

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-5630 CI

**ORDER DENYING ELI LILLY AND COMPANY'S MOTION TO STAY
UNSEALING OF RECORDS**

On June 13, 2008, the Court issued an Order Granting Bloomberg's Motion to Unseal Records. Court staff telephonically notified the parties' counsel that the order was available in chambers. Counsel for the parties obtained copies of the order that afternoon. On June 16, 2008, Lilly moved to stay unsealing of records until Lilly filed a motion to reconsider and the Court ruled on that motion to reconsider. Lilly moved for expedited consideration of the motion to stay.

The Court granted expedited consideration of Lilly's motion to stay and requested a response from Bloomberg. The Court instructed court staff to delay unsealing records. On June 17, 2008, Bloomberg opposed Lilly's motion.

The Court has delayed unsealing the records for five days. Lilly has not moved to reconsider. The Court will not stay unsealing the records. The records now are available for public access.

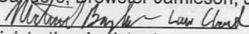
DATED at Anchorage, Alaska, this 18th day of June 2008.


MARK RINDNER

Superior Court Judge

I certify that on June 18, 2008 a copy was mailed to:

Eric Sanders, Brewster Jamieson, Jon Dawson


Administrative Assistant

Alaska Court System
Page 1

State v. Eli Lilly
3AN-06-5630 CI

Order Denying Eli Lilly and Company's Motion to Stay Unsealing of Records

005503

FILED
JUN 17 PM 4:24
CLERK, TRIAL COURT
JANUARY 17 2008

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9 d/b/a Bloomberg New

10 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
11 THIRD JUDICIAL DISTRICT AT ANCHORAGE

12 STATE OF ALASKA,)

13 Plaintiff,)

14 vs.)

15 ELI LILLY AND COMPANY,)

16 Defendant.)

Case No. 3AN-06-05630 CI

17
18 **OPPOSITION TO ELI LILLY'S MOTION TO STAY UNSEALING OF**
19 **RECORDS PENDING FILING OF MOTION FOR RECONSIDERATION**

20 On June 13, 2008, this Court issued a carefully crafted 26 page order granting
21 Bloomberg, LLC's motion to unseal various documents in the above-captioned matter.
22 Eli Lilly & Company has already had two opportunities to oppose the unsealing of those
23 documents (their Opposition filed March 20, 2008, and their Supplemental Opposition
24 filed April 25, 2008). Eli Lilly now requests that the Court stay its order unsealing
25

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005504

1 documents so Eli Lilly can file yet a third round of briefing in the form of a motion for
2 reconsideration. There can be little doubt that Eli Lilly's motive is to delay the inevitable
3 release of judicial documents in the hope that time will erode the news value and public
4 importance of this information. However, this Court is not charged with the task of
5 helping Eli Lilly deal with its public relations problems. The motion for stay should be
6 denied for the reason that Eli Lilly has had more than adequate opportunity to brief its
7 position, and a motion for reconsideration is inappropriate and futile under Alaska R. Civ.
8 P. 77(k).
9
10

11 In opposing Bloomberg's motion, Eli Lilly offered only conclusory assertions that
12 it would be put at a competitive disadvantage. Those assertions were based in large part
13 on an affidavit filed in another case that did not even relate to the particular documents at
14 issue in Bloomberg's motion. In short, Eli Lilly failed to show specific facts of harm so
15 as to overcome the public's right of access. This Court agreed. In its Order Granting
16 Bloomberg's Motion to Unseal Records, the Court repeatedly noted that Eli Lilly rested
17 its opposition upon conclusory statements of harm, or relied upon affidavits that failed to
18 address the specific documents that Bloomberg sought to unseal. See Order Granting
19 Bloomberg's Motion to Unseal Records at p.13 ("Lilly supports these claims through
20 conclusory statements lacking factual support"); p. 14 ("the conclusory statement that . . .
21 'competitors could use this information to Lilly's competitive disadvantage' with no
22 supporting facts or affidavits is inadequate to show good cause"); p.16 ("Lilly has failed
23
24
25

1 to show how disclosure of Plaintiff's Ex. No. 10106 will harm Lilly"); p. 18 ("[t]he
2 Hoffman declaration does not discuss the Neoges deposition . . . [and] Lilly fails to
3 illustrate, with any specificity, how Lilly competitors would use this information to harm
4 Lilly"); p. 18 ("Lilly does not indicate the nature of alleged trade secrets or confidential
5 business information and merely makes a conclusory statement that the information, if
6 released, could be used by Lilly competitors to Lilly's disadvantage . . ."); p. 19 ("Lilly's
7 reliance on general conclusory declarations which do not discuss the pleadings at issue is
8 inadequate to show good cause"); p. 20 ("Lilly claims that the FDA must assert the
9 documents confidentiality . . . [but] Lilly presents no law in support of this claim"); p. 25
10 ("Lilly cites the Hoffman declaration's general discussion regarding competitive
11 intelligence . . . [but] Lilly fails to present facts that support its contention that disclosure
12 of these call notes will cause harm"); p. 26 ("Lilly offers no basis beyond general
13 reference to the Franson declaration for why these communications must remain
14 confidential").

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18 Eli Lilly now argues that, unless a stay of this Court's Order is granted, "Lilly will
19 have lost forever its chance to convince this Court that certain of the documents should
20 remain under seal." Affidavit of Brewster H. Jamieson Re Expedited Consideration of
21 Motion to Stay at para. 3. Eli Lilly has already had two chances to convince this Court
22 that the documents at issue should remain under seal, and a motion for reconsideration
23 cannot be used to obtain a third bite at the apple. Motions for reconsideration are granted
24
25

1 only where the court has “overlooked, misapplied, or failed to consider” a material fact,
2 controlling law, or material question in the case. Alaska R. Civ. P. 77(k). Motions for
3 reconsideration cannot “be used as a means to seek an extension of time for the
4 presentation of additional evidence on the merits of the claim.” Neal & Co. v. Ass’n of
5 Village Housing, 895 P.2d 497, 506 (Alaska 1995). Inasmuch as Eli Lilly has twice
6 failed to make the requisite factual showing necessary to establish good cause for keeping
7 the documents at issue under seal, it cannot now seek a stay of the Court’s Order so it can
8 attempt to cure its omissions by means of a motion for reconsideration. Motions for
9 reconsideration are not a vehicle to supplement the record with facts that, if they exist,
10 should have been timely presented to the Court in briefing on the underlying motion. Id.

13 CONCLUSION

14 Eli Lilly has had two opportunities to convince this Court that the documents at
15 issue should remain under seal. Having failed to properly support its position in prior
16 briefing, Eli Lilly should not now be granted a stay of this Court’s Order to take a third
17 bite at the apple. There are no grounds for reconsideration, and this Court is not charged
18 with dealing with courts not being the place to deal with the public relations problems of
19 litigant and this Court should implement its Order vindicating the public’s right of access
20 to the records of this case.
21
22
23
24
25

1 DATED this 17th day of June, 2008.

2
3 DAVIS WRIGHT TREMAINE LLP
4 Attorneys for Bloomberg LLC

5
6 By: 

7 Jon S. Dawson, ABA #8406022

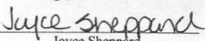
8 Certificate of Service:

9 I certify that on June 17, 2008, and a true and correct
10 copy of the foregoing document was sent to the
following attorneys or parties of record by:

- 11 () Mail
12 (X) Facsimile and Mail
13 () Hand Delivery

14 Eric T. Sanders, Esq.
Feldman Orlansky & Sanders
500 L Street, Suite 400
Anchorage, AK 99501

15 Brewster H. Jamieson, Esq.
Lane Powell LLC
301 W. Northern Lights Blvd., Ste.
16 301
Anchorage, AK 99503

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18 Joyce Sheppard

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OPPOSITION TO MOTION FOR STAY

5

State of Alaska vs. Eli Lilly and Company, Case No. 3AN-06-05630 Civil

DWT 11321121v2 3970124-000020

005508

2008 JUN 17 PM 3:26
IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
CLERK TRIAL COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE

BY DEPUTY CLERK

STATE OF ALASKA,

Plaintiff,

v.

Case No. 3AN-06-05630 CI

ELI LILLY AND COMPANY,

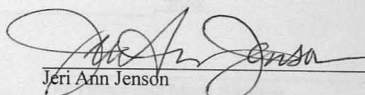
CERTIFICATE OF SERVICE

Defendant.

The undersigned certifies that on June 17, 2008, a copy of Defendant Eli Lilly and Company's Motion for Expedited Consideration and Motion to Stay Unsealing of Records was served by hand on the following:

Eric T. Sanders, Esq.
Feldman Orlansky & Sanders
500 L Street, Suite 400
Anchorage, Alaska 99501-5911

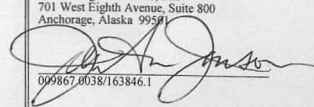
DATED this 17th day of June, 2008.


Jeri Ann Jensen

I certify that on June 17, 2008, a copy of the foregoing was served by hand on:

Eric T. Sanders, Esq.
Feldman Orlansky & Sanders
500 L Street, Suite 400
Anchorage, Alaska 99501-5911

Jon S. Dawson, Esq.
Davis Wright Tremaine, LLP
701 West Eighth Avenue, Suite 800
Anchorage, Alaska 99501


009867.0038/163846.1

005509

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-05630 CI

**ORDER GRANTING
EXPEDITED CONSIDERATION**

THIS COURT, having considered Lilly's Motion for Expedited Consideration on its Motion to Stay Unsealing of Records, all responses thereto, as well as applicable law:

IT IS HEREBY ORDERED that Lilly's Motion for Expedited Consideration is GRANTED. Any opposition to the underlying Motion to Stay Unsealing of Records shall be filed and served no later than ____ a.m./p.m., _____, 2008; and Lilly shall provide a reply, if any, no later than ____ a.m./p.m., _____, 2008. The Court shall rule on the underlying Motion by June 17, 2008.

ORDERED this ____ day of _____, 2008.

The Honorable Mark Rindner
Judge of the Superior Court

I certify that on June 16th, 2008, a copy of the foregoing was served by hand and facsimile on:

Jon S. Dawson, Esq.
Davis Wright Tremaine, LLP
701 West Eighth Avenue, Suite 800
Anchorage, Alaska 99501

Sharon Kroes
Sharon Kroes
009867.0038/164855.1

005510

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

Case No. 3AN-06-05630 CI

v.

ELI LILLY AND COMPANY,

Defendant.

**AFFIDAVIT OF
BREWSTER H. JAMIESON
RE EXPEDITED CONSIDERATION
OF MOTION TO STAY**

STATE OF ALASKA

ss.

THIRD JUDICIAL DISTRICT

I, Brewster H. Jamieson, being first duly sworn, states as follows:

1. I am an attorney with Lane Powell LLC, counsel for Defendant Eli Lilly and Company ("Lilly"), and have personal knowledge of the contents of this affidavit. This affidavit is filed in support of Lilly's Motion for Expedited Consideration of its Motion to Stay Unsealing of Records.

2. On June 13, 2008, this Court issued its Order Granting Bloomberg's Motion to Unseal Records ("Order"). The undersigned understands that Bloomberg will seek to immediately obtain the documents which the Order unseals. Lilly has filed herewith a Motion to Stay Unsealing of Records which seeks to stay the unsealing and release of the documents to Bloomberg until the Court has had the opportunity to consider and rule on Lilly's Motion for Reconsideration of the Order, which will be filed shortly. The Motion for Reconsideration will ask the Court to continue to keep a discrete subset of the documents under seal.

3. Lilly seeks expedited consideration of its Motion to Stay so that the Court may consider the motion before the documents are released to Bloomberg. Under the usual

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briefing schedule, Lilly is concerned that there will not be sufficient time for the parties to fully address, and for this Court to rule on, the Motion for Stay and the Motion for Reconsideration before Bloomberg obtains the documents. Once the documents are unsealed and released, the Motion for Stay and Motion for Reconsideration will be moot, and Lilly will have lost forever its chance to convince this Court that certain of the documents should remain under seal.

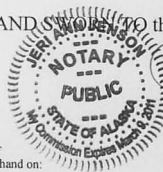
4. For the reasons stated above, Lilly respectfully requests that the Court consider the Motion to Stay on an expedited basis, and rule on the underlying Motion for Stay by June 17, 2008.

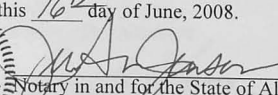
5. The undersigned certifies that Bloomberg's counsel of record was notified of the Motion for Expedited Consideration by faxing and hand-delivering on this date the Motion for Expedited Consideration, along with this Affidavit in Support and the proposed Order, and the underlying Motion to Stay, Affidavit in Support and proposed Order.

