# EMERGENCY

Law Project for Psychiatric Rights
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Attorney for Appellant

IN THE SUPREME COURT FOR THE STATE OF ALASKA

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| WILLIAM BIGLEY,<br>Appellant,<br><br>vs.<br><br>ALASKA PSYCHIATRIC INSTITUTE<br>Appellee. | ) Supreme Court No. S-13353 |
| _____ | ) Trial Court Case No. 3AN 08-1252PR |

**EMERGENCY MOTION FOR STAY OF ORDER AUTHORIZING FORCED PSYCHIATRIC DRUGGING**

Appellant hereby moves, pursuant to Appellate Rules 504 and 205, on an emergency basis, for an order staying pending appeal the Superior Court's authorization of the forcible administration of psychotropic drugs to Appellant:

(1) under its November 25, 2008 Order granting the AS 47.30.839(a)(2) *parens patriae* count of the petition by Appellee Alaska Psychiatric Institute (API) under AS 47.30.839(a)(2) (*Parens Patriae* Forced Drugging Order),[1] and

(2) under its December 3, 2008, order purporting to clarify the *Parens Patriae* Forced Drugging Order, but actually authorizing the forced drugging under the AS 47.30.839(a)(1) police power count of API's petition without giving

Appellant an opportunity to be heard thereon (Police Power Forced Drugging Order).[2]

## I. Appellate Rule 504 Emergency Motion Application

### A. Telephone Numbers and Addresses of Counsel.

Counsel for Appellant's telephone number is 274-7686[3] and his office address is 406 G Street, Suite 206, Anchorage, Alaska 99501. Erin Pohland and Laura Derry have both served as counsel for Appellee Alaska Psychiatric Institute (API) in this matter, both of their offices are at 1031 West 4th Avenue, Suite 200, Anchorage, Alaska 99501, Ms. Pohland's phone number is 269-5140 and Ms. Derry's phone number is 269-5540.

### B. Nature of Emergency and the Date and Hour Before Which a Decision is Needed.

The nature of the emergency is that Appellant is currently subject to being improperly drugged against his will, which this Court has equated with the intrusiveness of lobotomy and electroshock,[4] and the United Nations has recently recognized constitutes torture under international law.[5]

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[1] Exhibit A.
[2] Exhibits B & C.
[3] Appellant's counsel is scheduled to be out of state during the week of December 7, 2008, and he will call the clerk with a telephone number(s) at which he may be contacted during that time.
[4] *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 242 (Alaska 2006); *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 271, 382
[5] Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, to United Nations General Assembly, July 28, 2008, relevant pages of which are attached hereto as Exhibit D, and a copy of the entire document accessible on the Internet available (on December 6, 2008) at http://psychrights.org/Countries/UN/080728UNRapporteuronTortureA_63_175.pdf.

A decision on staying the Police Power Forced Drugging Order is needed immediately because API takes the position it can now forcibly drug Appellant thereunder in spite of the time limited stay issued by the Superior Court in its *Parens Patriae* Forced Drugging Order.[6] A decision on staying the *Parens Patriae* Forced Drugging Order is needed before the stay granted by the Superior Court is set to expire on December 17, 2008, unless this Court has granted Appellant's emergency motion in Alaska Supreme Court Case No. S-13116 to vacate the *Parens Patriae* Forced Drugging Order because it violates the stay pending appeal issued in S-13116.[7]

### C. Grounds Submitted to Superior Court

Appellant has contemporaneously herewith filed in the Superior Court a motion for stay pending appeal of the Police Power Forced Drugging Order,[8] asking for expedited consideration thereof.[9] Appellant filed a motion for stay pending appeal of the *Parens Patriae* Forced Drugging Order on December 1, 2008,[10] expedited consideration of which was denied that same day.[11]

### D. Notification of Opposing Counsel

On Sunday, December 7, 2008, Appellant e-mailed counsel for API a link to this motion posted on the Internet. A copy of this motion is also set to be hand delivered to API's counsel as early as possible on Monday, December 8, 2008.

