NO. 90-CI-6033

JEFFERSON CIRCUIT COURT

DIVISION FIVE (5)

JOYCE FENTRESS, et al. PLAINTIFFS

v.

SHEA COMMUNICATIONS, et al. DEFENDANTS

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REPORT OF THE FRIEND OF THE COURT

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I. Charge to the Friend of the Court

On September 6, 1996, the Court entered an Order in this case appointing the undersigned to act as Friend of the Court "to develop and present facts from which the Court can determine the true nature of the settlement of the parties and can otherwise comply with the Supreme Court opinion." *Court's Motion and Order Pursuant to Kentucky Supreme Court Opinion in Potter vs. Eli Lilly No. 95SC580-MR 9 (Dated 5/23/96) and Notice*, p. 6.

The Supreme Court opinion referred to in the Court's Order is the opinion in *Potter v. Eli Lilly and Co.*, Ky., 926 S.W.2d 449 (1996), in which the Supreme Court held that "a trial court has the authority and duty to determine that its judgments are correct and accurately reflect the truth in all respects." *Id.* at 454. It further held:

> In order to so determine, the trial court has sufficient inherent authority to conduct an investigation and a hearing to determine whether its judgments accurately reflect the truth. This right of investigation is conditioned to such

> circumstances where there is a reasonable basis to believe that there is a possible lack of accuracy or truth in the judgment. This inherent power goes beyond actual fraud. It encompasses bad faith, abuse of judicial process, deception of the court and lack of candor to the court. There can be no accommodation of deceit or lack of candor in any respect in the judicial process.

Id. at 454-55. In addition, the Supreme Court specifically found that the circumstances surrounding the instant case provide a reasonable basis for inquiry and investigation by the trial judge. *Id.* at 454.

Accordingly, the charge to the Friend of the Court in this matter is to develop and present facts from which the Court can determine the true nature of the settlement of the parties, and can otherwise determine whether there was any fraud, bad faith, abuse of judicial process, deception of the Court, or lack of candor to the Court in this matter. In developing these facts, the Friend of the Court has, among other things, conducted interviews with various individuals. The attorneys for Eli Lilly & Co., Lively Wilson and John Tate, have been present at the interviews conducted with Jim Burns, Larry Myers, Steve Lore, Paul Smith, Nancy Zettler, Irv Foley, and Armer Mahan. Mr. Wilson and Mr. Tate represent Jim Burns, Larry Myers, and Steve Lore in this matter; their presence at the other interviews was the result of their assertion that they needed to be present on behalf of Eli Lilly in order to protect the terms of the confidential agreement. The interview with Irv Foley was also conducted in the presence of his attorney, Margaret

Keane.

The facts developed by the Friend of the Court will be presented to the Court at the hearing that is scheduled for March 27 and 28, 1997. This Report is intended as a summary of those facts, in order to facilitate the hearing, but is in no way intended to be a complete recitation of the facts that will be presented at the hearing or to place any limitation upon the Friend of the Court's presentation of the facts at the hearing.

II. Context of Prozac Litigation

Eli Lilly & Co. ("Eli Lilly") manufactures the drug Prozac, a widely prescribed psychoactive antidepressant medication. *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1198 (7th Cir. 1996). Over the past several years, hundreds of plaintiffs have sued Eli Lilly nationwide for injuries allegedly caused by ingesting Prozac. *Id.* These cases have been brought in both state and federal courts. [Smith, Burns][1] The instant case, *Fentress v. Shea Communications* ("*Fentress*"), is one of the Prozac cases that was filed in state court.

Prozac litigation in federal courts became so prolific that, in 1992, 75 federal Prozac cases were consolidated for discovery by the Federal Judicial Panel on

[1]Citations in brackets indicate the names of the individuals from whom the Friend of the Court received the information. A more detailed description of the individuals may be found in Section IV.A of this Report.

Multidistrict Litigation. *Winkler v. Eli Lilly & Co.*, 101 F.3d at 1198. This Multidistrict Litigation ("MDL") was styled *In Re Eli Lilly & Company, Prozac Products Liability Litigation*, MDL Docket No. 907, and was assigned to Judge Dillin in the Southern District of Indiana. Late in 1993, attorney Paul Smith assumed the role of lead counsel for this multidistrict litigation. *Winkler v. Eli Lilly & Co.*, 101 F.3d at 1198.

When the state trial in the *Fentress* case started in September, 1994, there were approximately 160 other Prozac cases pending against Eli Lilly. *Potter v. Eli Lilly and Co.*, 926 S.W.2d at 451. These cases included the cases consolidated in the MDL as well as the pending cases in other state courts. [Burns, Smith] The *Fentress* case was the first Prozac case to go to trial; as of the date of this report, no other Prozac case has gone to trial. [Burns]

III. Brief Summary of the *Fentress* Case

On September 14, 1989, Joseph Wesbecker entered the Standard Gravure plant in Louisville, Kentucky, and shot and killed eight people and seriously wounded at least 12 others.[2] The eight decedents' estates and twelve of the injured people filed lawsuits against various defendants, including Eli Lilly. All of the defendants other than Eli Lilly

[2]The facts described here are taken from *Potter v. Eli Lilly and Co.*, Ky., 926 S.W.2d 449 (1996), and from the Reply Brief filed by the Appellees in that case.

settled or were dismissed prior to the trial, which began on September 26, 1994.

The trial was trifurcated. In the first portion of the trial, the only issues to be decided by the jury were whether the anti-depressant drug Prozac, manufactured by Eli Lilly, was unreasonably defective and dangerous and whether it caused Wesbecker to kill or injure the Plaintiffs. The issues of compensatory and punitive damages were reserved for future proceedings, if necessary; if the jury returned a verdict for Eli Lilly, there would be no need for any future proceedings regarding compensatory and punitive damages.

The trial lasted 47 days, during which 75 live witnesses testified, 22 depositions were presented to the jury, and 411 exhibits were introduced into evidence. On December 12, 1994, the jury returned a verdict in favor of Eli Lilly.