Further affiant sayeth naught.


Brewster H. Jamieson

SUBSCRIBED AND SWORN TO this 16th day of June, 2008.




Notary in and for the State of Alaska

My commission expires: 03-09-2011

I certify that on June 16th, 2008, a copy of the foregoing was served by facsimile and hand on:

Jon S. Dawson, Esq.
Davis Wright Tremaine, LLP
701 West Eighth Avenue, Suite 800
Anchorage, Alaska, 99501


Sharon Kroes

Affidavit of Brewster H. Jamieson
Re Expedited Consideration of Motion to Stay
State of Alaska v. Eli Lilly and Company (Case No. 3AN-06-05630 CI)

Page 2 of 3

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECEIVED
Chambers of
Judge Rindner
JUN 16 REC'D
State of Alaska Superior Court
Third Judicial District
in Anchorage

STATE OF ALASKA,

Plaintiff,

v.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-05630 CI

**MOTION FOR
EXPEDITED CONSIDERATION**

COMES NOW defendant, Eli Lilly and Company ("Lilly"), by and through counsel, and hereby moves, pursuant to Civil Rule 77(g), for expedited consideration of Lilly's Motion to Stay Unsealing of Records. Lilly respectfully requests that the court rule on the underlying Motion to Stay no later than June 17, 2008. This motion is supported by the attached affidavit of Brewster H. Jamieson.

DATED this 16th day of June, 2008.

PEPPER HAMILTON LLP

Nina M. Gussack, admitted *pro hac vice*

George A. Lehner, admitted *pro hac vice*

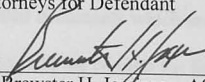
John F. Brenner, admitted *pro hac vice*

and

LANE POWELL LLC

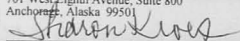
Attorneys for Defendant

By


Brewster H. Jamieson, ASBA No. 8411122
Andrea E. Girolamo-Welp, ASBA No. 0211044

I certify that on June 16th, 2008, a copy of the foregoing was served by facsimile and hand on:

Jon S. Dawson, Esq.
Davis Wright Tremaine, LLP
701 West Eighth Avenue, Suite 800
Anchorage, Alaska 99501


Sharon Kroes
009867.0038/164852.1

005513

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECEIVED
Chambers of
Judge Rindner
JUN 16 2008
State of Alaska
Third Judicial District
in Anchorage

STATE OF ALASKA,

Plaintiff,

v.

Case No. 3AN-06-05630 CI

ELI LILLY AND COMPANY,

Defendant.

**ELI LILLY AND COMPANY'S MOTION TO STAY
UNSEALING OF RECORDS**

COMES NOW defendant Eli Lilly and Company ("Lilly"), by and through counsel of record, and hereby moves the Court to stay the implementation of its June 13, 2008, Order Granting Bloomberg's Motion to Unseal Records ("Order")—that is, to stay the unsealing of any records which were there subject of the Order—until such time as the Court rules on Lilly's Motion for Reconsideration of the Order, which will be filed shortly.

The Motion for Reconsideration will ask the Court to reconsider the Order regarding a specific and discrete subset of the sealed documents which are the subject of the Order. That subset is still being identified by Lilly, and the Motion for Reconsideration will be filed within the 10-day deadline imposed by the Civil Rules. However, it has become apparent that Lilly must act before that 10-day deadline in order to prevent the documents from being unsealed at this time, which would moot any motion for reconsideration. It is Lilly's understanding that Bloomberg will seek immediately to obtain all of the documents

ordered to be unsealed, including the discrete subset which the Motion for Reconsideration will concern. Therefore, Lilly asks the Court to stay the unsealing of all of the documents until briefing on that subset of the documents Lilly asserts should still be sealed is completed and the Court has had the opportunity to rule on that Motion. The stay is necessary because once the documents are unsealed, Lilly will have no further ability to protect its rights with respect to the contested documents.

Moreover, this motion to stay is necessary because of unavoidable time constraints. This office did not receive the Order until the late afternoon of Friday, June 13. Affidavit of Brewster H. Jamieson. However, Mr. Jamieson, Lilly's lead local counsel, was out of town on that date and did not get a chance to review the Order and discuss it with Lilly until today. *Id.* Mr. Jamieson is again scheduled to be out of town on Tuesday and Wednesday of this week (June 17 and 18) attending a mediation in California. *Id.* As such, Lilly could not have prepared its Motion for Reconsideration in time to file with this motion for stay (although Lilly will file the Motion for Reconsideration by the deadline).

Further, Mr. Jamieson has contacted counsel for Bloomberg to discuss a possible agreement for a stay pending its Motion for Reconsideration, but at the time this motion was filed Bloomberg's counsel had not definitively responded to Mr. Jamieson. *Id.* Staying this matter will allow the parties the opportunity to discuss this matter between themselves to possibly resolve this matter without the need for this Court's involvement.

CONCLUSION

For the aforementioned reasons, Lilly requests that the Court stay the unsealing of the records covered by the Order until such time as the Court rules on Lilly's Motion for Reconsideration.

DATED this 16th day of June, 2008.

PEPPER HAMILTON LLP

Nina M. Gussack, admitted *pro hac vice*

George A. Lehner, admitted *pro hac vice*

John F. Brenner, admitted *pro hac vice*

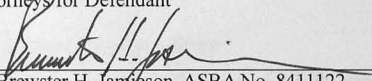
Andrew R. Rogoff, admitted *pro hac vice*

and

LANE POWELL LLC

Attorneys for Defendant

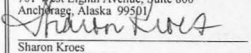
By


Brewster H. Jamieson, ASBA No. 8411122

Andrea E. Girolamo-Welp, ASBA No. 0211044

I certify that on June 16th, 2008, a copy of the foregoing was served by facsimile and hand on:

Jon S. Dawson, Esq.
Davis Wright Tremaine, LLP
701 West Eighth Avenue, Suite 800
Anchorage, Alaska 99501


Sharon Kroes
009867.0038/164856.1

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-05630 CI

**AFFIDAVIT OF
BREWSTER H. JAMIESON
RE: MOTION TO STAY**

STATE OF ALASKA

ss.

THIRD JUDICIAL DISTRICT

I, Brewster H. Jamieson, being first duly sworn, states as follows:

1. I am an attorney with Lane Powell LLC, counsel for Defendant Eli Lilly and Company ("Lilly"), and have personal knowledge of the contents of this affidavit. This affidavit is filed in support of Lilly's Motion for Stay.

2. My office received the June 13, 2008 Order Granting Bloomberg's Motion to Unseal Records late in the day on Friday, June 13, 2008. I was out of the office that day, out of town for the balance of the weekend, and was not able to review the Order nor confer with my client regarding the Order until today, Monday, June 16, 2008.

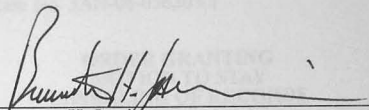
3. I am leaving town again in the early morning tomorrow, Tuesday, June 17, to attend a mediation in California and will not return to my office until Thursday morning, June 19, 2008.

4. At this time, Lilly and its counsel are identifying a discrete subset of the documents ordered to be unsealed, and intend to file a Motion for Reconsideration with respect to those documents by the 10 day deadline for such Motions, on June 23, 2008.

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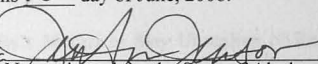
5. I have been in contact with counsel for Bloomberg to procure a stipulation to agree to stay the unsealing of any documents pursuant to the Order until this discrete subset of contested documents are identified and the motion practice regarding them is complete. As of this writing, I have not received any definitive response from Bloomberg's counsel.

Further affiant sayeth naught.


Brewster H. Jamieson

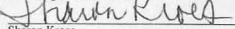
SUBSCRIBED AND SWORN TO this 16th day of June, 2008.




Notary in and for the State of Alaska
My commission expires: 03-09-2011

I certify that on June 16th, 2008, a copy of the foregoing was served by hand on:

Jon S. Dawson, Esq.
Davis Wright Tremaine, LLP
701 West Eighth Avenue, Suite 800
Anchorage, Alaska 99501


Sharon Kroes
009867.0038/164858.1

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-05630 CI

**ORDER GRANTING
MOTION TO STAY
UNSEALING OF RECORDS**

THIS COURT, having considered Lilly's Motion to Stay Unsealing of Records, all responses thereto, as well as applicable law:

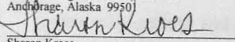
IT IS HEREBY ORDERED that Lilly's Motion to Stay Unsealing of Records is GRANTED. The Court's June 13, 2008, Order Granting Bloomberg's Motion to Unseal Records ("Order") is stayed pending further order of this Court.

ORDERED this ____ day of _____, 2008.

The Honorable Mark Rindner
Judge of the Superior Court

I certify that on June 16th, 2008, a copy of the foregoing was served by hand and facsimile on:

Jon S. Dawson, Esq.
Davis Wright Tremaine, LLP
701 West Eighth Avenue, Suite 800
Anchorage, Alaska 99501


Sharon Kroes
009867.0038/164857.1

LANE POWELL LLC
301 West Northern Lights Boulevard, Suite 301
Anchorage, Alaska 99503-2648
Telephone 907.277.9511 Facsimile 907.276.2631

005519

Jon S. Dawson
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Anchorage, Alaska 99501-3468
(907) 257-5300, telephone
(907) 257-5399, facsimile
jondawson@dwt.com

Attorneys for Bloomberg, LLC,
d/b/a Bloomberg News

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-05630 CI

ORDER GRANTING MOTION TO INTERVENE AND TO UNSEAL RECORDS

This Court having considered Bloomberg, LLC d/b/a Bloomberg News' ("Bloomberg") Motion to Intervene and to Unseal Records, the Memorandum in Support, and all pleadings and papers filed in support of, and in opposition, to that motion;

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Bloomberg's motion is Granted.

2. Bloomberg is permitted to intervene in this matter for the purpose of bringing a motion to unseal documents currently under seal in this action, and for the purpose of asserting the public's right of access to any document which any party may hereafter attempt to place under seal.

3. All documents previously filed under seal in this matter shall be unsealed and shall be made available to the public except as to those specific documents (if any), or portions of documents, set forth below that the Court has expressly determined shall remain under seal for the specific reasons indicated below:

4. Those provisions of the Protective Order dated July 30, 2007 which permit the parties to file documents under seal are vacated. Henceforth, documents may not be sealed or filed under seal except upon motion and hearing. A copy of any such motion shall be served on Bloomberg, and Bloomberg shall have the right to respond to such motion.

DATED this ____ day of _____, 2008

The Honorable Mark Rindner
Alaska Superior Court Judge

Certificate of Service:

I certify that on March 7 2008, and a true and correct copy of the foregoing document was sent to the following attorneys or parties of record by:

- () Mail
() Facsimile and Mail
(X) Hand Delivery

Eric T. Sanders, Esq.
Feldman Orlansky & Sanders
500 L Street, Suite 400
Anchorage, AK 99501

Brewster H. Jamieson, Esq.
Lane Powell LLC
301 W. Northern Lights Blvd., Ste. 301
Anchorage, AK 99503

Janet Eastman
Janet Eastman

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-05630 CI

ORDER

THIS COURT, having considered Bloomberg, LLC d/b/a Bloomberg News' ("Bloomberg") Motion to Intervene and to Unseal Records, Eli Lilly and Company's ("Lilly") Opposition, any response thereto, as well as applicable law:

IT IS HEREBY ORDERED that Bloomberg's Motion is DENIED. Lilly's documents filed under seal shall remain under seal and subject to the July 31, 2007 Protective Order.

ORDERED this ____ day of March, 2008.

The Honorable Mark Rindner
Judge of the Superior Court

I certify that on March 20, 2008, a copy
of the foregoing was served by hand on:

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NOTICE OF DEFICIENT FILING(S)

FROM:

Alaska Court System
Nesbett Courthouse
825 W 4th Ave
Anchorage, AK 99501

DATE: March 27, 2008

CASE NO: 3AN-06-05630CI

CASE NAME: State of Alaska vs. Eli Lilly & Co

CLERK: ECook

TO:

JON S DAWSON
701 W 8TH AVE SUITE 800
ANCHORAGE, AK 99501

☐ Your documents are being returned to you.

The document(s) you submitted to the court is/are deficient. Please provide the following:

- ☒ Proposed order for your Motion to Extend Deadline for Reply Brief Pending Filing of Eli Lilly's Supplemental Brief that was filed on 03/26/08 as required by Civil Rule 77.