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[6] Exhibit A.
[7] Exhibit E, attachments omitted and Exhibit F.
[8] Exhibit G.
[9] Exhibit H.
[10] Exhibit I.
[11] Exhibit J.

## II. Relationship to Pending Emergency Motion In S-13116

The procedural setting for this motion seems at least somewhat complex. As briefly mentioned above, in S-13116, Appellant has filed an emergency motion to vacate the *Parens Patriae* Forced Drugging Order for violating the stay pending appeal issued in that appeal.[12] That is a completely separate ground than asserted here. However, should this Court grant Appellant's pending emergency motion in S-13116 and vacate the *Parens Patriae* Forced Drugging Order that will moot the motion here.[13] Looked at differently, even if the stay issued in S-13116 is determined by this Court in S-13116 to not apply to the forced drugging orders issued below in this case, Appellant is, by this motion, separately seeking a stay pending appeal here.

## III. Standard for Granting Stay Pending Appeal

This Court's Order granting the stay in S-13116, sets forth the standard for deciding whether a stay pending appeal should be granted:

> It is first necessary to identify the standard for deciding whether a stay is appropriate. The standard depends on the nature of the threatened injury and the adequacy of protection for the opposing party. Thus, if the movant faces a danger of irreparable harm and the opposing party is adequately protected, the "balance of hardships" approach applies. Under that approach, the movant "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without

[12] Exhibit K, without Exhibits.

[13] It might be argued that vacating the *Parens Patriae* Forced Drugging Order does not impact the Police Power Forced Drugging Order, but since the Superior Court held, as untrue as it is, that the Police Power Forced Drugging Order was really only a clarification of the *Parens Patriae* Forced Drugging Order, it seems vacating the *Parens Patriae* Forced Drugging Order would also encompass the Police Power Forced Drugging Order. However, since there seems no reason to leave this in doubt, Appellant respectfully suggests if this Court grants this motion, its order be clear in this regard. The proposed order lodged herewith addresses this issue.

> merit.'" *State, Div. of Elections v. Metcalfe*, 110 P.3d 976,978 (Alaska 2005). On the other hand, if the movant's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, the movant must demonstrate a "clear showing of probable success on the merits."[14]

Appellant meets both tests with respect to both the *Parens Patriae* Forced Drugging Order and the Police Power Forced Drugging Order.

## IV. Police Power Forced Drugging Order

### A. The Superior Court Lacked Subject Matter Jurisdiction to Issue the Police Power Forced Drugging Order.

As a threshold matter, it appears the Superior Court did not have subject matter jurisdiction to issue the Police Power Forced Drugging Order since Appellant had already filed the instant appeal. Appellate Rule 203, provides:

> The supervision and control of the proceedings on appeal is in the appellate court from the time the notice of appeal is filed with the clerk of the appellate courts, except as otherwise provided in these rules.

In *Noey v. Bledsoe*,[15] this court held an appeal in another case didn't deprive the Superior Court of jurisdiction in the case at question. Appellant respectfully suggests *Noey* can be read as affirming Appellate Rule 203's assumption of exclusive jurisdiction over the matter on appeal unless some exception applies. Thus, in *Hertz v. Carothers*,[16] this Court held there was exactly just such an exception allowing the Superior Court to issue writs of execution while a judgment was on appeal where no stay had been granted. Here, the Superior Court purported to dramatically change its decision after it had been appealed.

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[14] Exhibit L.
[15] 978 P.3d 1264, 1275 (Alaska 1999).
[16] 174 P.3d 243, 248 (Alaska 2008).

### B. Appellant Can Show Probable Success on the Merits

#### (1) Substantive Due Process Requirements

In *Myers v. Alaska Psychiatric Institute*, this Court held being free from the unwanted administration of psychotropic medications is a fundamental constitutional right[17] and:

> 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.[18]

The compelling state interest in *Myers* was the *parens patriae* doctrine involving "the inherent power and authority of the state to protect "the person and property" of an individual who "lacks legal age or capacity,"[19] while the compelling state interest invoked under the police power is when there is "imminent threat of harm."[20]

#### (2) Alaska's Statutory Implementation of the Police Power Justification

AS 47.30.838 is Alaska's statutory implementation of the Police Power justification. AS 47.30.838(a)(1) permits such forced drugging only if

> there is a crisis situation, or an impending crisis situation, that requires immediate use of the medication to preserve the life of, or prevent significant physical harm to, the patient or another person.

