me. It does seem to
10 me, based on the description, that he at least
11 told the recipients --

12 OPERATOR: The following participant
13 has joined the conference.

14 MR. WOODIN: Peter Woodin. Your
15 Honor --

16 THE COURT: Yes, I know. You got
17 dropped and you're back.

18 MR. WOODIN: Yeah.

19 THE COURT: Okay. It does seem to
20 me, Mr. McKay, that at the very least, there
21 was no need for him to assert his position to
22 third parties, and it may have been
23 ill-advised for him to do so. But I am not
24 making any findings on that, at this point.
25 That will be for Judge Weinstein, when he gets

1 back, if indeed there is a written application
2 for specific sanctions.

3 I do hear you, Mr. McKay, in
4 talking about the compliance efforts that have
5 been made. It is clear that some level of
6 compliance efforts have been made. The only
7 thing I need to know is, you know, we now
8 have, as far as I'm concerned, passed the
9 deadline on the list of people who are
10 supposed to be recipients, who are supposed to
11 have been identified. And I understand your
12 point that we have got email names, that
13 you're willing to tell us who those recipients
14 are -- but by close of business tomorrow, so
15 there is no ambiguity, I want that list sent
16 to Mr. Woodin, okay?

17 MR. MCKAY: That will be done, Your
18 Honor. Your Honor, just so you know, Mr.
19 Gottstein, this morning, hours ago, early this
20 morning, had advised Mr. Woodin in response to
21 his email, that he was preparing that list for
22 him, and would try to get it to him today.

23 THE COURT: Okay.

24 MR. MCKAY: So there is no objection
25 to that. He fully intends to comply with

1 that, and I appreciate you hearing us out on
2 the others issues.

3 THE COURT: All right. That's fine.

4 All right. Anything further?

5 MR. FAHEY: Your Honor, I would just
6 ask that Mr. Gottstein, through his counsel,
7 certify by the end of day today that any
8 documents on his computer have been deleted.

9 THE COURT: Any problem with that,
10 Mr. McKay? That's a two-line declaration.

11 MR. MCKAY: Your Honor, subject to
12 the understanding that we all, I believe, have
13 now, that there's no need for him to retain
14 them so that he can -- subject to the
15 understanding that there is no longer any
16 requirement that he identify documents by
17 Bates Stamp Number or otherwise, we have no
18 problem with that, but it would be impossible
19 to comply with that part of the order if he
20 were to eradicate the documents. I believe if
21 that requirement is no longer there, then he
22 can identify them by referring to the two sets
23 of documents.

24 THE COURT: You understand that, Mr.
25 Fahey, right?

1 MR. FAHEY: Yes. The only thing I
2 want to clarify is when he says, "Or
3 otherwise," I know he's already told us that
4 he will identify which groups of recipients
5 which received which batch of documents.

6 MR. MCKAY: To the best of his
7 ability, he will do that.

8 THE COURT: All right, gentlemen.
9 I'm here tomorrow, if you need me further, and
10 Judge Weinstein will be back on Tuesday.

11 MR. JAMIESON: For the record, this
12 is Brewster Jamieson in Alaska. Could I have
13 a direction as to whom I could send these CDs
14 that were delivered to me at the beginning of
15 this call.?

16 THE COURT: Mr. Woodin.

17 MR. JAMIESON: I'll do that by FedEx
18 tonight.

19 MR. WOODIN: Very good.

20 MR. MCKAY: Excuse me. May I ask one
21 other question, to make sure we're completely
22 clear on this? The question that I wanted to
23 ask a couple days ago, so we could comply with
24 this, is there any reason that we can't simply
25 do as Mr. Fahey's just suggested, and certify

1 that the documents on the computer have been
2 erased? I mean, we don't need to make another
3 copy of what's on the computer if we've
4 already sent this out.

5 THE COURT: My understanding is that
6 you do not, no.

7 MR. FAHEY: And you're representing
8 that they're the identical copies of the
9 documents that have already been sent to our
10 office.

11 MR. MCKAY: What I'm doing is, I will
12 make sure that whatever representation is to
13 be made will be made, you know, as far as what
14 the documents are. I need to check with
15 Mr. Gottstein to make sure exactly which
16 documents were sent to your office, and what
17 they contain exactly -- but I will make sure
18 that if you don't already have a copy of these
19 documents, that you will get them.

20 THE COURT: Right. In other words,
21 what has been produced, need not be produced.
22 What has not, if anything, needs to be
23 produced quickly.

24 MR. MCKAY: Understood.

25 THE COURT: All right. Thank you

Lisa S. Cox, CCR, RMR
Official Court Reporter

1 all. If I don't speak to you, have a happy
2 holiday.

3 MR. FAHEY: Thank you, Your Honor.

4 MR. MCKAY: Thank you, Your Honor.

5 (PHONE CONFERENCE WAS CONCLUDED.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25