Deficiencies must be corrected within 20 calendar days from the date of this notice.

CIV600Anch cv (03/08)

Civil Deficiency Memo / Notice of Deficient Filing(s) - Anchorage

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for

OPP 040808

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TF-620 (3/00)(pink cdsk)(2 1/4 x 4)(duplex)

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-5630 CI

ORDER GRANTING BLOOMBERG'S MOTION TO UNSEAL RECORDS

I. INTRODUCTION

This case stems from Defendant Eli Lilly and Company's ("Lilly" or "Defendant") production, marketing, and distribution of the antipsychotic medicine Zyprexa. Plaintiff State of Alaska (the "State" or "Plaintiff") sued asserting claims of strict products liability, fraud and misrepresentation, negligence, and violations of Alaska's Unfair Trade Practices and Consumer Protection Act (the "UTPA"). The State sought medical expenses for recipients of the Alaska Medicaid Program allegedly harmed by Zyprexa, restitution for the cost of Zyprexa prescriptions paid by the State, and civil penalties for violation of the UTPA. Midway through trial, the parties settled all claims. The matter now comes before the Court on Bloomberg, LLC, d/b/a Bloomberg News's ("Bloomberg") motion to intervene and unseal confidentially filed documents.

II. BACKGROUND

On July 30, 2007, pursuant to Alaska Rule of Civil Procedure 26(c)(7) ("Rule 26(c)(7)"), the Court entered a protective order "[t]o expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, adequately

protect confidential material, and ensure that protection is afforded only to material so entitled" (the "protective order").¹ The protective order extended to all "information that the producing party in good faith believe[d was] properly protected under [Rule] 26(c)(7); under any Federal or state statutes, regulations or court rules; or under Federal or state constitutions."² The protective order provided that any confidential discovery materials filed with the Court were to be "kept under seal until further order of the Court."³

Relying on the protective order, the parties filed under seal numerous pleadings and exhibits, which Lilly claims contain confidential information, specifically communications with the Food and Drug Administration ("FDA") and deposition transcripts discussing trade secrets and other confidential business information.⁴

On March 7, 2007, at the outset of trial, Bloomberg moved to intervene and unseal documents filed under seal and to assert the public's right of access to any documents which any party may attempt to seal or file under seal.⁵ Bloomberg argued that "[u]nder the First Amendment, the common law, and Alaska's statutes and rules, court records cannot be sealed absent specific findings that there is a compelling interest that overcomes the right of public access to the records; that sealing is necessary to preserve that interest; and that there are no less restrictive alternatives to sealing."⁶ Bloomberg argued that pleadings and documents were sealed without such findings and must be unsealed.⁷ Bloomberg set forth twenty-five pleadings filed under seal or filed with sealed attachments, which Bloomberg

¹ Protective Order, July 30, 2007.

² *Id.* at 2.

³ *Id.* at 12.

⁴ Def. Eli Lilly and Company's Opp'n Bloomberg, LLC D/B/A Bloomberg News' Mot. Intervene and Unseal Records ("Lilly Opp'n") 2.

⁵ Mot. Intervene and Unseal Records.

⁶ Memo. Supp. Mot. Intervene and Unseal Records 1-2.

⁷ *Id.* at 2.

argued the Court should release.⁸ Bloomberg claimed that the protective order does not meet the rigorous requirements for sealing judicial records and requested records filed under seal be unsealed, and that the provisions of the Protective Order that permitted the parties to file matters under seal be vacated.⁹

That same day, Lilly opposed release of the sealed records. Lilly claimed that Bloomberg failed to distinguish between the legal standards applicable to protection of dispositive pleadings and the protection of nondispositive pleadings.¹⁰ Lilly asserted that a party seeking to protect documents filed with dispositive pleadings must illustrate a "compelling reason" for keeping the documents sealed¹¹ but need only show "good cause" for keeping documents attached to nondispositive pleadings sealed.¹² Lilly argued that harm would result from disclosure of confidential information and outlined reasons why disclosure of a number of documents would cause harm.¹³ Lilly requested the Court postpone ruling on specific challenges to the confidentiality of sealed documents until the trial concluded.¹⁴

The Court deferred deciding the matter until conclusion of trial. On March 26, 2008, the parties settled. Following settlement, the Court allowed Lilly to supplement its opposition to Bloomberg's motion.

On April 25, 2008, Lilly supplemented its opposition and argued, specific to the pleadings enumerated in Bloomberg's motion, why the Court should keep those

⁸ Id. at 3-6.

⁹ Id. at 14.

¹⁰ Lilly Opp'n 4.

¹¹ Id.

¹² Id. at 8-9.

¹³ Id. at 6-10.

¹⁴ Id. at 10.

pleadings or certain documents attached to those pleadings sealed.¹⁵ In addition, Lilly set forth a number of pleadings that Lilly did not contest unsealing.¹⁶

On May 2, 2008, Bloomberg replied arguing that Lilly's justification for protecting sealed documents consisted "of nothing more than the conclusory, unsupported assertion that disclosure will harm Eli Lilly's competitive position."¹⁷ Bloomberg argued that Lilly failed to support its allegations of harm with evidence of specific facts or concrete examples showing particular harm that outweighs Bloomberg's and the public's right of access.¹⁸ Bloomberg undertook a pleading-by-pleading analysis, applying the two standards outlined by Lilly, illustrating why Lilly failed to justify keeping the records sealed.¹⁹ Further, Bloomberg asserted that, to the extent legitimate reasons exist for protecting confidentially filed documents, Lilly had not demonstrated that redaction would be inadequate to protect those documents.²⁰ Finally, Bloomberg argued that the Court should permit Bloomberg's counsel to review any documents retained under seal, subject to counsel's agreement to abide by the terms of the protective order, because Bloomberg is unfairly hampered in its ability to respond to Lilly's assertions that harm will result if documents are unsealed.²¹

III. DISCUSSION

Bloomberg seeks to access specific pleadings and attachments unilaterally designated by the parties as "confidential" and filed under seal pursuant to a blanket protective order, and Bloomberg seeks to vacate the protective order. Lilly opposes

¹⁵ Def. Eli Lilly and Company's Supplemental Resp. Bloomberg, LLC D/B/A Bloomberg News' Mot. Intervene and Unseal Records ("Lilly's Supplemental Resp.") 6-20.

¹⁶ Id.

¹⁷ Bloomberg's Reply Supplemental Resp. Mot. Intervene and Unseal Records.

¹⁸ Id. at 1-2.

¹⁹ Id. at 6-16, 18-20.

²⁰ Id. at 21-22.

²¹ Id. at 22.

unsealing a number these pleadings and attachments arguing that they contain trade secrets and information that would competitively disadvantage Lilly.

A. Public Right to Access Court Records and Rule 26(c) Protective Orders Under Alaska Law

Generally, Alaska court records are accessible to the public.²² However, mechanisms exist for courts to maintain records under seal as confidential. Alaska Rule of Civil Procedure 26(c) ("Rule 26(c)") allows Alaska courts, with good cause, to enter any protective order that "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."²³ Protective orders may mandate:

(1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.²⁴

Alaska courts have "broad discretion to determine the scope and extent of discovery and to craft protective orders."²⁵

²² Alaska R. Admin. P. 37.5(d)(1).

²³ *DeNardo v. Bax*, 147 P.3d 672, 677 (Alaska 2006) (quoting Rule 26(c)).

²⁴ Alaska R. Civ. P. 26(c) (emphasis added).

²⁵ *DeNardo*, 147 P.3d at 676 (Alaska 2006).

In addition, pursuant to the Alaska Administrative Rules, Alaska courts may, by order, limit access to public information in an individual case record by sealing or making confidential the case file or individual records therein.²⁶ Alaska courts may limit public access if the court finds that a legitimate interest in confidentiality outweighs the public interest in disclosure.²⁷

Pursuant to Rule 26(c)(7), the Court entered the protective order to expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, adequately protect confidential material, and ensure that protection is afforded only to material so entitled. The protective order required that any documents designated as confidential and filed with the Court be maintained under seal.

While Civil Rule 26(c) and the Alaska Administrative Rules contemplate a court making specific findings before issuing a protective order or sealing records from public access, "the unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."²⁸ It would severely impeded the progress of discovery in complex litigation, if a court were required to make specific findings on individual invocations of Rule 26(c). Thus, courts often fashion blanket protective orders such as the one at issue. While blanket protective orders are inherently subject to challenge and modification, as the party resisting disclosure is not required to make a particularized showing of good cause with respect to any individual document,²⁹ parties unhindered ability to unilaterally

²⁶ Alaska R. Admin. P. 37.6(a).

²⁷ Alaska R. Admin. P. 37.6(b) (such legitimate interest in confidentiality include, but are not limited to, risk of injury to individuals; individual privacy rights and interests; proprietary business information; the deliberative process; or public safety).

²⁸ Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984).

²⁹ San Jose Mercury News, Inc. v. U.S. Dist. Court - N. Dist., 187 F.3d 1096, 1103 (9th Cir. 1999).

designate documents as confidential substantially facilitates the discovery process.³⁰ Such protective orders serve the vital function of securing the just, speedy, and inexpensive determination of complex civil disputes by encouraging full disclosure of all conceivably relevant evidence.³¹

Blanket protective orders are essential to court facilitation of discovery in complex litigation. Thus, the Court will not vacate the protective order. However, to satisfy Alaska's mandate that court records be accessible by the public, the unilateral designation of documents filed in courts as confidential, even if pursuant to a blanket protective order, without a finding of good cause or that a legitimate interest in confidentiality outweighs the public interest in disclosure, must be reviewed when the public seeks to unseal specific records.

Alaska law regarding Rule 26(c) protective orders is extremely limited. In situations where an Alaska rule is similar to a Federal rule, as is the case with Rule 26(c),³² the Alaska Supreme Court has repeatedly found federal authorities to be

³⁰ See Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F.Supp. 866, 879 n.18 (E.D. Pa. 1981).

³¹ See S.E.C. v. TheStreet.com, 273 F.3d 222, 229 (2d Cir. 2001); see also Bachner v. Pearson, 479 P.2d 319, 323 (Alaska 1970) ("The importance of a thorough and effective system of pretrial discovery in the resolution of civil matters cannot be overemphasized.").

³² Federal Rule of Civil Procedure 26(c) provides:

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

persuasive when interpreting the Alaska rule.³³ Further, the Alaska Supreme Court has recognized that "the entire mechanism for pretrial discovery provided for in Alaska's Rules of Civil Procedure has been taken from the system established in the Federal Rules of Civil Procedure."³⁴

On the issue of public access to records filed as confidential pursuant to a Rule 26(c) protective order, the Court finds recent Ninth Circuit decisions particularly informative.

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs. (emphasis added).

³³ McNett v. Alyeska Pipeline Serv. Co., 856 P.2d 1165, 1168 (Alaska 1993) (citing Fenner v. Bassett, 412 P.2d 318, 321 (Alaska 1966)).

³⁴ Bachner, 479 P.2d at 323 (comparing Alaska Rules of Civil Procedure 26-37 with Federal Rules of Civil Procedure 26-37 and noting that the following commentary regarding the importance of discovery in federal courts applies equally to discovery in Alaska courts, "[i]n the theory of the federal rule-makers, discovery, with all its forms, is the make-or-break device of the whole system, for pleadings are required to be only generally informative, and clarifying motions are neither encouraged nor efficacious. Unless the discovery rules function sufficiently well, issues will often come to trial or pretrial sprawling and unformed; and many litigants will reach the courtroom ill-prepared.").

B. Ninth Circuit Decisions Regarding Public Access to Court Records Filed Confidential Pursuant to a Protective Order.

While federal courts do not recognize that the First Amendment bestows on the public a right to access court records,³⁵ the U. S. Supreme Court has recognized a federal common law right "to inspect and copy public records and documents,"³⁶ and "[f]ederal appellate courts have uniformly concluded that this common law right extends to both criminal and civil cases."³⁷ However, "[t]he federal common law right of access is not absolute, and is not entitled to the same level of protection accorded a constitutional right."³⁸ "Thus, although the common law right creates a strong presumption in favor of access, [as does Alaska law,] the presumption can be over come by sufficiently important countervailing interests."³⁹ In determine whether to limit public access to court records, Ninth Circuit courts consider all relevant factors, including:

"the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets After taking all relevant factors into consideration, the district court must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture."⁴⁰

³⁵ See, e.g., San Jose Mercury News, 187 F.3d at 1102 (deferring deciding whether the First Amendment also bestows on the public a prejudgment right of access to civil court records.).

³⁶ Nixon v. Warner Commc'n, 435 U.S. 589, 597 (1978).