It then goes on to require the behavior or condition of the patient giving rise to a crisis to be documented in the patient's medical records, which must "include an explanation of

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[17] 138 P.3d 238, 248 (Alaska 2006)
[18] 138 P.3d at 245-246, internal quotes and citations omitted.
[19] *Myers* 138 P.3d at 249.
[20] *Myers*, 138 P.3d at 248.

alternative responses to the crisis that were considered or attempted by the staff and why those responses were not sufficient."

Under AS 47.30.838(c) API can unilaterally invoke the police power justification for only three crisis periods without superior court approval under AS 47.30.839(a)(1).

**(3) Appellant Was Denied Due Process**

The order granting expedited consideration of the motion leading to the Police Power Forced Drugging Order, states in pertinent part:

> The Court has ruled on this and the underlying substantive motion without further input from William Bigley and James Gottstein because the issues were fully addressed at the recent hearing and should have been more clearly articulated by the Court in its decision.[21]

That the police power justification for forced drugging under AS 47.30.839(a)(1) (Police Power Count) was fully addressed in the hearing is untrue. Believing that if it granted the forced drugging petition based on the *parens patriae* justification under AS 47.30.839(2) (*Parens Patriae* Count) it would eliminate the need for considering the Police Power Count and reduce the hearing time, the Superior Court ruled it would not take any evidence on the Police Power Count until after it ruled on *Parens Patriae* Count and if there was then a need to consider the Police Power Count, further evidence would be taken from both sides, after allowing Appellant some discovery.[22]

The issue of the separate nature of the Police Power Count was first raised by Appellant at the October 28, 2008, status conference:

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[21] Exhibit B.
[22] Exhibits M & N, culminating at Exhibit N, p 6, Tr. 19-20 (November 3, 2008).

> MR. GOTTSTEIN . . . Your Honor, in the past, API has administered medication pursuant to [the police power justification under AS 47.30.838/AS 47.30.839(a)(1)] without the legal predicate . . . existing. And I'd be very surprised if the actual legal requirement for that medication exists. And so that's one of the things that I really need to be able to discover, is what actually --what actually happened. So,. . . it really puts me in a difficult position because. . . they come in and say all these things and then many times it turns out not to be true, and so I really have to have an opportunity to be able to explore that.[23]

It was then discussed at some length during the November 3, 2008, status conference, perhaps the most relevant portions of the transcript being:

> THE COURT: So let's assume, just for purposes of walking it through, that I grant the 839 petition because he's incapable of giving informed consent and I meet all the other Meyer/Weatherhorn criteria [*Parens Patriae* Count]. Doesn't that moot out the 838 -- the 839(a)(1) petition [Police Power Count]?
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> MS. DERRY: Yes, Your Honor.[24]
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> * * *
>
> THE COURT: Doesn't it make sense for the State to proceed under 839(a)(2) [*Parens Patriae* Count] in the first instance and present only the information it thinks is necessary there? If I grant that petition, then any need for 839(a)(1) authorization [Police Power Count] is moot?
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> MS. DERRY: Yes. I believe that, Your Honor.
>
> THE COURT: And then if, on the other hand, I deny your 839(a)(2) request, then the State can, if it wants, present whatever additional information is necessary to seek 839(a)(1) authority.[25]
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> * * *
>
> THE COURT: Okay. . . . So do you see any problem, Mr. Gottstein, if we -- if the State goes under 839(a)(2) first, under whatever it thinks is a smaller subset of evidence, you respond to that, I'm going to make a ruling, if I grant it, doesn't that moot out the (a)(1) request?