A. The Oraflex Evidence

As part of its proof in the *Fentress* trial, Eli Lilly presented evidence that Prozac and its U.S. package insert had been approved by the FDA. The Plaintiffs attempted to counter this evidence by demonstrating that Eli Lilly had failed to accurately report test results to the FDA. Before and during the trial, the Plaintiffs repeatedly sought to introduce evidence regarding the fact that Eli Lilly had been sanctioned in 1985 for its failure to report to the FDA adverse incidents resulting from Oraflex, an arthritis drug

manufactured by Eli Lilly that had been taken off the market. Both Eli Lilly and its chief medical officer had pled guilty to multiple misdemeanors regarding that matter. The Court originally excluded the evidence regarding Oraflex, but on December 7, 1994, the Court reversed its prior ruling and decided that the Plaintiffs would be allowed to admit certain evidence regarding Oraflex: a Congressional report, the plea agreement from Eli Lilly, the indictment, the statement of facts, and the judgment. [Transcript of the *Fentress* trial ("Transcript"), Vol. XLVII, pp. 8, 10] All of this evidence was public record, and none of it had been newly discovered by the Plaintiffs in *Fentress*. [Burns]

On December 8, 1994, Paul Smith, the Plaintiffs' attorney, informed the Court that the Plaintiffs would not be offering the Oraflex evidence at the trial, but that they would reserve it for the punitive damages phase of the case, if any. [Transcript, Vol. XLVIII, p. 4] Both the Plaintiffs and Eli Lilly informed the Court at that time that they would present no further evidence to the jury and that the case was ready to be submitted to the jury. [*Id.* at pp. 4-5] The Court then requested an off-the-record discussion with the parties' attorneys. [Transcript, Vol. XLVIII, p.4][3]

[3]Details of this off-the-record discussion are summarized in the Chronology of Certain Events and Court Proceedings, *infra*.

IV. Other Facts

A. The Attorneys

* Leonard Ring of Chicago was lead counsel for the Plaintiffs. Nancy Zettler, one of his associates, worked with him on the case. [Zettler]

* Ring died in February, 1994. Paul Smith of Texas became the lead counsel for the Plaintiffs in March, 1994. Zettler continued to work on the case with Smith. Smith and Zettler tried this case for the Plaintiffs. [Zettler, Smith]

* Irv Foley was lead local counsel for the Plaintiffs. He attended the trial almost every day. His office served as the office for the lead Plaintiffs' lawyers, Smith and Zettler. [Foley]

* Many of the Plaintiffs were represented by local attorneys, whose level of involvement in the case varied. [Foley]

* Jim Burns is Assistant General Counsel for Eli Lilly. He had the primary in-house responsibility for handling the lawsuit on behalf of the Defendant Eli Lilly. He had this responsibility from the beginning of the lawsuit to its conclusion. He was in charge of picking the attorneys and putting together the team for handling the lawsuit. His job was to act as the coordinator or facilitator for the team, making sure that things got done in a timely way. [Burns]

* Burns selected Ed Stopher as local counsel to represent Eli Lilly in this lawsuit. [Burns] This occurred in July 1990. [Stopher] Stopher's primary responsibility was to be in charge of the facts surrounding Joseph Wesbecker and the things that were specifically connected with Louisville. [Burns] Stopher was to try the case regarding the issue of the causation of Wesbecker's actions. [Stopher]

* Burns selected two other firms to represent Eli Lilly in this lawsuit: McCarter & English (Newark, NJ) and Freeman & Hawkins (Atlanta, GA). The responsibility of these firms was to handle the scientific issues involved in the case. [Burns]

* The attorneys involved from McCarter & English were John McGoldrick and John Brenner. The attorneys involved from Freeman & Hawkins were Joe Freeman,

Lawrence Myers, and Steve Lore. [Burns, Myers, Lore]

* Armer Mahan was the attorney for the workers' compensation insurer for Standard Gravure. [Mahan]

B. Settlement/Agreement Negotiations

* Burns was in charge of settlement on behalf of Eli Lilly. He instructed all of the lawyers for Eli Lilly that all settlement questions and overtures should be directed to him. [Burns]

* Smith handled the settlement negotiations with Eli Lilly for the Plaintiffs. [Foley, Smith]

* The Plaintiffs' lawyers always wanted to discuss settlement. At least up until the trial in the case, Eli Lilly's consistent response was that it was not interested in discussing settlement. [Burns]

* In late November, 1994, Eli Lilly began to think about talking with the Plaintiffs about reaching some kind of an agreement to end the case with the jury verdict. During the Thanksgiving break in the lawsuit, Eli Lilly began to sense that the jury had had enough of the case. [Burns]

* After the Thanksgiving recess, Burns called Smith, who met with Burns in Stopher's office to discuss the possibility of reaching an agreement. This meeting was 2 or 3 days after the Thanksgiving recess. [Smith]

* At that meeting, Burns told Smith that Eli Lilly was willing to discuss reaching an agreement, but that it wanted any agreement tied to the jury's verdict and it wanted any agreement to be confidential. [Smith]

* Eli Lilly wanted any agreement to require a jury verdict, because it wanted to know what the jury would say. It would never consider "settling" the case, which would end the case without a jury verdict. [Burns]

* Burns and Smith negotiated the final agreement. The attorneys who were trying the

case for Eli Lilly (*i.e.*, Stopher, Freeman, Myers) were not involved in these negotiations. [Burns, Stopher]

* The reason for trying to reach an agreement was to reduce the enormous risk that existed for both parties. [Burns, Smith]

  * The risk for Eli Lilly was that, in order for it to win, the jury would have to find Eli Lilly 100% not liable (or, in opposite terms, to find that Eli Lilly had 0% liability). Eli Lilly was convinced that the Court would proceed with the damages phases of the case even if Eli Lilly were only found 1% liable. This presented a great risk to Eli Lilly, which, if faced with the punitive damages phase of the case, might be looking at a large damages figure. In addition, Eli Lilly considered the cost involved to continue the trial if it proceeded to the damages phase. [Burns]