³⁷ San Jose Mercury News, 187 F.3d at 1102.

³⁸ Id.

³⁹ Id.

⁴⁰ Foltz v. State Farm Mut. Auto. Ins. Co., 331 P.3d 1122, 1135 (9th Cir. 2003) (quoting Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995)) (emphasis added).

The Ninth Circuit has carved out an exception to this presumption for material filed under seal pursuant to a valid protective order. " [W]hen a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted." ⁴¹ The Ninth Circuit has reasoned that " '[w]hen a court grants a protective order for information produced during discovery, it already has determined that 'good cause' exists to protect this information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality.'" ⁴² "The application of a strong presumption of access to sealed records, not directly relevant to the merits of the case, would eviscerate the 'broad power of the district court to fashion protective orders.'" ⁴³ "In short, 'good cause' suffices to warrant preserving the secrecy of sealed discovery material attached to nondispositive motions." ⁴⁴

The Ninth Circuit limited this exception to nondispositive motions and expressly distinguished between nondispositive motions and dispositive motions. The court noted that while "the public has less of a need for access to court records attached only to nondispositive motions because those documents are often 'unrelated, or only tangentially related, to the underlying cause of action,'" ⁴⁵ "[t]he strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments [filed pursuant to a Rule 26(c) protective order] . . . because the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in

⁴¹ Id. at 1135 (quoting Phillips v. General Motors Corp., 307 F.3d 1206, 1213 (9th Cir. 2002)).

⁴² Id. (quoting Phillips, 307 F.3d at 1213).

⁴³ Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1180 (quoting Phillips, 307 F.3d at 1213).

⁴⁴ Foltz, 331 F.3d at 1135.

⁴⁵ Kamakana, 447 F.3d at 1179 (quoting Phillips, 307 F.3d at 1213).

ensuring the 'public's understanding of the judicial process and of significant public events.' ⁴⁶

Adopting these standards, the Court will undertake a pleading-by-pleading review of the records Bloomberg requests the Court unseal.

C. Nondispositive Pleadings

Bloomberg requests the Court unseal twenty-three nondispositive pleadings, which allegedly contain confidential information. Lilly objects to unsealing a number of these documents. Lilly claims that "good cause" exists for maintaining these documents under seal because the information contained in the documents constitutes trade secrets and disclosure would create a competitive disadvantage to Lilly.

A party asserting "good cause" bears the burden, for each particular document it seeks to protect, of demonstrating that " '(1) the material in question is a trade secret or other confidential information within the scope of Rule 26(c), and (2) disclosure would cause an identifiable, significant harm.' " ⁴⁷ Courts have found "good cause" where a party shows that disclosure of information puts the party at a competitive disadvantage. ⁴⁸ A party requesting a protective order must provide " 'specific demonstrations of fact, supported where possible by affidavits and concrete examples, rather than broad, conclusory allegations of potential harm.' " ⁴⁹ "Any such order [] requires that the court's determination 'identify and discuss the factors it considered in its 'good cause' examination.' " ⁵⁰

⁴⁶ Id. at 1179 (quoting Valley Broadcasting Co. v. U.S. Dist. Ct., 798 F.2d 1289,1294 (9th Cir. 1986)).

⁴⁷ Foltz, 331 F.3d at 1131 (quoting in parenthetical Deford v. Schmid Prods. Co., 120 F.R.D 648, 653 (D. MD. 1987)).

⁴⁸ Zenith Radio, 529 F.Supp. at 890.

⁴⁹ Foltz, 331 F.3d at 1130 (quoting in parenthetical Deford, 120 F.R.D at 653).

⁵⁰ Id.

To determine if "good cause" exists to seal nondispositive pleadings, the Court has conducted an *in camera* review of all pleadings Bloomberg requests the Court release. The following is the Court's analysis of these pleadings labeled according to the court system's docket and the parties' briefing.

1. 02/29/2008 Notice of Filing Under Seal; Attorney: Jamieson, Brewster H.

This docket entry corresponds to Lilly's Motion to Seal Exhibits to Eli Lilly and Company's Petition for Review. Since Lilly withdrew the petition for review, Bloomberg stipulates that this docket entry may remain sealed. The Court makes no finding whether this pleading satisfies the good cause standard but maintains its confidentiality under the protective order since no intervenenor seeks access to the pleading.

2. 02/28/2008 Defendant Eli Lilly and Company's Notice of Filing Under Seal; Attorney: Jamieson, Brewster H.

This docket entry corresponds to Defendant Eli Lilly and Company's Motion Requesting Confidential Protections of Regulatory Communications Not Subject to Public Disclosure. In this pleading, Lilly requested the Court protect from disclosure Lilly's 2007 FDA submissions, communications related to these FDA submissions, and any references to these FDA submissions. Lilly requested that Courtroom View Network not be allowed to record portions of the trial that would involve disclosure of these submissions and communications. On the record, the Court denied this motion and allowed Courtroom View Network to record the entire trial.

There are no confidential Lilly documents attached to this pleading, but Lilly requests four exhibits, Plaintiff's Ex. Nos. 10105, 10106, 10107, and 10111, that are discussed in the pleading stay confidential. Of these exhibits, only Plaintiff's Ex. No. 10106 is in the Court's possession. The Court discusses Plaintiff's Ex. No. 10106 in Section III.C.5, below. The Court is not in possession of the other three exhibits.

While these exhibits may have been submitted for review, they were not submitted with the pleading or any other pleading and were not admitted at trial. These documents are not part of the court record. Thus, the Court will not order disclosure of these documents. However, the Court will not maintain the confidentiality of the subject pleading. The Court unseals Defendant Eli Lilly and Company's Motion Requesting Confidential Protections of Regulatory Communications Not Subject to Public Disclosure and attachments.

3. 02/25/2008 Notice of Filing Under Seal a Pleading Titled "State of Alaska's Request for Clarification of the Court's Order Excluding Evidence of the Defendant's Profits, Net Worth, and the Price of Zyprexa;" Attorney Sanders Eric T.

This docket entry corresponds to State of Alaska's Request for Clarification of the Court's Order Excluding Evidence of the Defendant's Profits, Net Worth, and the Price of Zyprexa. Lilly requests that Plaintiff's Ex. Nos. 4121 and 8262, attached to the pleading, remain confidential. Lilly claims that Plaintiff's Ex. No. 4121 contains market research and strategic marketing discussions that Lilly has attempted to keep confidential and that competitors would use to Lilly's competitive disadvantage. Lilly claims Plaintiff's Ex. No. 8262 is an email that reflects internal Lilly discussions about its products and plans for further medical and regulatory development and that permitting Lilly's competitors to access this email could give them insight into Lilly's development plans for Zyprexa.

Lilly supports these claims through conclusory statements lacking factual support. Plaintiff's Ex. 4121 is a strategy and implantation overview for marketing Zyprexa to primary care physicians. This document was created August 2000. Lilly has failed to illustrate how disclosing eight-year-old market research and projections will create a competitive disadvantage. Plaintiff's Ex. 8262 is an email discussing a November 23, 1999 meeting of Lilly's Executive Steering Committee for Olanzapine-associated Weight Changes and Hyperglycemia. Any information in

these emails regarding weight changes and hyperglycemia possibly associated with Zyprexa was extensively discussed at trial. Lilly fails to illustrate how this dated document will create a competitive disadvantage or cause harm. The Court unseals State of Alaska's Request for Clarification of the Court's Order Excluding Evidence of the Defendant's Profits, Net Worth, and the Price of Zyprexa and attachments.

4. 02/25/2008 Notice of Filing Under Seal a pleading titled "Request for Clarification of the Court's Order Excluding Testimony Regarding Other Drugs Manufactured by Defendant Eli Lilly and Company:" Attorney: Sanders Eric T.

This docket entry corresponds to Plaintiff's Request for Clarification of the Court's Order Excluding Testimony or Argument Regarding Other Drugs Manufactured by Defendant Eli Lilly and Company. Lilly requests that Plaintiff's Ex. Nos. 8262 and 10052 and excerpts from the Sidney Taurel deposition ("Taurel deposition"), which are attached to the pleading, be kept confidential. The Court has already unsealed Plaintiff's Ex. No. 8262. Lilly argues that Plaintiff's Ex. No. 10052 contains a presentation to Lilly's Global Management Team, setting forth priorities and business strategies, which is not publicly available and was not widely disseminated within Lilly because competitors could use the information to Lilly's competitive disadvantage. Lilly argues that the Taurel deposition references internal Lilly discussions regarding both Zyprexa and Prozac, reflects internal Lilly planning, and is not available to Lilly's competitors. Lilly cites a declaration by Lilly Manager of Global Competitive Intelligence Gerald Hoffman (the "Hoffman declaration") in support of its claim that information in the Taurel deposition could be used by Lilly's competitors to Lilly's competitive disadvantage.

Plaintiff's Ex. No. 10052 is not attached to this pleading and from the short description in Lilly's brief the Court can not determine what exhibit Lilly refers to as Plaintiff's Ex. No. 10052. Further, the conclusory statement that "[t]his document is not publicly available and was not widely disseminated within the company because

competitors could use this information to Lilly's competitive disadvantage" with no supporting facts or affidavits is inadequate to show "good cause" for sealing a document.

Lilly relies on the Hoffman declaration to support its assertion that the Taurel deposition "could be used by Lilly's competitors to Lilly's competitive disadvantage." The Hoffman declaration does not discuss the Taurel deposition and only discuss general principles of competitive intelligence and the importance of maintaining secrecy. The excerpt from the Taurel deposition pertains to questions regarding Lilly's loss of its Prozac patent – a topic extensively discussed at trial. Lilly has failed to show that disclosure of the deposition excerpt will cause harm. The Court unseals Plaintiff's Request for Clarification of the Court's Order Excluding Testimony or Argument Regarding Other Drugs Manufactured by Defendant Eli Lilly and Company and attachments.

**5. 02/20/2008 Lilly's Notice of: Reply re: Mtn Exclude Evidence
New York Times Articles, Filed Under Seal; Attorney:
Jamieson, Brewster H.**

This docket entry corresponds to Defendant Eli Lilly and Company's Reply in Further Support of its Motion in Limine to Exclude Evidence Relating to New York Times Articles. Lilly opposes disclosure of one attached exhibit. Lilly refers to this exhibit as Plaintiff's Ex. No. 10106; however, as attached to the pleading, the exhibit is labeled Exhibit B. The Court will refer to this document as Plaintiff's Ex. No. 10106. This document is a portion of Lilly's 2007 regulatory response, submitted to the FDA, to allegations in a December 17, 2006 New York Times article and discusses results of a internet-based physician survey conduct by Harris Interactive between February 2001 and August 2002 regarding Zyprexa side effects, specifically hyperglycemia and diabetes. Lilly relies on a declaration by Lilly Vice President of Global Regulatory Affairs Timothy Franson (the "Franson declaration") to support its argument that the submissions and communications contained in

8. 02/19/2008 Notice of Filing Under Seal – Objection to the State's Motion in Limine to Exclude Evidence; Eli Lilly and Company (Defendant)

This docket entry corresponds to Defendant Eli Lilly and Company's Objection to the State of Alaska's Motions in Limine to Exclude Evidence Relating to Zyprexa's Efficacy or Benefits of Zyprexa for (1) Indicated Uses, and (2) Non-Indicated or "Off-Label" Uses, filed February 14, 2008. Lilly does not oppose unsealing this pleading and attachments.

9. 02/20/2008 Plaintiff's Response to Defendant's Motion in Limine to Exclude References to Foreign Regulatory Action

This docket entry corresponds to Plaintiff's Response to Defendant's Motion in Limine to Exclude Reference to Foreign Regulatory Action, filed February 14, 2008. Lilly does not oppose unsealing this pleading and attachments.

10. 02/14/2008 Plaintiff's Response to Defendant's Motion in Limine to Exclude Testimony and Call Notes of Non-Alaska Based Sales Representatives

This docket entry corresponds to Plaintiff's Response to Defendant's Motion in Limine to Exclude Testimony and Call Notes of Non-Alaska Based Sales Representatives. Lilly opposes unsealing two excerpts from the deposition transcript of David Neosges (the "Neosges deposition"), attached to this pleading as Exhibit A. Lilly argues that these excerpts contain discussion of confidential Lilly documents, Lilly's training plans and policies for its sale force, and Lilly's computer and communication systems. Lilly cites the Hoffman declaration in support of its contention that "information pertaining to the training of Lilly's sales force is of particular interest to Lilly's competitors, and Lilly would suffer competitive harm from its disclosure."