[23] Exhibit M, p. 6; Tr. 18 (October 28, 2008).
[24] Exhibit N, p. 6, Tr. 14 (November 3, 2008).
[25] Exhibit N, p. 5, Tr. 15 (November 3, 2008).

> MR. GOTTSTEIN: I think that, Your Honor, this is where the Supreme Court stay really comes into effect, because the Alaska Supreme Court issued a stay on essentially the same evidence that I presented to you, Your Honor, and then you indicated --
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> THE COURT: Forget the stay. Just forget that there's a stay for purposes of this discussion, and then we'll go back to what the stay brings. If there was no stay in place, doesn't the granting of the 839(a)(2) petition, if that's what I do, moot out the (a)(1)?
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> MR. GOTTSTEIN: Yes, Your Honor.[26]

Appellant then pointed out that because of the stay, API was going to run out of its limited authorization to utilize the police power justification for forced drugging under AS 47.30.838 without obtaining court approval under AS 47.30.839(a).[27] Assuming the Court would follow through on its statements that a later hearing would be held on the Police Power Count before forced drugging would be authorized under the police power justification, Appellant thought limiting the hearing to the *Parens Patriae* Count benefitted him,[28] and the Superior Court said:

> THE COURT: Okay. We're both in agreement. . . . [T]he State will present what it thinks is necessary under 839(a)(2) [*Parens Patriae* Count].

Appellant then raised the question of how much time he would have to prepare for a hearing on the Police Power Count "if we end up going to that?"[29] The Superior Court responded:

> THE COURT: . . . I'm going to issue an order in the first instance on the 839(a)(2) petition [*Parens Patriae* Count], and if I grant that, then everything else is moot. If I don't grant it, then I'm going to grant the State an opportunity right then to supplement its evidentiary basis for the second

[26] Exhibit N, p. 5, Tr. 17 (November 3, 2008).
[27] Exhibit N, pp 5-6, Tr. 17-18 (November 3, 2008).
[28] Exhibit N, p. 6, Tr. 18 (November 3, 2008).
[29] Exhibit N, p.

> type of authorization [Police Power Count]. And then, Mr. Gottstein, you can tell me when the time comes why you think you might not have been prepared. If you're not, you're not. I'll deal with that assertion when it's given to me and when I've had a chance to see the evidence that both sides present.[30]

The problem was, just as Appellant had advised the Superior Court, everything else was not moot when the Superior Court issued the *Parens Patriae* Forced Drugging Order, as most dramatically shown by API filing a motion to "clarify" that the *Parens Patriae* Forced Drugging Order also granted the Police Power Count.[31]

Then, as set forth above, the Superior Court granted that motion without allowing Appellant to be heard on the matter. It is hard to imagine a more clear denial of due process. As the United States Supreme Court has recently held, a meaningful opportunity to be heard is one of the fundamental hallmarks of Due Process.[32]

### (4) The Factual and Legal Predicates for the Police Power Forced Drugging Order Are Extremely Unlikely to Be Present

Appellant was not able to conduct much discovery with respect to the true facts surrounding API's purported police power drugging, but there is enough to demonstrate the factual and legal predicates justifying granting the Police Power Count are highly unlikely to exist. First, following a prior emergency motion to this Court to stop the improper purported police power forced drugging of Appellant in S-12851, Dr. Worrall advised Appellant's counsel that there was no API policy on implementing the police power justification as embodied in AS 47.30.838, or otherwise, he had received no

[30] Exhibit N, p 6, Tr. 19-20 (November 3, 2008).
[31] Exhibit O.
[32] *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 2648-49 (2004).

training on the topic, and he had had no idea of the requirements before Appellant raised them in S-12851.[33] Appellant's counsel understands from the same source that the Attorney General's office started working on a policy following this.

During the deposition of Ron Adler, API's CEO, over counsel for API's objection, Appellant asked Mr. Adler about this and he promised to provide the new policy,[34] but API has failed to do so. Mr. Adler did testify in his deposition that there was now training, that he couldn't identify who did the training, but he would subsequently provide that information "through our attorneys,"[35] which it has failed to do.