  * The risk for the Plaintiffs was that they might recover nothing if the jury returned a verdict for Eli Lilly. This was a substantial risk, given the nature of the evidence presented by Eli Lilly regarding causation. Some of the Plaintiffs were severly injured, and some had lost loved ones; for many of the Plaintiffs, their future livelihood would depend on the outcome of this case. [Smith]

  * Both Eli Lilly and the Plaintiffs believed that there was a value in reaching an agreement in order to put a top and a bottom figure on the risk that they faced. [Burns, Smith]

* Burns's recollection is that Smith suggested a sliding scale for damages, depending on what verdict the jury returned (a "high-low" agreement). This was the first time that Burns had been involved with any kind of "high-low" agreement. The agreement finally was a "high-medium-low" agreement. [Burns]

* Smith's recollection is that Burns suggested the concept of a "high-low" agreement. [Smith]

* On December 7, 1994, an agreement was reached between Smith and Burns. Smith needed to determine if the Plaintiffs consented to the agreement. [Burns]

* There was a meeting with all of the Plaintiffs and their counsel regarding approving

the proposed agreement. This meeting probably occurred on December 7, 1994. The discussion centered on the amount of money being offered. Everyone agreed to the terms of the agreement. [Foley]

* There was a meeting on December 8, 1994, to make sure that everyone understood the terms of the agreement. The people at the meeting were Foley, Freeman, Lore, Burns, Smith, and Zettler. [Foley, Lore, Smith] This meeting was in the morning. [Lore] Lore's recollection is that the Plaintiffs' attorneys still needed to get the approval of the Plaintiffs after this meeting. [Lore]

* Agreement was reached between the parties before the Court was told on December 8, 1994, that the parties would not be putting on any more testimony, including the Oraflex testimony, and that the case was ready for submission to the jury. [Foley, Burns]

* All of the parties (*i.e.*, all of the Plaintiffs and the Defendant Eli Lilly) knew about and had agreed to the terms of the Agreement before the December 8 discussion with the Court regarding submitting the case to the jury. [Foley] The knowledge of the attorneys regarding the terms of the Agreement is discussed in the next section.

C. <u>When the Attorneys Knew About the Agreement</u>

* On December 7, 1994, Foley knew that settlement discussions were going on. [Foley] Stopher also knew that there were some talks going on that day. [Stopher]

* On December 7, 1994, Stopher received a call from Burns, who asked Stopher to come to Foley's office to talk with Burns. Stopher went to Foley's office, where he spoke with Burns. Burns told Stopher that there was a problem with the worker's compensation lienholder, and that this was a stumbling block to the settlement negotiations that were then occurring. [Stopher]

* On the afternoon of December 8, 1994, Stopher saw Burns at Stopher's office. Burns told Stopher that the case was not settled, and that Stopher needed to make the best closing argument possible. [Stopher]

* Stopher learned of the existence of a verbal agreement some time after the verdict had

been reached by the jury, and before Christmas, 1994. He did not know the terms of this verbal agreement until June, 1996, when he read the summary of the agreement that was given to him by Burns. [Stopher] Stopher did, however, sign the written Agreement that was executed on February 6, 1995, although he says that he did not read the Agreement. [Stopher]

* Foley, Freeman, Lore, Smith, Zettler, and Burns knew about the agreement and the terms of the agreement before the December 8, 1994, discussion with the Court regarding submitting the case to the jury. [Foley, Smith, Lore, Burns, Zettler]

* All of the Plaintiffs' local attorneys, as well as all of the Plaintiffs, knew about and had approved the terms of the Agreement before the December 8, 1994, discussion with the Court regarding submitting the case to the jury. [Smith, Foley]

* Myers learned about the existence of an agreement on the evening of December 8, 1994. He knew at that time that the agreement was that the case would be concluded if the jury reached a verdict, and that no additional phases of the case would be necessary if that occurred. He knew none of the other terms of the agreement until after the jury reached a verdict. [Myers] He probably learned of the agreement from Mr. Burns, although he might have learned about the agreement from Lore. [Myers]

D. <u>The Terms of the December 1994 Agreement</u>

* The agreement between the parties that was reached before the December 8, 1994, discussion with the Court was a verbal agreement. The agreement was not reduced to writing at that time, and there is no correspondence or other formalized contemporaneous documentation reflecting the terms of the agreement. [Foley, Smith, Burns] Irv Foley has notes from the meeting that was held with all of the Plaintiffs and their counsel. [Foley]

* Some time in June, 1996, the terms of this verbal agreement were summarized in a document that was reviewed and agreed upon by at least Foley and Burns. This document was given to the Friend of the Court on October 11, 1996, by Foley, and is attached hereto as Exhibit 1.

* The Friend of the Court had understood that this summary of the verbal agreement

had been prepared by Foley. Foley indicates, however, that he received the summary from Stopher; it was Foley's impression that the summary had been written by Stopher. [Foley] Stopher says that he received the summary from Burns, and that he then gave the summary to Foley. [Stopher] Stopher received the summary in June, 1996; when he read the summary, it was the first time that he learned the specifics of the verbal agreement. [Stopher]

* This summary of the verbal agreement was presented to the Friend of the Court as an accurate summary of the terms of that agreement, which it lists as:

1. All of the conditions agreed upon were contingent on the jury returning a verdict. If there were a mistrial or a hung jury, the parties would proceed as if there were no agreement.

2. The parties would not submit any more evidence to the jury. [This included the evidence regarding Oraflex.]

3. The parties would not appeal the decision of the jury.

4. Eli Lilly had the right to renew all of the motions already before the Court, including making all of its directed verdict motions.

5. In the event of a jury verdict for the Plaintiffs, Eli Lilly would pay one half of the costs expended by the Plaintiffs to try the case.

6. In the event that the jury found Eli Lilly to be liable to the Plaintiffs in a percentage between 0 (no liability) and 30, Eli Lilly would pay the Plaintiffs the sum of — (the "sum certain").