The Hoffman declaration does not discuss the Neosges deposition. As noted above, the Hoffman declaration merely discusses general principles of competitive intelligence and the importance of maintaining secrecy. Lilly fails to illustrate, with any specificity, how Lilly competitors would use this information to harm Lilly. Such conclusory states are inadequate to show good cause for keeping the Neosges deposition confidential. The Court unseals Plaintiff's Response to Defendant's Motion in Limine to Exclude Testimony and Call Notes of Non-Alaska Based Sales Representatives and attachments.

11. 02/14/2008 Plaintiff's Response to Defendant's Motion in Limine to Exclude Reference to Recent Regulatory Communications and Developments

This docket entry corresponds to Plaintiff's Response to Defendant's Motion to Exclude References to Recent Regulatory Communications and Developments. Lilly does not oppose unsealing this pleading and attachments.

12. 02/11/2008 Notice of Filing Plaintiff's Objections to Defendant's Page/Line Counter Designations Under Seal

This docket entry corresponds to Plaintiff's Objections to Defendant's Page/Line Counter Designations. The exhibits attached to these objections are excerpts of deposition testimony by Lilly witnesses Charles Beasely Jr., M.D.; Alan Breier, M.D.; John C. Lechleiter, Ph.D.; David Neosges; Sidney Taurel; Gary Tollefson, M.D.; and Robin Wojcieszek. Lilly concedes that substantial portions of these excerpts were played at trial, but nevertheless contends that the depositions should remain under seal. Lilly contends that these deposition excerpts contain "discussions of trade secrets, internal business documents, and other confidential business information." Lilly does not indicate the nature of alleged trade secrets or confidential business information and merely makes a conclusory statement that the "information, if released, could be used by Lilly competitors to Lilly's disadvantage in

the market place." Lilly does not present facts establishing that the information includes trade secret or how Lilly's competitors will use this information to Lilly's disadvantage. Lilly cites the Hoffman and Franson declarations which do not specifically address these depositions. Further, Lilly states that "it would be a waste of judicial resources to . . . wade through each prior, obsolete round of designations for each separate witness and analyze which lines of testimony were not played in open court."

Lilly inappropriately places the burden on the Court to undertake necessary steps to show good cause for sealing these depositions. Lilly's reliance on general conclusory declarations which do not discuss the pleadings at issue is inadequate to show good cause for maintaining the confidentiality of these records. The Court unseals Plaintiff's Objections to Defendant's Page/Line Counter Designations and attachments.

13. 02/11/2008 Eli Lilly's Notice of Filing Deposition Designations Under Seal; Attorney Jamison, Brewster H.

This docket entry corresponds to Eli Lilly and Company's Deposition Counter-Designations for Trial. Attached to this pleading are excerpts of deposition testimony by Lilly witnesses Michael Bandick, Jack E. Jordan, Bruce Kinon, M.D., and Denice M. Torres. Lilly objects to unsealing these transcripts and references its argument discussed in Section III.C.12 for keeping these depositions confidential. For reasons the Court discusses in Section III.C.12, the Court unseals Eli Lilly and Company's Deposition Counter-Designations for Trial and attachments.

14. 02/04/2008 Notice of Filing Counter-Designations and Excerpts of Depositions under Seal; Brewster H. Jamison (Attorney) on Behalf of Eli Lilly and Company

This document entry corresponds to Defendant Eli Lilly and Company's Deposition Counter-Designations for Trial. Attached to this pleading are transcript

excerpts from Lilly witnesses Beasely, Breier, Lechleiter, Noesges, Taurel, Tollefson, and Wojcieszek. Lilly objects to unsealing these transcripts and references its argument discussed in Section III.C.12. For reasons discussed in Section III.C.12, the Court unseals Defendant Eli Lilly and Company's Deposition Counter-Designations for Trial and attachments.

15. 02/04/2008 Notice of Filing Motion in Limine to Exclude Certain Testimony of the State's Experts Under Seal; Brewster H. Jamieson (Attorney) on Behalf of Eli Lilly and Company

This docket entry corresponds to Defendant Eli Lilly and Company's Motion in Limine to Exclude Certain Testimony of the State's Experts. Attached to the pleading is a document bates numbered FDACDER 2154-2168. FDACDER 2154-2168 is a review and evaluation of clinical data regarding the association of atypical antipsychotics, including Zyprexa, with diabetes mellitus. The FDA produced this document to Lilly in the Zyprexa multidistrict litigation pending before Judge Jack B. Weinstein. Under the terms of the blanket protective order issued in the multidistrict litigation, this document was labeled confidential. Lilly argues that "[t]he confidentiality rights to this document are held by FDA, and this Court should not disclose it to the public without permitting FDA the opportunity to assert its document's confidentiality."

As evident in this order, not all documents produced pursuant to a blanket protective order satisfy the requirements for sealing records. Lilly has failed to make a good cause argument for keeping this document sealed. Instead, Lilly claims that the FDA must assert the document's confidentiality. Lilly presents no law in support of this claim. The FDA is not a party to this proceeding, and the Court will not rely on hypothetical or conjectural harm to the FDA in determining whether to maintain the confidentiality of this document. However, that being said, after reviewing the document at issue, the Court can not conceive how disclosure of this document

would harm the FDA. The Court unseals Defendant Eli Lilly and Company's Motion in Limine to Exclude Certain Testimony of the State's Experts and attachments.

16. 02/04/2008 Notice of Filing Motion in Limine to Exclude Evidence Relating to New York times Articles Under Seal

This docket entry corresponds to Defendant Eli Lilly and Company's Motion in Limine to Exclude Evidence Relating to New York Times Articles. Lilly does not oppose unsealing this pleading and attachments.

17. 02/04/2008 Notice of Filing Plaintiff's Amended Trial Deposition Designations Under Seal: Eric T. Sanders (Attorney) on Behalf of State of Alaska (Plaintiff)

This docket entry corresponds to Plaintiff's Amended Trial Deposition Designations. Attached to this pleading are deposition transcripts of Lilly witnesses Bandick, Jordan, Kinon, and Torres. Lilly objects to unsealing these transcripts and references its argument discussed in Section III.C.12. For reasons discussed in Section III.C.12, the Court unseals Plaintiff's Amended Trial Deposition Designations and attachments.

18. 1/28/2008 Notice of Filing Plaintiff's Objections to Defendant's Page/Line Designations and Exhibits Under Seal; Eric T. Sanders (Attorney) on behalf of State of Alaska (Plaintiff)

This docket entry corresponds to Plaintiff's Counter Designations to Defendant's Deposition Designations for Trial. Attached to this pleading are deposition transcripts of Lilly witnesses Beasley and Tollefson. Lilly objects to unsealing these transcripts and references its argument discussed in Section III.C.12. For reasons discussed in Section III.C.12, the Court unseals Plaintiff's Counter Designations to Defendant's Deposition Designations for Trial and attachments.

19. 1/28/2008 Notice of Filing Plaintiff's Objections to Defendant's Page/Line Designations and Exhibits Under Seal; Eric T. Sanders (Attorney) on Behalf of State of Alaska (Plaintiff)

This docket entry corresponds to Plaintiff's Objections to Defendant's Page/Line Designations. Attached to this pleading are deposition transcripts of Lilly witnesses Beasley and Tollefson. Lilly object to unsealing these transcripts and references its argument discussed in Section III.C.12. For reasons discussed in Section III.C.12, the Court unseals Plaintiff's Objections to Defendant's Page/Line Designations for trial and attachments.

20. 01/25/2008 Notice of Filing Supplemental Page 77 Under Seal; Eric T. Sanders (Attorney) on behalf of State of Alaska (Plaintiff)

This docket entry corresponds to Supplemental Page 77 to Plaintiff's Trial Deposition Designation. This supplemental page contains excerpts of the deposition transcript of Lilly witness Bandick. Lilly object to unsealing these transcripts and references its argument discussed in Section III.C.12. For reasons discussed in Section III.C.12, the Court unseals Supplemental Page 77 to Plaintiff's Trial Deposition Designation and attachment.

21. 01/23/2008 Notice of Filing Deposition Designation Under Seal; Brewster H. Jamison (Attorney) on behalf of Eli Lilly and Company

This docket entry corresponds to Eli Lilly and Company's Deposition Designations for Trial, filed January 22, 2008. Attached to this pleading are deposition transcripts of Lilly witnesses Beasley and Tollefson. Lilly objects to unsealing these transcripts and references its argument discussed in Section III.C.12. For reasons discussed in Section III.C.12, the Court unseals Defendant Eli Lilly and Company's Deposition Designations for Trial and attachments.

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22. 01/22/2008 Notice of Filing Pleadings Under Seal; Eric T. Sanders (Attorney) on behalf of State of Alaska (Plaintiff)

This docket entry corresponds to Plaintiff's Trial Deposition Designations. Attached to this pleading are deposition transcripts of Lilly witness Jerry Clewell, Kenneth Kwong, M.D., Susan Schuler, Michelle Sharp, and Sidney Taurel. Lilly notes that the State withdrew these witnesses between submitting this original deposition designation and its final designation. Also attached are deposition transcripts from Bandick, Beasely, Breier, Jordan, Kinon, Lechleith, Neosges, Tollefson, Torres, and Wojcieszek. Lilly reasserts its argument discussed in Section III.C.12 in objecting to unsealing this pleading. For reasons discussed in Section III.C.12, the Court unseals Plaintiff's Trial Deposition Designations and attachments.

23. 12/20/2007 Notice of Filing Pleadings and Exhibits Under Seal, Re: Defendant's Motion to Compel Discovery; Eric T. Sanders (Attorney) on behalf of State of Alaska (Plaintiff)

This docket entry corresponds to Plaintiff's Response to Defendant's Motion to Compel Discovery. Attached to this pleading is an excerpt from Plaintiff's Zyprexa Backgrounder,⁵¹ confidentially filed around May 25, 2007, which includes block quotations from a confidential Lilly document, Plaintiff's Ex. No. 3909. Lilly objects to unsealing this pleading without first redacting content in the excerpt from Plaintiff's Zyprexa Backgrounder regarding Plaintiff's Ex. No. 3909. Lilly says that Plaintiff's Ex. No. 3909 is a draft letter to healthcare professionals which was not available outside of the company nor widely disseminated within the company and

⁵¹ On or about May 25, 2008, the State filed, under seal, a pleading titled "Plaintiff's Reply to Eli Lilly's Response to Plaintiff's Motion Concerning Claims and Proofs" and a pleading titled "Plaintiff's Zyprexa Backgrounder." Due to error on behalf of Alaska Court System, these pleadings were not docketed or file stamped and copies of the notices of filing under seal were not included in the case file. This error has been remedied. The confidentiality of these pleadings has not been challenged, so the Court will not unseal these pleadings at this time.

argues that "Lilly would be at a severe competitive disadvantage if this document w[as] released because draft documents give competitors insight into Lilly's clinical analysis and thought process." Lilly cites the Hoffman declaration in support.

Plaintiff's Ex. No. 3909 is not a draft letter to healthcare professionals. It is a May 2003 email from Alan Breier to Lilly's "Zyprexa leadership" answering "8 of the most pointed questions" on the important issue of hyperglycemia. In the email Breier writes "[p]lease feel free to forward as you deem appropriate." Lilly has failed to show good cause for keeping this document sealed. The Court unseals Plaintiff's Response to Defendant's Motion to Compel Discovery and attachments.

D. Dispositive Pleadings

Bloomberg requests the Court unseal two sealed nondispositive pleadings. Lilly objects to unsealing these documents because the information contained in the documents constitutes trade secrets and other confidential information and disclosure would create a competitive disadvantage to Lilly.

A party seeking to seal dispositive pleadings bears the burden of overcoming the strong presumption favoring public access. The party must articulate compelling reasons, supported by specific factual findings, that outweigh the general history of access and the public policies favoring disclosure.⁵² "In general, 'compelling reasons' sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets."⁵³ The 3rd Circuit as "expressly recognized that courts may deny access to judicial records . . . where they are sources of business information that might harm a litigant's competitive

⁵² Kamakana, 447 P.3d at 1178.

⁵³ Id. at 1179.

standing.”⁵⁴ Under this standard, a court “must weigh relevant factors, base its decision on a compelling reason, and articulate the factual basis for its ruling without relying on hypothesis or conjecture.”⁵⁵

To determine if “compelling reasons” exist for sealing dispositive pleadings, the Court has conducted an *in camera* review of all documents Bloomberg requests the Court release. The following is the Court’s analysis of these pleadings labeled according to the court system’s docket and the parties’ briefing.