A deposition was also taken of Dr. [redacted], the psychiatrist who signed the forced drugging petition on appeal here, and is the psychiatrist in charge of Appellant.[36] Over, API's objection, Appellant also questioned Dr. [redacted] about police power justification forced drugging procedures at API and of Appellant.[37] Appellant suggests this transcript demonstrates API's administration of police power forced drugging to Appellant did not and does not comply with AS 47.30.838, nor does it comply with constitutional requirements.[38]

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[33] Dr. Worrall asked that his e-mail so advising Appellant's counsel not be made public, so it is being filed in an envelope marked confidential.
[34] Exhibit P, page 4, Transcript page 12.
[35] Exhibit P, page 3, Transcript pages 8-9.
[36] Exhibit Q.
[37] Exhibit Q, pages 5-7, Transcript pages 15-25.
[38] Appellant sought the names of the nurses who decide whether the conditions for administering police power forced drugging exist and Dr. [redacted] said she would get Appellant a list of names the next day if not by fax that afternoon (Exhibit Q, page 7, Transcript page 23), which she failed to do.

## V. *Parens Patriae* Forced Drugging Order

If this Court does not vacate the *Parens Patriae* Forced Drugging Order before December 17, 2008, which is the date the Superior Court in this case set for termination of its stay without further order of this Court, this Court should grant a stay of it pending appeal.

### A. <u>This Court Has Already Granted a Stay Pending Appeal on Exactly the Same Relevant Facts.</u>

This Court has already granted a stay pending appeal in S-13116 on exactly the same relevant facts,[39] including denying full court reconsideration.[40] Appellant respectfully suggests that at least until this Court decides S-13116, which has been expedited, something akin to *collateral estoppel* or "law of the case" should apply.

API will presumably argue that it introduced new facts, but none of the testimony it elicited goes to the issues relevant for determining whether a stay pending on appeal should be granted. This is illustrated by the Superior Court's indication that it will deny Appellant's motion for stay pending appeal because it had concluded Appellant, "has deteriorated since May 2008 and should not have to wait longer for medication."[41] As set forth above, that is not the standard. Moreover, any deterioration of Appellant, if any, is almost certainly, as Dr. Jackson testified in both cases, to be from the brain damage caused by the drugs and the failure of API/the State to provide a less intrusive alternative,

[39] Exhibit L.
[40] Exhibit R.
[41] Exhibit A, page 32.

primarily consisting of having someone with Appellant in the community enough to avoid the difficulties he has been experiencing.

### B. Appellant Faces the Danger of Irreparable Harm

With some trepidation, Appellant will incorporate by reference his presentation of harm that resulted in this Court granting the stay pending appeal in S-13116 on the belief repeating it here would unnecessarily lengthen this motion.[42] All of the same evidence was presented below,[43] plus the affidavit of Dr. Jackson filed in S-13116, which this Court did not rely upon in granting the stay in S-13116,[44] and some additional cross-examination below in this case, confirming the brain damage and that the drugging will likely kill Appellant if not stopped.

In that regard, in granting the *Parens Patriae* Forced Drugging Petition, the Superior Court assumed that past psychiatric drugging had caused brain damage, the forced drugging the Superior Court authorized will cause further brain damage and shorten Appellant's life.[45] This is a further demonstration of irreparable harm.

### C. Appellant Can Demonstrate Probable Success on the Merits as Well.

Appellant also incorporates by reference his argument that he can demonstrate probable success on the merits contained in his opposition to API's motion for

[42] A copy of the Emergency Motion for Stay in S-13116 without the exhibits is attached hereto as Exhibit K.
[43] Exhibit S.
[44] Exhibit L, page 4.
[45] Exhibit A, page 28.

reconsideration of the stay granted in S-13116.[46] In addition, with respect to probable success on the merits, the Superior Court clearly erred in denying Appellant's motion for summary judgment and incorporates by reference his motion for summary judgment below[47] and reply to API's opposition.[48] To summarize that argument, API filed no affidavits or other competent evidence in opposition to those presented by Appellant. Frankly, it is hard for Appellant to see how he wouldn't prevail on that issue.