7. In the event that the jury found Eli Lilly to be liable to the Plaintiffs in a percentage of between 31 and 50, Eli Lilly would pay the Plaintiffs the sum certain, plus an additional 25% of that figure.

8. In the event that the jury found Eli Lilly to be liable to the Plaintiffs in a percentage between 51 and 100, Eli Lilly would pay to the Plaintiffs the sum certain, plus an additional 75% of that figure.

9. 50% of the amount of the payment would be made within 30 days of the receipt by Eli Lilly of whatever signed documents would be required; 25% of the amount of the payment would be made on the first anniversary of the first payment; the remainder of the payment would be made on the second anniversary of the first payment.

10. The Plaintiffs would determine how the money held on their behalf was to be invested.

11. There was no agreement if there was no jury verdict.

12. The fact of the agreement, and the terms and conditions of the agreement, including financial considerations, were to remain strictly confidential.

* It turns out that this summary of the verbal agreement is neither complete nor entirely accurate.

* There are three terms of the verbal agreement that are not reflected in the summary:

1. The parties would tender their own proposed jury instructions to the Court.

2. The Plaintiffs would decide how the money would be divided among them.

3. Eli Lilly would take care of the workers' compensation liens. Any money received by the Plaintiffs would not be used to satisfy the workers' compensation liens.

[Foley, Burns, Smith]

* In addition, paragraph 6 of the summary is inaccurate. [Foley] Foley's recollection now is that the agreement was that Eli Lilly would pay one-half of the Plaintiffs' costs regardless of the verdict, so long as a jury verdict was reached. [Foley]

* Burns and Smith also agreed that Lilly would reimburse Smith for part of his expenses regarding discovery even if there were not a jury verdict for the Plaintiffs. [Smith, Burns] The amount would be no more than half of Smith's expenses. [Burns] Because there had been some joint discovery in *Fentress* and the MDL, this payment

of Smith's expenses would have covered some of Smith's discovery expenses in the MDL. [Smith, Burns] Such coverage of MDL expenses was not an intentional result of this agreement. [Burns]

* After the verdict was returned, meetings were held with the Plaintiffs and the Plaintiffs' attorneys to decide how the money would be divided. An agreement was reached. Paul Smith was still in town for these meetings. [Foley]

E. The Written Agreements

* Smith represented the Plaintiffs in preparing the written agreements. [Foley] Attorneys from Freeman & Hawkins prepared the written agreements on behalf of Eli Lilly. [Burns, Myers]

* Two written agreements were prepared. The first agreement is styled "Confidential Agreement," and is attached hereto as Exhibit 2. The second agreement is styled "General Release and Agreement," and is attached hereto as Exhibit 3.

* On February 6, 1995, after the agreements were reduced to writing, all of the Plaintiffs' and the Plaintiffs' attorneys were called in to read and sign the agreements. It was the first time that any of them, except for Paul Smith, had seen the written agreements. [Foley]

* Each Plaintiff and Plaintiffs' counsel met separately with Paul Smith and Nancy Zettler. The agreements were discussed and then signed. After the Plaintiff signed the agreements, he or she received the first payment. [Foley, Smith, Zettler]

* The Plaintiffs and their attorneys were allowed to read the agreements and to commit them to memory, but they were not allowed to have copies of the agreements. [Foley]

F. Terms of the Written Agreements Regarding Discovery and Return of Documents

* The Confidential Agreement includes a provision that requires that discovery in all state court cases filed by the Plaintiffs' attorneys against Eli Lilly involving in any manner the medicine Prozac be governed by Orders and Stipulations entered in *In Re:*

Eli Lilly and Company Prozac Products Liability Litigation, MDL Docket No. 907, pending in the United States District Court for the Southern District of Indiana. This provision also requires the Plaintiffs' attorneys to enter into stipulations or take whatever steps are necessary to effect entry of discovery orders in their cases identical to those in the Prozac MDL. [Exhibit 2, ¶ 15(a)]

- This provision was not part of the agreement reached in December 1994. Lilly wanted it to be part of the written agreement. [Smith]

- Lilly wanted to include this provision in the agreement because it wanted to handle discovery in all Prozac cases in the same way and it wanted all cases to be subject to the rules in the Prozac MDL. [Myers, Lore]

- From Lilly's perspective, this would make sense and add ease, order, and predictability to present and future Prozac cases. It would avoid future skirmishes, because the answers to discovery questions would be the same as in the Prozac MDL. [Burns]

- From Smith's perspective, it did not matter one way or the other if this provision was in the written agreement, because the parties had been operating pursuant to the MDL discovery provisions anyway. [Smith]

* The Confidential Agreement also includes a requirement that the Plaintiffs' attorneys return to Eli Lilly all documents or other materials produced to them by Eli Lilly in this case or in any other state court Prozac case, with the exception of those documents or other materials that have specifically been made applicable to and in the Prozac MDL by a court order. [Exhibit 2, ¶ 15(e)] The Plaintiffs' attorneys are also required to furnish to Eli Lilly a log or record identifying any person or entity to whom documents or other discovery materials produced by Eli Lilly in this case or in any other state court Prozac case have been furnished. [Exhibit 2, ¶ 15(e)]

  - This provision was not part of the agreement reached in December 1994. Lilly wanted it to be part of the agreement. [Smith] Lilly wanted to protect the discovery materials that had been produced in the *Fentress* case. [Myers, Lore]

  - Burns and Smith both indicate that this provision for the return of documents was put into the agreement in response to Lilly's request to obtain the return of

documents pursuant to the Court's *Order Governing the Production of Information and Documents by Elt Lilly and Company and the Confidentiality of Such Materials* (March 29, 1991), a copy of which is attached hereto as Exhibit 4. [Smith, Burns]

* Paragraph 17 of that Order states:

> 17. Within forty-five (45) days of the conclusion of the trial and all appeals or other termination of this litigation, all confidential documents and information, including all copies of such documents or information, shall be returned to Lilly. The provisions of this Order, insofar as they restrict the communication and use of confidential documents or information produced hereunder or information obtained from confidential documents or information shall continue to be binding after the conclusion of this litigation unless written permission is given by counsel for Lilly pursuant to further Order of this Court.