1. 01/25/2008 Notice of Filing Supplemental Exhibits in Opposition to Lilly’s Motion for Summary Judgment Under Seal

This docket entry corresponds to Plaintiff’s Notice of Filing Supplemental Exhibits in Opposition to Lilly’s Motion for Summary Judgment. Lilly objects to unsealing Exhibit 12, which Lilly refers to as Plaintiff’s Ex. Nos. 10098 and 10099. Lilly says these exhibits are excerpts from Lilly sales representative “call notes,” which are rough notes concerning sales representative discussions with physicians. Lilly claims that “[c]ompetitors could use the call notes to approximate what concerns Lilly’s customers – doctors – share with Lilly about its products as well as its competitor’s products” and that “call notes could be used like market research, costing Lilly the time, expense, and good will it has expended to compile this information.” Lilly cites the Hoffman declaration’s general discussion regarding competitive intelligence gather in the pharmaceutical industry.

Lilly fails to present facts that support its contention that disclosure of these calls notes will cause harm. Lilly does not reference specific call notes that constitute confidential market research or that would cause competitive disadvantage. Further, the call notes, generated in 2002 and 2003, pertain to issues

⁵⁴ Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 662 (3rd Cir. 1991) (internal quotations omitted).

⁵⁵ Pintos v. Pacific Creditors Ass’n, 504 F.3d 792, 802 (9th Cir. 2007) (internal citations and quotation omitted).

extensively discussed at trial. Lilly's cursory, conclusory statements are inadequate to support a finding that harm will result from disclosure of these five-year-old call notes. The Court unseals these supplemental exhibits.

2. 01/08/2008 Notice of Filing Pleadings Under Seal; Attorney: Orlansky, Susan C.

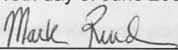
This docket entry corresponds to State of Alaska's Opposition to Lilly's Motion for Summary Judgment. Lilly objects to unsealing excerpts of the Robin Wojcieszak deposition attached to the pleading. Lilly states that the deposition excerpts "contain references to confidential communications between Lilly and the FDA, as well as internal communications with Lilly's sales force."

Regarding the communications between Lilly and the FDA, Lilly offers no basis beyond general reference to the Franson declaration for why these communications must remain confidential. The arguments advanced by Lilly to prevent disclosure of the communications do not establish compelling reasons for keeping the excerpts under seal. Furthermore, Lilly does not attempt to show why harm to Lilly outweighs the public interest in disclosure. The Court unseals State of Alaska's Opposition to Lilly's Motion for Summary Judgment and attachments.

IV. Conclusion

Bloomberg's motion to unseal records is granted according to the discussion above.

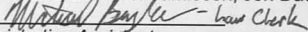
DATED at Anchorage, Alaska, this 13th day of June 2008.



MARK RINDNER
Superior Court Judge

I certify that on June 13, 2008 a copy was mailed to:

Eric Sanders, Brewster Jamieson, Jon Dawson


Administrative Assistant

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005550

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7
8 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

9 THIRD JUDICIAL DISTRICT AT ANCHORAGE

10 STATE OF ALASKA,)

11 Plaintiff,)

12 vs.)

13)
14 ELI LILLY AND COMPANY,)

15 Defendant.)

Case No. 3AN-06-05630 CI

16
17 BLOOMBERG'S REPLY TO SUPPLEMENTAL RESPONSE TO MOTION TO
18 INTERVENE AND TO UNSEAL RECORDS

19 Although Eli Lilly's Supplemental Response purports to undertake a document-
20 by-document analysis of the individual documents under seal, the justification in each
21 case consists of nothing more than the conclusory, unsupported assertion that disclosure
22 will harm Eli Lilly's competitive position. There is no evidence of specific facts or
23 concrete examples showing a particular harm, and there is certainly no showing that any
24 alleged harm outweighs Bloomberg's and the public's right of access. Eli Lilly has
25

therefore failed to meet the applicable burden for sealing any of the documents that were sealed.

A. There is a Strong Presumption of Access to Documents Filed with the Court

Contrary to what Eli Lilly suggests, there is a strong presumption of access to documents filed in this Court. This presumption derives from the First Amendment (*See Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1176 (6th Cir. 1983)), the common law (*See Nixon v. Warner Communications*, 435 U.S. 589 (1978), and *Johnson v. State*, 40 P.2d 404, 405-406 (Alaska 2002)), and Alaska's statutes (AS 40.25.120(a) and Administrative Rule 37.5¹). Although Eli Lilly cites two Second Circuit cases for the proposition that "there is a strong presumption against the disclosure of documents attached to non-dispositive motions," neither of those cases stands for that proposition.

In *Gambale v. Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004), the Second Circuit held only that it was wrong for the court to disclose the amount of a settlement agreement when that settlement agreement was not filed with the court:

That amount is set forth in settlement documents that were entered into on a confidential basis between the parties and are not themselves part of the court record. There is no established presumption of access of which we have been made aware with respect to the information contained in them. . . . *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir.1993) ("Once a settlement is filed in district court, it becomes a judicial record. The presumption in favor of the public's common law right of access to court records therefore

¹ Eli Lilly states that documents filed under seal are not public records within the meaning of Administrative Rule 37.5. However, this is true only if documents were properly sealed in the first place. Documents on file with the court do not lose their status as public records when, as here, they were sealed without any showing whatsoever.

1 applies to settlement agreements that are filed and submitted
2 to the district court for approval." (citation omitted)). We
3 cannot and do not conclude that there can never be a
4 circumstance or a showing that would require such disclosure.
5 At the same time, however, there may well be valid reasons in
6 this and other cases terminated by settlement for maintaining
7 the amount of settlement in confidence when the settlement
8 itself was conditioned on confidentiality and when the
9 settlement documents were not filed with the court and were
10 not the basis for the court's adjudication.

11 377 F.3d at 143.

12 In *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 229 (2d Cir. 2001), the Second Circuit
13 held only that where there has been reasonable reliance by a party or deponent on a valid
14 protective order, the court should not modify the protective order absent a showing of
15 improvidence in the granting of the order or other extraordinary circumstance. 273 F.3d
16 at 229. However, a number of federal circuits have held that a blanket protective order
17 such as the one stipulated to by Eli Lilly and the State is not entitled to such deference.
18 As stated by the Ninth Circuit:

19 In the instant case, the district court entered a blanket
20 stipulated protective order pursuant to Rule 26(c). Such
21 blanket orders are inherently subject to challenge and
22 modification, as the party resisting disclosure generally has
23 not made a particularized showing of good cause with respect
24 to any individual document. See *Beckman*, 966 F.2d at 476;
25 *Public Citizen*, 858 F.2d at 790.

26 *San Jose Mercury News, Inc. v. U.S. Dist. Court-Northern Dist. (San Jose)*, 187 F.3d
27 1096, 1103 (9th Cir. 1999). And as stated by the Seventh Circuit in *Citizens First*
28 *National Bank of Princeton v. Cincinnati Insurance Co.*, 178 F.3d 943 (7th Cir. 1999):

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DWT 3172278v3 3970124-000020

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The determination of good cause cannot be elided by allowing the parties to seal whatever they want, for then the interest in publicity will go unprotected unless the media are interested in the case and move to unseal. The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). *See* Arthur R. Miller, "Confidentiality, Protective Orders, and Public Access to the Courts," 105 *Harv. L. Rev.* 427, 492 (1991). He may not rubber stamp a stipulation to seal the record. *In re Krynicki*, 983 F.2d 74 (7th Cir.1992) (chambers opinion).

178 F.3d a 944-45.

Insofar as the Second Circuit cases can be read as establishing a presumption against disclosure of documents filed with this Court, those cases should be emphatically rejected by this Court as being inconsistent with the First Amendment, the common law, and the statutes of the State of Alaska.

B. For Documents Attached to Non-Dispositive Motions, Good Cause Requires that Eli Lilly Demonstrate Specific Facts and Provide Concrete Examples to Show Harm on a Document-by-Document Basis.

Bloomberg agrees that for documents attached to non-dispositive motions, the burden to be met by Eli Lilly is one of good cause. However, in order to demonstrate good cause, Eli Lilly must come forward, on a document-by-document basis, with specific facts and concrete examples to show the particular harm that will result if the document is not sealed:

A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted. *Id.* at 1210-11 (citing *San Jose Mercury News*, 187

1 F.3d at 1102); *see also Beckman*, 966 F.2d at 476 (“[B]road
2 allegations of harm, unsubstantiated by specific examples or
3 articulated reasoning, do not satisfy the Rule 26(c) test.”)
4 (quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108,
5 1121 (3d Cir.1986) (internal quotation marks omitted));
6 *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653
7 (D.Md.1987) (requiring party requesting a protective order to
8 provide “specific demonstrations of fact, supported where
9 possible by affidavits and concrete examples, rather than
10 broad, conclusory allegations of potential harm”).

11 *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130-31 (9th Cir. 2003). As
12 stated by the Washington Supreme Court: “Unsubstantiated allegations will not satisfy
13 the rule. The requesting party must support, where possible, its request by affidavits and
14 concrete examples.” *Dreiling v. Jain*, 93 P.3d 861, 871 (Wash. 2004). Accordingly,
15 before a document may be sealed, the Court must “articulate the factual basis for its
16 ruling, without relying on hypothesis or conjecture.” *Id.* at 1135.

17 Eli Lilly has submitted the Declaration of Gerald Hoffman (“Hoffman
18 Declaration”) in support of its opposition. The Hoffman Declaration was filed over two
19 years ago in a completely different proceeding than the instant case, and Eli Lilly’s
20 reliance on that declaration is disingenuous if not downright dishonest: although the
21 Hoffman Declaration makes reference to documents at issue in that different proceeding,
22 those documents are not identified in the Declaration, and there is no indication that they
23 are the same as the documents at issue in this motion. The court should therefore
24 disregard that affidavit in its entirety.
25

1 A document-by-document analysis of the documents that were attached to non-
2 dispositive motions shows that Eli Lilly has failed to come forward with specific facts or
3 concrete examples of a particularized harm—has failed, in short, to show good cause for
4 sealing any of those documents.

5
6 C. For Documents Attached to Non-Dispositive Motions, Eli Lilly Has Failed to
7 Demonstrate Specific Harm with Specific Facts and Concrete Examples.

8 1. 02/29/2008 Notice of Filing Under Seal; Attorney: Jamieson, Brewster H.

9 This docket entry is said to correspond to Eli Lilly's Motion to Seal Exhibits to Eli
10 Lilly and Company's Petition for Review. Inasmuch as the Petition for Review was
11 withdrawn, Bloomberg stipulates that this docket entry may remain sealed.

12
13 2. 02/28/2008 Defendant Eli Lilly and Company's Notice of Filing Under Seal;
14 Attorney: Jamison, Brewster H.

15 This docket entry is said to correspond to Eli Lilly's Motion Requesting
16 Confidential Protection of Regulatory Communications Not Subject to Public
17 Disclosure. Eli Lilly seeks to prevent the disclosure of the motion itself and Plaintiff's
18 Ex. Nos. 10105, 10106, 10107, and 10111, which are said to consist of regulatory
19 responses to the FDA. Eli Lilly concedes that all other documents contained in this
20 docket entry should be unsealed.

21
22 The Motion Requesting Confidential Protection:

23 Eli Lilly makes no attempt to show how disclosure of the motion itself would
24 result in harm to Eli Lilly. The mere fact that it refers to Eli Lilly's regulatory responses
25

1 to the FDA is certainly not enough to establish such harm. The motion must therefore be
2 unsealed.

3 Plaintiff's Ex. Nos. 10105, 10106, 10107, and 10111:

4 As support for its position, Eli Lilly has submitted an Affidavit of Timothy R.
5 Franson ("Franson Affidavit") that was filed in connection with an earlier motion by Eli
6 Lilly. Although the Franson Affidavit appears to relate to various submittals by Eli Lilly
7 to the FDA, the Franson Affidavit does not in fact state that those submittals include the
8 four documents under seal. Even assuming the four documents are among those
9 submittals, Eli Lilly has failed to make the necessary document-by-document showing of
10 specific harm. According to Franson, "companies with products in competition with
11 Zyprexa and Symbyax could use this information to gain unfair insight to their benefit, as
12 well as to exploit this information to harm Lilly in the marketplace today." Broad
13 allegations that competitors will gain "unfair insight," and will "exploit this information
14 to harm Lilly" are not sufficient to meet Eli Lilly's burden, because there is no indication
15 of the nature of the "unfair insight" that might be gained, and no showing of specific facts
16 or concrete examples of how this information would be exploited or the harm that would
17 result. *See Foltz*, 331 F.3d at 1122. The four documents in question must therefore be
18 unsealed.
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- 1 3. 02/25/2008 Notice of Filing Under Seal a pleading titled "State of Alaska's
2 Request for Clarification of the Court's Order Excluding Evidence of the
3 Defendant's Profits, Net Worth, and the Price of Zyprexa;" Attorney:
4 Sanders, Eric T.