In addition, although perhaps less clear in light of *Wetherhorn*, Appellant believes he should also prevail on his motion to dismiss, and incorporated herein by reference that section of his motion to dismiss[49] and reply to API's Opposition.[50] To summarize that argument, the *Parens Patriae* Count fails to allege that the forced drugging is, as required by *Myers*, in Appellant's best interest and there is no less intrusive alternatives available. Thus, it fails to state a claim upon which relief may be granted or is otherwise insufficient to support the relief requested.

Appellant suggests *Wetherhorn* does not hold otherwise. First, *Wetherhorn* involved the sufficiency of the petition for commitment not forced drugging. However, even if the same analysis applies, in *Wetherhorn*, the sufficiency of the allegations were tested against the claim that they should:

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[46] Exhibit T, without 170 pages of exhibits.
[47] Exhibit U.
[48] Exhibit V, pages 4-9.
[49] Exhibit W, pages 2-3.
[50] Exhibit V, page 3.

> "(1) be sufficient, without supplementation, to entitle the petitioner to the granting of the petition as a matter of law, and (2) to at least summarize all of the evidence the state intends to put on in its case in chief."[51]

That is not the assertion here. The assertion here is just that the petition has to at least be sufficient to survive a Civil Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted.

Also, it is respectfully suggested the ruling in *Wetherhorn* on this issue was dicta because it was decided under the plain error standard since Ms. Wetherhorn's counsel at the time, the Alaska Public Defender Agency had not raised the issue with the trial court.

Thus, Appellant believes he has also shown probable success on the merits with respect to his motion to dismiss the *Parens Patriae* Count.

## VI. Conclusion

For the foregoing reasons, both the Parens Patriae Forced Drugging Order and the Police Power Forced Drugging Order should be stayed pending appeal.

Dated this 6th day of December, 2008, at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By: _____
James B. Gottstein, Esq.
Alaska Bar No. 7811100

[51] 156 P.3d at 380

Exhibits

A. *Parens Patriae* Forced Drugging Order, November 25, 2008.
B. Order Granting Expedited Consideration, December 3, 2008.
C. Police Power Forced Drugging Order, December 3, 2008.
D. Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, to United Nations General Assembly, July 28, 2008
E. Emergency Motion to Enforce Stay and Non-Emergency Motion for Sanctions, December 1, 2008.
F. Second Update to Emergency Motion to Enforce Stay, December 3, 2008.
G. Memorandum in Support of Motion to Stay Police Power Forced Drugging Order, December, 6, 2008.
H. Motion to Expedition Motion to Stay Police Power Forced Drugging Order, December 6, 2008.
I. Memorandum in Support of Motion to Modify Stay and For Stay Pending Appeal of *Parens Patriae* Forced Drugging Order, December 1, 2008.
J. Order Denying Motion for Expedited Consideration, December 1, 2008.
K. Emergency Motion to Enforce Stay and Non-Emergency Motion for Sanctions in S-13116, December 1, 2008.
L. Stay Order in S-13116, May 23, 2008.
M. Transcript of October 28, 2008, hearing.
N. Transcript of November 3, 2008, hearing.
O. Motion for Clarification of Order, December 3, 2008.
P. Deposition Transcript of Ron Adler, November 4, 2008.
Q. Deposition Transcript of [redacted], MD, November 4, 2008
R. Full Court Denial of Reconsideration in S-13116, June 25, 2008.
S. Notice of Filing Written Testimony, October 28, 2008.
T. Opposition to Reconsideration of Stay in S-13116, June 9, 2008.
U. Summary Judgment Motion, October 28, 2008.
V. Reply re: Summary Judgment & Motion to Dismiss, November 3, 2008.
W. Motion to Dismiss, October 28, 2008.

Confidential Envelope, E-mail string between William Worrall, MD and Jim Gottstein, September 22, 23, 2007.