* The Order does not define the term "confidential documents and information," although it does define the term "confidential material" in paragraph 4 of the Order.

* This provision of the written agreement does not limit the return of the documents to those documents that are classified as "confidential documents and information." Neither does the provision in the agreement reference the Court's Order of March 29, 1991.

* Pursuant to this provision of the agreement, Zettler returned a total of 28 boxes of documents to Lilly in June and July 1995. [Burns] Zettler had been in charge of the documents in the case, and had kept them with her after the conclusion of the trial. [Smith]

* Upon the return of these documents, Lilly kept these documents separated from the documents that had been produced in the Prozac MDL discovery. In October, 1996, Lilly sent the documents to Zettler to be included with the MDL

discovery documents. [Burns]

G. Terms of the Written Agreements Regarding Non-Disclosure

* The Confidential Agreement and the General Release and Agreement both include a provision in which the Plaintiffs and the Plaintiffs' attorneys agree that they shall never disclose to anyone the existence of the Confidential Agreement or the General Release and Agreement. [Exhibit 2, ¶ 7(a); Exhibit 3, p. 5] They also agree not to disclose:

> the terms, the fact, amount or timing of any payments made pursuant to this Confidential Agreement or the General Release and Agreement; information contained in this Confidential Agreement or the General Release and Agreement or discussed or communicated during the negotiations leading up to execution of this Confidential Agreement or the General Release and Agreement.

[Exhibit 2, ¶ 7(a)]

* The examples given in the Confidential Agreement of the groups to whom the Plaintiff and the Plaintiffs' attorneys may not disclose this agreement include the public, the press, and family members of the Plaintiffs. [Exhibit 2, ¶ 7(a)]

* In sum, the Plaintiffs and the Plaintiffs' attorneys agree "not to disclose the existence of or describe or characterize this settlement or the terms of this settlement in any way whatsoever." [Exhibit 3, p. 5]

* The Agreements do not require Eli Lilly to abide by these non-disclosure requirements.

* The Confidential Agreement also includes penalties for disclosure:

> Should the existence of this Confidential Agreement or the General Release and Agreement, the terms, the facts, amount or terms of any payments made pursuant to this Confidential Agreement or the General Release and Agreement, information contained in this Confidential Agreement or the

> General Release and Agreement or discussed or communicated during the negotiations leading up to the execution of this Confidential Agreement or the General Release and Agreement be disclosed in any way, whether by Plaintiffs, Plaintiffs' Attorneys, or by any other persons or entities (whether or not party to this Agreement), and whether any such disclosure is made intentionally, accidentally, or with or without the consent or knowledge of Plaintiffs or Plaintiffs' Attorneys, Defendant may, at its sole option, terminate its remaining payment obligation . . . .

[Exhibit 2, ¶ 12]

H. Connection Between the *Fentress* Agreement and Smith's Other Prozac Cases

* Smith was lead counsel for the Plaintiffs in the Prozac MDL from late in 1993 until July, 1995. Zettler was very active in the MDL on behalf of the Plaintiffs. [Smith, Zettler] Zettler was in charge of the documents that were collected pursuant to the discovery in the MDL.

* At the time of the *Fentress* trial, Smith also represented some Plaintiffs in state court Prozac cases. He is unsure of the number of cases. [Smith]

* In negotiating the agreement in this case, Smith and Burns never discussed anything about Smith withdrawing as lead counsel in the MDL case. The MDL case had nothing to do with this case. [Burns] There were no discussion regarding Smith's participation or lack of participation in any other lawsuit. [Smith]

* Myers and Lore know of no connection between the agreements between the Plaintiffs and Eli Lilly in *Fentress* and Smith's withdrawal as lead counsel in the Prozac MDL. [Myers, Lore]

* Smith states that his withdrawal as lead Plaintiffs' counsel in the MDL was not connected to the settlement in this case. [Smith]

* Smith withdrew as lead Plaintiffs' counsel in the MDL in July of 1995. [Smith] Zettler retained the job of custodian of the documents that had been collected pursuant to the discovery in the MDL, as ordered in the MDL on December 27, 1995. A copy

of that order is attached hereto as Exhibit 5. [Smith, Zemler]

* Smith indicates that the reasons for his withdrawal were: He had taken over 50 depositions in the MDL and had reviewed all of the documents. His commitment to the MDL was to be in charge of the common discovery. That commitment had come to an end. It was time to turn the cases back over to the individual lawyers and for the cases to go back to their individual courts. In addition, he had 4 employees when he started the Fentress case; he had only 2 employees when he withdrew from the MDL. He had other cases that needed attention. [Smith]

* Before Smith withdrew as lead Plaintiffs' counsel in the MDL, he filed his "Report of Lead Counsel" with the Court. A copy of that Report is attached hereto as Exhibit 5.

* After Smith withdrew as lead Plaintiffs' counsel in the MDL, he continued to handle the individual federal court cases that he had that were part of the MDL. [Smith] He also continued to handle his state court cases that still were pending. [Smith]

    * As of July 27, 1995, Smith had six pending federal court cases and five pending state court cases. [Burns]

    * After July 27, 1995, Smith filed one additional state court case. [Burns]

* Two of Smith's state court Prozac cases were settled before he was hired to represent the Plaintiffs in the *Fentress* case. [Smith]

* All of the remainder of Smith's Prozac cases, whether in federal or state courts, were either dismissed or settled after the *Fentress* trial. [Smith, Burns]

    * Discussions regarding settling these cases began before Smith's involvement in the *Fentress* case. These discussions continued during Smith's involvement in *Fentress* and continued after the *Fentress* case was concluded. [Burns, Smith]

    * Smith and Burns reached a global number for settling all of Smith's Prozac cases during the *Fentress* trial. Each agreed that he would recommend this settlement to his client(s). [Burns]

        * This did not constitute a settlement of any of Smith's other Prozac cases.