5 Eli Lilly contends that the Request for Clarification and Plaintiff's Ex. Nos. 4121
6 and 8262 attached to that filing should remain under seal, but concedes that all other
7 documents contained in this docket entry should be unsealed.

8 Plaintiff's Ex. No. 4121:

9 Eli Lilly states that this document contains market research and strategic
10 marketing discussions. Eli Lilly alleges that disclosure of this document to its
11 competitors would "harm Lilly's competitive edge." However, that allegation is not
12 supported by an affidavit articulating specific facts or giving concrete examples of harm.
13 The broad and conclusory statement that disclosure will harm Eli Lilly's competitive
14 position is simply insufficient to establish good cause.

15 Plaintiff's Ex. No. 8262:

16 Eli Lilly states that this is an email that reflects Eli Lilly's internal discussion
17 about its product and plans for further medical and regulatory development. Eli Lilly
18 alleges that disclosure of this email would give competitors "insight into Lilly's
19 development plans for Zyprexa and other medications, allowing them to counter-detail
20 Lilly products in the marketplace." The broad allegation that Eli Lilly's competitors will
21 "counter-detail Lilly products in the marketplace" is not supported by an affidavit laying
22 out specific facts or concrete examples of harm. It amounts to saying that Eli Lilly will
23
24
25

lose its competitive edge, and broad allegations of that nature are insufficient to establish good cause.

The Request for Clarification itself:

Eli Lilly contends that the Request for Clarification should remain under seal or be redacted to remove references to the above-mentioned documents. However, Eli Lilly makes no attempt to show how mere references to these documents would result in harm to Eli Lilly. The request itself must therefore be unsealed without redaction.

4. 02/25/2008 Notice of Filing Under Seal a pleading titled "Request for Clarification of the Court's Order Excluding Testimony Regarding Other Drugs manufactured by Defendant Eli Lilly and Company;" Attorney: Sanders, Eric T.

Eli Lilly contends that the Request for Clarification, Plaintiff's Ex. Nos. 8262 and 10052, and the Taurel deposition excerpt should remain under seal, but concedes that all other documents contained in this docket entry should be unsealed.

Plaintiff's Ex. No. 8262:

See discussion in C.3 above.

Plaintiff's Ex. No. 10052:

Eli Lilly states that this document contains a presentation to Eli Lilly's management team, "setting forth priorities and business strategies." According to Eli Lilly, "competitors could use this information to Lilly's competitive disadvantage." This conclusory assertion is not supported by an affidavit laying out specific facts or concrete examples of harm. Because there is no showing of how competitors would use this

information to Eli Lilly's disadvantage, nor of the particular harm that would result, Eli Lilly has failed to show good cause.

Taurel deposition excerpt:

According to Eli Lilly, this excerpt references internal Lilly discussions regarding both Zyprexa and Prozac, reflects internal Lilly planning . . . [and] could be used by Lilly's competitors to Lilly's competitive disadvantage." Eli Lilly has not laid out facts to show how the information would be used by Eli Lilly's competitors to Eli Lilly's disadvantage, nor does it provide concrete examples of such harm. Although Eli Lilly cites to the Hoffman Declaration, the Hoffman Declaration was prepared two years ago in connection with a different proceeding, and there is no indication that the declaration addresses any of the particular information contained in the excerpts. The excerpt should therefore be unsealed.

The Request for Clarification itself:

Eli Lilly contends that the Request for Clarification should remain under seal or be redacted to remove references to the above-mentioned documents and excerpt. However, Eli Lilly makes no attempt to show how mere references to these materials would result in harm to Eli Lilly. The request itself must therefore be unsealed without redaction.

5. 02/20/2008 Lilly's Notice of: Reply re: Mtn Exclude Evidence New York Times Articles, Filed Under Seal; Attorney: Jamieson, Brewster H.

Eli Lilly contends that Plaintiff's Ex. No. 10106 should remain under seal, but

concedes that all other documents contained in this docket entry should be unsealed.

Plaintiff's Exhibit No. 10106 is discussed in Section C.2 above.

6. 02/20/2008 Reply: Motion in Limine Exclude Regulatory Communications filed under seal; Attorney: Jamieson, Brewster H.

Eli Lilly concedes that all documents contained in this docket entry should be unsealed.

7. 02/20/2008 Eli Lilly and Company's Notice of Filing its Reply in Further Support of its Motion in Limine to Exclude Evidence Relating to New York Times Articles Under Seal

Eli Lilly contends that Plaintiff's Ex. No. 10106 should remain under seal, but concedes that all other documents contained in this docket entry should be unsealed.

Bloomberg's discussion of Plaintiff's Exhibit No. 10106 is already set out at Section C.2 above.

8. 02/19/2008 Notice of Filing Under Seal – Objection to the State's Motions in Limine to Exclude Evidence; Eli Lilly and Company (Defendant)

Eli Lilly concedes that all documents contained in this docket entry should be unsealed.

9. 02/20/2008 Plaintiff's Response to Defendant's Motion in Limine to Exclude References to Foreign Regulatory Action

Eli Lilly concedes that all documents contained in this docket entry should be unsealed.

10. 02/14/2008 Plaintiff's Response to Defendant's Motion in Limine to Exclude Testimony and Call Notes of Non-Alaska Based Sales Representatives

Eli Lilly concedes that this motion in limine and the document attached to the motion should be unsealed. However, Eli Lilly contends that the Noesdges deposition excerpts attached to the motion should remain under seal. Those excerpts are said to contain discussions of "confidential Lilly documents, Lilly's training plans and policies for its sales force, and Lilly's computer and communications systems." Eli Lilly's only justification for keeping the excerpts under seal is that "Information pertaining to the training of Lilly's sales force is of particular interest to Lilly's competitors, and Lilly would suffer competitive harm from its disclosure." This conclusory assertion is not supported by an affidavit laying out specific facts showing how competitors would use this training information to harm Eli Lilly, nor concrete examples of such harm. Although Eli Lilly again cites to the Hoffman Declaration, that declaration from a different proceeding says absolutely nothing about the training information or any of the other information said to be contained in the excerpts of deposition.

11. 02/14/2008 Plaintiff's Response to Defendant's Motion in Limine to Exclude References to Recent Regulatory Communications and Developments

Eli Lilly concedes that all documents contained in this docket entry should be unsealed.

12. 02/11/2008 Notice of Filing Plaintiff's Objections to Defendant's
Page/Line Counter Designations Under Seal

Eli Lilly contends that excerpts of deposition testimony included with this filing should remain under seal. The excerpts are said to contain "discussions of trade secrets, internal business documents, and other confidential business information." Eli Lilly does not indicate the nature of alleged trade secrets or confidential business information, but states that "[the] information, if released could be used by Lilly's competitors to Lilly's disadvantage in the marketplace." Eli Lilly does not lay out facts establishing that any of the information is a trade secret or otherwise confidential. Eli Lilly certainly does not lay out facts to show how the information would be used by Eli Lilly's competitors to Eli Lilly's disadvantage, nor does it provide concrete examples of such harm. Although Eli Lilly again cites to the Hoffman Declaration, there is no indication that the excerpts concern any of the documents that were at issue in the proceeding for which that declaration was prepared. The excerpts should therefore be unsealed with the objections.

Eli Lilly concedes that substantial portions of these excerpts were played at trial, but nevertheless contends that the excerpts should remain under seal, because "it would be a waste of judicial resource to . . . analyze which lines of testimony were not played in open court." The burden, though, is on Eli Lilly—and not this Court—to undertake whatever steps are necessary to show good cause for sealing the excerpts. The fact that much of this deposition testimony was played in court makes it even less likely that disclosure of any of the remaining excerpts would result in harm to Eli Lilly. Although

Eli Lilly may not want to undertake the exercise of showing what was played and what was not played, that exercise is necessary to determine if good cause exists. Eli Lilly's failure to undertake that effort is a further reason why the excerpts should be unsealed.

13. 02/11/2008 Eli Lilly's Notice of Filing Deposition Designations Under Seal: Attorney Jamieson, Brewster H.

See discussion at Section C.12 above.

14. 02/04/2008 Notice of Filing Counter-Designations and Excerpts of Depositions under Seal: Brewster H. Jamieson (Attorney) on Behalf of Eli Lilly and Company

See discussion at Section C.12 above.

15. 02/04/2008 Notice of Filing Motion in Limine to Exclude Certain Testimony of the State's Experts Under Seal: Brewster H. Jamieson (Attorney) on Behalf of Eli Lilly and Company

This docket entry is said to include a copy of document bates numbered FDACDER 2154-2168, and excerpts from the Gueriguian deposition in which he discusses that document. Eli Lilly states that the document was produced by the FDA subject to a protective order in a different proceeding. However, that protective order is not a part of this action between the State and Eli Lilly; the document was not filed in this action subject to the protective order in that other proceeding; and Eli Lilly does not have standing to assert the FDA's rights or the possibility of harm to the FDA. It is incumbent upon Eli Lilly to show specific harm to Eli Lilly, not hypothetical or conjectural harm to the FDA. All of the documents in this docket entry must therefore be unsealed.

16. 02/04/2008 Notice of Filing Motion in Limine to Exclude Evidence
Relating to New York Times Articles Under Seal

Eli Lilly concedes that all documents contained in this docket entry should be
unsealed.

17. 02/04/2008 Notice of Filing Plaintiff's Amended Trial Deposition
Designations Under Seal; Eric T. Sanders (attorney) on behalf of State of
Alaska (Plaintiff)

See discussion in Section C.12 above.

18. 1/28/2008 Notice of Filing Plaintiff's Objections to Defendant's Page/Line
Designations and Exhibits Under Seal; Eric T. Sanders (Attorney) on behalf
of State of Alaska (Plaintiff)

See discussion in Section C.12 above.

19. 1/28/2008 Notice of Filing Plaintiff's Counter Designations to Defendant's
Deposition Designations and Exhibits Under Seal; Eric T. Sanders
(Attorney) on behalf of State of Alaska (Plaintiff)

See discussion in Section C.12 above.

20. 01/25/2008 Notice of Filing Supplemental Exhibits in Opposition to Lilly's
Motion for Summary Judgment Under Seal

See discussion in Section D below regarding documents filed in connection with
dispositive motions.

21. 01/25/2008 Notice of Filing Supplemental Page 77 Under Seal; Eric T.
Sanders (Attorney) on behalf of State of Alaska (Plaintiff)

See discussion in Section C.12 above.

22. 01/23/2008 Notice of Filing Deposition Designations Under Seal; Brewster H. Jamieson (Attorney) on Behalf of Eli Lilly and Company

See discussion in Section C.12 above.

23. 01/22/2008 Notice of Filing Pleadings Under Seal; Eric T. Sanders (Attorney) on behalf of State of Alaska (Plaintiff)

See discussion in Section C.12 above.

24. 01/08/2008 Notice of Filing Pleadings Under Seal; Attorney: Orlansky, Susan C.

See discussion in Section D below regarding documents filed in connection with dispositive motions.

25. 12/20/2007 Notice of Filing Pleading and Exhibits Under Seal, Re: Defendant's Motion to Compel Discovery; Eric T. Sanders (Attorney) on behalf of State of Alaska (Plaintiff)

This filing is said to include excerpts from Eli Lilly's "Zyprexa Backgrounder" containing block quotations from Plaintiff's Ex. No. 3909. Eli Lilly contends that the excerpts should be redacted before being unsealed, but concedes that all other documents contained in this docket entry should be unsealed without redaction.

Excerpts from Zyprexa Backgrounder:

Eli Lilly states that the excerpts include quotations taken from a draft letter to healthcare professionals. Eli Lilly alleges that disclosure of the quotations would put Lilly "at a severe competitive disadvantage . . . because draft documents give competitors insight into Lilly's clinical analysis and thought processes." Again, the allegation is not supported by affidavit, does not include specific facts to show how the quoted

information would result in competitive disadvantage, and does not provide concrete examples of harm. A broad allegation that Eli Lilly will be at a "severe competitive disadvantage" is no less broad, and no more efficacious, simply because the competitive disadvantage is alleged to be severe. Because Eli Lilly has failed to demonstrate the existence of good cause for keeping the excerpts under seal, they must be unsealed.

D. For Documents Attached to Dispositive Motions, Eli Lilly Must Demonstrate Compelling Reasons for Sealing the Documents.