No agreement was reached regarding offering or accepting any particular number for any particular one of these cases until after the *Fentress* trial was concluded. [Smith]

* The settlements were concluded after the *Fentress* trial and were within the global number that Smith and Burns had agreed upon during the *Fentress* trial. [Burns]

I. Connection Between the Oraflex Evidence and the Agreement

* The Court's decision to allow evidence to be introduced regarding Oraflex was some small consideration in Eli Lilly's decision to discuss an agreement with the Plaintiffs, but it was not a driving force in the decision. Eli Lilly felt that Oraflex was not that big a deal. [Burns] The agreement was not reached in order to prevent the introduction of the Oraflex evidence. [Smith, Zettler]

* Freeman & Hawkins had represented Eli Lilly in other cases regarding Oraflex. They had tried two other cases regarding Oraflex and had won both of those cases. [Myers, Lore]

* From Eli Lilly's view, there was little or no value added to the Plaintiffs' case from the Oraflex evidence. [Myers] There was no damage to Eli Lilly from the admission of this evidence. [Lore] The legal impact of admitting the Oraflex evidence from Eli Lilly's view was that the admission was absolutely reversible error. [Myers, Lore] This was discussed among the attorneys for Eli Lilly, including Burns. [Lore] From Lore's point of view, the admission of this evidence would not have played any part in reaching an agreement in the case. [Lore]

* Eli Lilly's response to the Oraflex evidence could have extended the trial for a few weeks. The response would have taken at least 5-6 days. [Lore] What had been tendered to the Court was factually incorrect. [Lore]

* While the Plaintiffs wanted the Oraflex evidence introduced, and had argued for that result, they did not consider the evidence crucial to their case. [Smith, Zettler] They fought hard to get the evidence introduced because they thought that it would be damaging to Eli Lilly. [Foley] There was some concern about whether introducing

the Oraflex evidence would have given Eli Lilly an appealable issue. [Smith] Ultimately, the absence of the Oraflex evidence did not seem to make any difference to the jury; the real problem with the Plaintiffs' case was causation. [Smith, Zettler] Since the jury was only out four hours, hindsight indicates that nothing the Plaintiffs could have done would have changed the verdict. [Foley]

J. Workers' Compensation Subrogation Claim

* The workers' compensation insurer for Standard Gravure had intervened in the case to assert its subrogation interest in the action. [Mahan] Pursuant to agreement between the insurer and the Plaintiffs, the insurer's subrogation interest was represented in the action by the Plaintiffs. [Mahan]

* On December 7, 1994, at around 3:00 p.m., while Mahan was in Arkansas on another matter, a letter from the Plaintiffs' attorneys was hand delivered to Mahan's office. The letter indicated that the Plaintiffs were withdrawing their representation of the insurer's worker's compensation subrogation interest in the action. A copy of that letter is attached hereto as Exhibit 7. [Mahan]

* In the evening of December 7, 1994, Mahan had a telephone conversation regarding the letter with Harry Hargadon, one of the local attorneys in the case, and one of the attorneys who signed the letter that Mahan had received. Hargadon indicated that settlement discussions were under way in the case. [Mahan]

* In the morning of December 8, 1994, Mahan talked with Stopher regarding the worker's compensation subrogation claim. Stopher indicated that there were discussions between the Plaintiffs and Lilly but that he was not privy to them. Stopher told Mahan that Mahan should rely on Stopher's word that Lilly would deal with the insurer in good faith. Stopher indicated that the insurer should continue to pay the worker's compensation benefits. Stopher also told Mahan that Mahan should deal only with Stopher on this matter, and that Mahan should not deal with the Plaintiffs' attorneys about this matter. [Mahan] Stopher does not recall telling Mahan that Mahan should not deal with the Plaintiffs' attorneys about this matter. He recalls that Mahan told him that the Plaintiffs' attorneys would not talk with Mahan. [Stopher]

* On or about January 4, 1995, there was a meeting between Arner Mahan and Ed Stopher to discuss reaching an agreement between the insurer and Lilly. On February 24, 1995, the insurer and Lilly had reached a verbal agreement regarding the insurer's subrogation claim. On April 28, 1995, a Release and Confidentiality Agreement was executed by the insurer and Lilly. [Mahan]

V. Chronology of Certain Events and Court Proceedings

- Late 1993: Smith becomes lead Plaintiffs' counsel in the Prozac MDL.
- February 1994: Leonard Ring dies.
- Some time before March 1994: Two of Smith's state court Prozac cases are settled.
- March 1994: Smith becomes lead Plaintiffs' counsel in *Fentress*.
- September 26, 1994: *Fentress* trial begins.
- After Thanksgiving recess in trial, 1994: Burns and Smith begin discussions about reaching an agreement to end the *Fentress* case with the jury verdict.
- December 7, 1994: Judge Potter rules that the Oraflex testimony may be admitted.
- December 7, 1994, in chambers: Discussion regarding presentation of Oraflex testimony:

> JUDGE POTTER: . . . we will recess till 2:00 tomorrow afternoon, at which time the Plaintiff will have an opportunity to put on additional proof, which he represents will be nothing more than the Oraflex documents.
>
> The parties are having some discussion to which I'm not privy. It is conceivable, if I understand it, that either Oraflex wouldn't be presented or Oraflex along with something else – anyway, however it works out, everybody is convinced that an hour and a half, two hours of Oraflex evidence will finish the Plaintiffs' case; is that right?

MR. SMITH: Yes.

[Transcript, Vol. XLVII, p. 80]

- December 7, 1994, in chambers: Discussion regarding trying case to a verdict:

  MR. SMITH: Judge, I think I can assure you this case is going to be tried to a verdict.

  [Transcript, Vol. XLVII, p. 120]

- December 7, 1994, c. 3:00 p.m.: letter to Mahan from the Plaintiffs' attorneys, indicating that the Plaintiffs are withdrawing their representation of the insurer's worker's compensation subrogation interest in the action.

- December 7, 1994: Stopher knew that settlement negotiations were occurring.

- December 7, 1994: Smith and Burns reach an agreement. The Plaintiffs and their counsel meet to discuss the proposed agreement. Everyone agrees with the terms of the agreement.

- December 8, 1994: Mahan talks with Stopher in the morning regarding the worker's compensation subrogation claim. Stopher indicates that there are discussions between the Plaintiffs and Lilly but that he is not privy to them. Stopher tells Mahan that Mahan should rely on Stopher's word that Lilly will deal with the insurer in good faith.

- December 8, 1994: Burns, Foley, Freeman, Lore, Smith, and Zettler meet in the morning to make sure that everyone understands the terms of the agreement.

- December 8, 1994: Agreement is reached before the parties' attorneys meet with the Court. Burns, Foley, Freeman, Lore, Smith, and Zettler know the terms of the agreement before the meeting with the Court.

- December 8, 1994, in chambers [counsel present: Smith, Zettler, Foley, Stopher, Freeman, Myers]: Discussion regarding closing the evidence without introducing the Oraflex testimony:

MR. SMITH: Judge, after a great deal of consideration, the Plaintiffs, in an effort to facilitate getting this case to the jury as rapidly and expeditiously as possible, are going to close the evidence without the introduction of any further evidence and reserve the offering of the Oraflex documents that have been previously tendered for admission into evidence, reserve that for admission into the punitive damages phase, if any, instead of offering it in the liability-only phase, with permission of the Court, of course.

MR. FREEMAN: That would mean that we would not put up any surrebuttal and we would be ready for argument in the morning.

JUDGE POTTER: Can we go off the record?

[Off the record.]

JUDGE POTTER: I guess, what, I should bring the jury in, is this fair, tell them that there had been other evidence considered, but the lawyers had talked about it among themselves and decided that if they -- one side put in more evidence then the other side would put in more evidence and both sides are content -- not content, maybe is the wrong word, but they have agreed to submit the case to them on what evidence has come in so far, because I think I should give them some kind of explanation.

[Transcript, Vol. XLVIII, pp. 4-5]

- December 8, 1994, off-the-record discussion: Although there is no transcript of this discussion, details of the discussion are provided in the affidavits of those who were present at the discussion. These affidavits are grouped together and are attached hereto as Exhibit 8.

  - There is some disagreement regarding exactly what was said during this off-the-record conversation. Judge Potter recalls either asking the attorneys if "money had changed hands" or stating that he assumed that "money had changed hands." In response to this question or statement, the Judge recalls that at least one attorney responded by stating that money had not changed hands. [Exhibit 8, p. 1 (Potter Affidavit, ¶ 3)]

- Foley recalls that the Judge said that it was not important whether money had changed hands. Foley also recalls that the Judge did not ask for a response to the Judge's statement, and that none was given. [Exhibit 8, p. 4 (Foley Affidavit, ¶ 4)] Freeman recalls that the Judge did not ask whether money had changed hands, but that the Judge specifically stated that if such were the case he did not want to know. [Exhibit 8, p. 6 (Freeman Affidavit, ¶ 4)] Myers recalls that the Judge said that he did not want to know if any payment had been made; the Judge did not ask, and no statement was made by the attorneys, about the issue of consideration. [Exhibit 8, p. 9 (Myers Affidavit, ¶ 6)] Stopher recalls that the Judge said that money or other things of value may have been exchanged, but that he did not want to know. [Exhibit 8, pp. 12-13 (Stopher Affidavit, ¶ 2)]

- There are recollections that other matters were also discussed during this off-the-record discussion. McBride, Myers, Smith, Stopher, and Zettler recall that the Judge indicated that he was not surprised, or that he had anticipated, that the parties might make some sort of agreement not to introduce the Oraflex evidence. [Exhibit 8, pp. 7, 9, 10, 12-13, 14] They also recall that the Judge said that he had discussed such an agreement with another judge or lawyer and that they agreed that there was nothing improper or unethical concerning the decision not to introduce the evidence. [*Id.*]

- Judge Potter asked the attorneys if there were still issues to go to the jury and was informed that there still was a justiciable controversy for the jury to consider. [Exhibit 8, pp. 1, 4, 5, 10, 13, 14]

- December 8, 1994, in open court: Explanation of submitting the case:

  JUDGE POTTER: Yesterday or earlier when the lawyers were planning things out, they thought there would be some more evidence today. At the very beginning of the case I talked to you-all about asking questions and I said sometimes the lawyers leave something out or they decide not to bring something up because that leads to something else and that leads to something else. Didn't I say something to you like that? One of the reasons they've spend some time talking yesterday and today, they came to an agreement to admit the case to you on the evidence that's come in. . . .

  [Transcript, Vol. XLVIII, pp. 7-8]

- December 8, 1994, in chambers: Defendant argues its Motion for Summary Judgment/Motion for Directed Verdict on claim for punitive damages. [Transcript, Vol. XLVIII, p. 17]

- December 8, 1994, in chambers [counsel present: Myers, Stopher, Zettler, Smith, Foley]: Defendant argues its Motion to conduct compensatory damages phase of case before the punitive damages phase. [Transcript, Vol. XLVIII, p. 54]

- December 8, 1994, evening: Myers learned about the existence of the agreement, and knew that the case would be concluded if the jury reached a verdict.

- December 9, 1994, in chambers [counsel present: [Stopher, McGoldrick, Myers, Smith, Zettler, Foley]: discussion regarding whether counsel can mention the next phases (re: punitive damages and compensatory damages) of the trial in closing arguments [Transcript, Vol. XLIX, p. 12]

- December 9, 1994: The case is submitted to the jury.

- December 12, 1994, in chambers, while the jury is deliberating [counsel present: Stopher, Freeman, Smith, Zettler, Foley]: Judge's suggestion regarding having the parties work with a mediator to try to settle the case:

> JUDGE POTTER: . . . . If there is a Plaintiffs' verdict, I would like to take a day's recess, and although I normally don't get involved in settlement, I would like to say something to you-all and then have you meet with a mediator to see if that portion of it could be settled, because I really do believe the dynamics there are such that it would be to both parties' benefit to settle it. I don't – this part of it I haven't even thought about trying to settle it.
>
> But with that in mind, I was going to ask Lilly to have somebody present who had substantial authority to talk for the company. From what went on this morning, in the sense you waited for a company representative to be here, I take it you have somebody here who has substantial authority.
>
> MR. FREEMAN: Yes, we did.
>
> * * * * *

JUDGE POTTER: . . . . Along that line, Mr. Smith, you not only have the plaintiffs you have here, you have a subrogation of workers' compensation claim. Would you contact that person and make sure that either – I think Mr. Mahan represents them here in Louisville. Would you make sure what his schedule is so that he could be available with somebody at the company that could, you know, make a decision?

MR. SMITH: All right.

[Transcript, Vol. L, pp, 13-14]

- December 12, 1994, in chambers, while the jury is deliberating [counsel present: Stopher, Freeman, Smith, Zettler, Foley]: Discussion regarding starting the next phase of the case:

MR. SMITH: Had the Court thought – in the event that there is a punitive damage phase, had the Court given any thought as to when the particular phase would start?

JUDGE POTTER: Within 24 to 36 hours after the verdict comes in. As I said, I want one day to have you-all talk about settlement.

* * * * *

MR. SMITH: Can I have my Chrismas presents sent here?

MR. FREEMAN: And the tree.

[Transcript, Vol. L, p 16]

- December 12, 1994, in chambers: Discussion with/about juror who heard someone say that the case had been settled:

  - Discussion with the juror:

JUROR DUNCAN: Okay. I was out in the hallway while some discussions were going on, and I overheard that the Lilly lawyers – can I call you that?

MR. STOPHER: Sure.

JUROR DUNCAN: Okay. That the Lilly lawyers were trying to settle out of court with the Plaintiffs, and I just, you know, caught that to some degree. I just overheard the lawyers discussing it as I was walking by, and that kind of, you know. . .

JUDGE POTTER: Okay. Let me ask you this: Do you remember who you heard say it or in what context you heard it? Because it's not correct. . . .

JUROR DUNCAN: I just heard that they were settling and everything out of court, and that just – it didn't really register right away; it did later. . . . I'm pretty sure it was two lawyers. . . . I'm pretty sure they were on opposite sides.

JUDGE POTTER: Okay. As I say, the parties are diametrically opposed on this case, and so they have not – the reason you're back there is because they have not settled it, and I can tell you I don't think either side has, you know, thought about that as a possibility because each side – they're so far apart on what went on. . . .

[Transcript, Vol. L, pp. 23-26]

- Discussion about the juror, after the juror left chambers:

JUDGE POTTER: Does anybody have the slightest clue?

MR. SMITH: No.

MR. STOPHER: I can't imagine. . . . I mean, this comes as an absolute shock to me.

JUDGE POTTER: Well, the only thing I can think of – and I didn't ask her what day it was, but assuming it's the day that Ms. Davis got sick, somebody might have said can't we settle on going without an alternative or something, you know, used that magic word.

MR. SMITH: It could have been that.

MR. STOPHER: I don't know. . . . But I would try to reinforce in her mind that the Court has been pretty well informed about all aspects of this case, not only what's going on in the courtroom but what's going on outside the courtroom, and that if any such statement was made, that it is not accurate and was made by somebody that did not have knowledge and that it should not ever be considered by her and should be disregarded by her as having no basis in truth at all.

[Transcript, Vol. L, pp. 26-27]

- Follow-up discussion with Juror Duncan back in chambers:

JUDGE POTTER: Ms. Duncan, the lawyers are at a loss as to what you might have overheard. I have been involved in this case, and although I don't know everything that goes on, I've been pretty well up on things, and neither I nor the lawyers can understand any basis for anybody to say that. . . .

[Transcript, Vol. L, p. 28]

- December 12, 1994: the jury returns a verdict in favor of the Defendant:

JUDGE POTTER: The verdict of the jury is as follows: We, the Jury, do not find Eli Lilly and Company at fault. . . .

[Transcript, Vol. L, p. 31]

- Some time before the end of the *Fentress* trial: Smith and Burns reach a global number for presenting to their client(s) in order to settle all of Smith's remaining Prozac cases.

- Some time after the end of the *Fentress* trial: All of Smith's remaining Prozac cases are dismissed or settled.

- c. January 4, 1995: meeting between Mahan and Stopher regarding agreement between insurer and Eli Lilly.

- February 6, 1995: Execution of General Release and Agreement between the Plaintiffs and Lilly.

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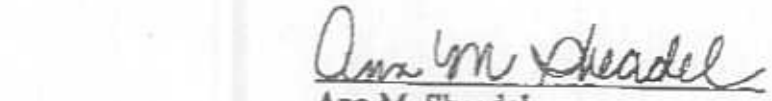
March 4, 1997

- February 6, 1995: Execution of Confidential Agreement between the Plaintiffs and Lilly.
- February 24, 1995: Insurer and Lilly reach a verbal agreement regarding the amount to be paid to the insurer by Lilly.
- April 28, 1995: Execution of Agreement between insurer and Lilly.
- June and July, 1995: 28 boxes of documents are returned to Lilly pursuant to the terms of the Confidential Agreement
- July, 1995: Smith files "Report of Lead Counsel" and withdraws as lead Plaintiffs' counsel in the MDL.
- December 27, 1995: An order is entered in the MDL retaining Zettler as custodian of the documents that had been collected pursuant to the discovery in the MDL.
- October, 1996: Lilly sends the 28 boxes of documents to Zettler to be included with the MDL discovery documents.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the original of this Report of the Friend of the Court was sent on this 4th day of March, 1997, by UPS Next Day Air, to:

John W. Potter, Judge
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and that a copy of this Report of the Friend of the Court was sent on this 4th day of March, 1997, by UPS Next Day Air, to:

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