Eli Lilly concedes that for documents filed with dispositive motions, it must demonstrate "compelling reasons" for sealing the document.

Unless a particular court record is one "traditionally kept secret," [i.e., grand jury transcripts and warrant materials in the midst of a pre-indictment investigation] a "strong presumption in favor of access" is the starting point. *Foltz*, 331 F.3d at 1135 (citing *Hagestad v. Trageser*, 49 F.3d 1430, 1434 (9th Cir. 1995)). A party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the "compelling reasons" standard. *Foltz*, 331 F.3d at 1135. That is, the party must "articulate[] compelling reasons supported by specific factual findings," *id.* (citing *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1102-03 (9th Cir. 1999)), that outweigh the general history of access and the public *1179 policies favoring disclosure, such as the "'public interest in understanding the judicial process.'" *Hagestad*, 49 F.3d at 1434 (quoting *EEOC v. Erection Co.*, 900 F.2d 168, 170 (9th Cir. 1990)). In turn, the court must "conscientiously balance[] the competing interests" of the public and the party who seeks to keep certain judicial records secret. *Foltz*, 331 F.3d at 1135. After considering these interests, if the court decides to seal certain judicial records, it must "base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Hagestad*, 49 F.3d at

1434 (citing *Valley Broadcasting Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1295 (9th Cir.1986)) . . . The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records. *Foltz*, 331 F.3d at 1136.

Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178-79 (9th Cir. 2006).

This is an significantly higher burden than good cause: not only must a party demonstrate specific harm favoring continued secrecy, but it must also show that this harm overcomes the presumption of access by outweighing the "public interest in understanding the judicial process." *Hagestad*, 49 F.3d at 1434 (citation omitted). A document-by-document analysis of the documents that were attached to dispositive motions shows that Eli Lilly has clearly failed to meet this burden.

E. For Documents Attached to Dispositive Motions, Eli Lilly Has Failed to Show Compelling Reasons for Sealing the Documents.

1. 01/25/2008 Notice of Filing Supplemental Exhibits in Opposition to Lilly's Motion for Summary Judgment Under Seal

Eli Lilly contends that Plaintiff's Ex. Nos. 10098 and 10099 should remain under seal, and that references to the contents of these documents should be redacted from the motion, but concedes that all other documents contained in this docket entry should be unsealed.

Plaintiff's Ex. Nos. 10098 and 10099:

Eli Lilly states that these documents are excerpted "call notes" from Eli Lilly sales representatives. Eli Lilly contends that by using these notes,

competitors could “approximate what concerns Lilly’s customers—doctors—share with Lilly about its products as well as its competitor’s products, . . . costing Lilly the time, expense, and good will it has expended to compile this information.”

Even if the call notes are not available to the public, the doctors are under no obligation to keep confidential the substance of those conversations reflected in those call notes. Thus, there is nothing confidential about the information contained in the call notes. Furthermore, although Eli Lilly alleges that release of this information will result in various costs to Eli Lilly, there is no affidavit to back up the allegation, and the broad allegation is insufficient in any event: there is no reason to believe that such disclosure will cause Eli Lilly to incur expenses, and Eli Lilly has failed to articulate any facts to show that it will lose good will. More importantly, there is certainly no showing whatsoever that these purported concerns outweigh the competing interests of Bloomberg and the public at large to have access to judicial records. In short, Eli Lilly has failed to demonstrate the existence of compelling reasons to seal the documents.

2. 01/08/2008 Notice of Filing Pleadings Under Seal; Attorney: Orlansky, Susan C.

Eli Lilly contends that excerpts of the Wojcieszek deposition attached to the Opposition should remain under seal, but concedes that all other documents contained in this docket entry should be unsealed.

1 Excerpts of Wojcieszek deposition:

2 Eli Lilly states that the deposition excerpts “contain references to confidential
3 communications between Lilly and the FDA, as well as internal communications with
4 Lilly’s sales force.” With respect to references to communications between Eli Lilly and
5 the FDA, Eli Lilly offers no basis for maintaining the excerpts under seal beyond the
6 arguments offered in support of keeping the communications themselves under seal.
7 However, Eli Lilly does not make any showing that mere references to such
8 communications will result in harm.
9

10
11 Furthermore, the arguments advanced by Eli Lilly to prevent disclosure of the
12 communications themselves do not establish compelling reasons for keeping the excerpts
13 under seal. Although the Franson Affidavit states that “companies with products in
14 competition with Zyprexa and Symbyax could use this information to gain unfair insight
15 to their benefit, as well as to exploit this information to harm Lilly in the marketplace
16 today,” there is no indication of the nature of the “unfair insight” that might be gained,
17 and no showing of specific facts or concrete examples of how this information would be
18 exploited or the harm that would result. *See Foltz*, 331 F.3d at 1122. More importantly,
19 there is absolutely no showing that any alleged harm outweighs Bloomberg’s and the
20 public’s competing rights to access.
21

22 With respect to the references to internal communications with Eli Lilly’s sales
23 force, Eli Lilly offers no reason to keep such references under seal beyond the
24
25

1 unsupported and conclusory assertion that such information “could easily be used to
2 Lilly’s commercial disadvantage.” Yet again, Eli Lilly cites to the Hoffman Declaration
3 that was prepared in connection with a different proceeding, but that declaration does not
4 even refer to such information. The declaration certainly does not articulate or give
5 concrete examples of any specific harm that would result from the disclosure of this
6 information. Furthermore, Eli Lilly has not even attempted to show that any alleged
7 harm outweighs Bloomberg’s and the public’s competing rights to access.
8

9 In short, Eli Lilly falls far short of demonstrating compelling reasons to keep the
10 excerpts under seal. The excerpts must therefore be unsealed.

11
12 F. Eli Lilly Has Failed to Demonstrate that Any Legitimate Objections to Disclosure
13 Cannot Be Met Through Redaction.

14 To the extent that there are legitimate objections to disclosure of documents filed
15 with this Court—and Eli Lilly has demonstrated none—Eli Lilly has not demonstrated
16 that it would not be adequately protected through redaction.

17
18 Courts have an obligation to consider all reasonable
19 alternatives to foreclosing the constitutional right of access.
20 Redaction constitutes a time-tested means of minimizing any
21 intrusion on that right . . . [T]he First Amendment requires
22 consideration of the feasibility of redaction on a document-
23 by-document basis, and the court’s blanket characterization
24 falls well short of this mark.

25 *In re Providence Journal Co., Inc.*, 293 F.3d 1, 15 (1st Cir. 2002) (internal citations
omitted). *See also Dreiling*, 93 P.3d at 871 (citing *Foltz*, 33 F.3d at 1137) (“Entire
documents should not be protected where mere redaction of sensitive items will satisfy

1 the need for secrecy"). None of the documents filed with the Court should remain sealed
2 without a showing that redaction is not a feasible alternative. Eli Lilly has made no such
3 showing.

4
5 G. Bloomberg's Counsel Should Be Permitted to Inspect Any Documents That the
6 Court is Inclined to Retain Under Seal.

7 Section 6(a) of the Protective Order entered in this matter permits Confidential
8 Discovery materials to be disclosed to "any person designated by the Court in the interest
9 of justice, upon such terms as the Court may deem proper." Insofar as this Court is
10 inclined to retain any of the documents (or portions of documents) at issue under seal
11 based on the scant information provided by Eli Lilly, it should first permit counsel for
12 Bloomberg to review the documents at issue, subject to counsel's agreement to abide by
13 the terms of the protective order. Otherwise, Bloomberg has no means for determining if
14 Eli Lilly has accurately described the documents in question, and Bloomberg is unfairly
15 hampered in its ability to respond fully to Eli Lilly's unsupported assertions that harm
16 will result if the documents are unsealed.
17

18 In order for there to be a meaningful opportunity for objection to the sealing of
19 records, "At a minimum, potential objectors should have sufficient information to be able
20 to appreciate the damages which would result from free access to the proceeding and/or
21 records." *Dreiling*, 93 P.3d at 869. As outlined above, Eli Lilly's description of the
22 documents at issue is cursory at best, and does not provide Bloomberg with a meaningful
23
24
25

1 opportunity to respond to Eli Lilly's argument that the documents at issue contain trade
2 secret information or that Eli Lilly would be damaged by the release of that information.

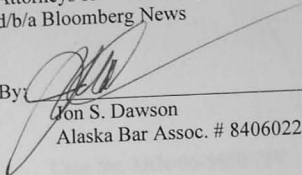
3 As demonstrated in Sections A through F above, Eli Lilly has not shown the
4 requisite good cause or compelling reasons, as applicable, necessary to seal the Court's
5 records, and the Court should simply order that the documents be unsealed due to Eli
6 Lilly's failure to make the necessary showing to maintain those documents under seal.
7 However, if there are documents that the Court is inclined to keep off limits to the public,
8 fairness requires that Bloomberg's counsel be permitted to first inspect those documents,
9 and be given the opportunity to respond further to Eli Lilly's arguments regarding the
10 need to maintain these documents under seal. Cf. *Natta v. Zletz*, 405 F.2d 99, 101 (7th
11 Cir. 1968) ("Natta's counsel may inspect the polyethylene documents [subject to] a
12 district court clause specifically forbidding Natta's counsel to make any disclosure to
13 Natta, its assignees, or any third parties.").

14 CONCLUSION

15 Merely saying something does not make it so. Despite Eli Lilly's oft-repeated
16 claim that disclosure of these various court filings will result in a competitive
17 disadvantage, Eli Lilly has failed to provide evidence of facts or concrete examples
18 establishing the specific harm that will result, and it fails to demonstrate how any alleged
19 harm overrides the public's right to know. Bloomberg's motion to unseal the documents
20 filed with the Court in the above-captioned matter should therefore be granted.
21
22
23
24
25

1 Dated this 2nd day of May, 2008.

2 DAVIS WRIGHT TREMAINE LLP
3 Attorneys for Bloomberg, LLC,
4 d/b/a Bloomberg News

5 By: 
6 Jon S. Dawson
7 Alaska Bar Assoc. # 8406022

8 Certificate of Service:

9 I certify that on May 2, 2008, and a true and correct
10 copy of the foregoing document was sent to the
11 following attorneys or parties of record by:

- 12 ☒ Mail
13 ☐ Facsimile and Mail
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-5630 CIV

**NON-OPPOSED MOTION TO WITHDRAW
PLAINTIFF'S OPPOSITION TO ELI LILLY AND COMPANY'S
MOTION TO STRIKE TESTIMONY OF R. DUANE HOPSON, M.D.**

The Plaintiff's Opposition to Eli Lilly and Company's Motion to Strike Testimony of R. Duane Hopson, M.D. filed on March 13, 2008, did not bear the signature of local counsel as required by Alaska Civil Rule 81. Accordingly, the State of Alaska moves to withdraw that pleading; Eli Lilly and Company agrees that this pleading should be withdrawn.

DATED this 1st day of April, 2008.

FELDMAN ORLANSKY & SANDERS
Counsel for Plaintiff

BY


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Non-Opposed Motion to Withdraw State's Opposition
To Lilly's Motion to Strike Testimony of R. Duane Hopson, M.D.
State of Alaska v. Eli Lilly and Company

Case No. 3AN-06-5630 CI
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

d in the Trial Courts
of ALASKA, THIRD DISTRICT
APR 20 2008
Clerk of the Trial Courts
Deputy

STATE OF ALASKA,

Plaintiff,

v.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-05630 CI

**DEFENDANT ELI LILLY AND
COMPANY'S SUPPLEMENTAL
RESPONSE TO BLOOMBERG, LLC D/B/A/
BLOOMBERG NEWS'S MOTION TO
INTERVENE AND TO UNSEAL RECORDS**

Bloomberg's Motion to Intervene and to Unseal Records should be denied. Now that this action has been settled, the Court should maintain the confidentiality of all documents filed under seal that were not admitted into evidence during trial. Pursuant to the April 7, 2008, Order of this Court, this supplemental response supersedes Lilly's previous response.

I. Introduction

"To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, adequately protect confidential material, and ensure that protection is afforded only to material so entitled," this Court entered a Protective Order on July 31, 2007, pursuant to Rule 26(c) of the Alaska Rules of Civil Procedure.¹ By its terms, this Order extended to all "information that the producing party in good faith believes is properly protected under Alaska Rule of Civil Procedure 26(c)(7); under any Federal or state

¹ Exhibit A, Protective Order at 1.

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statutes, regulations or court rules; or under Federal or state constitutions.”² Relying upon this Protective Order and the Court Administrative Rules 37.5 through 37.6,³ the parties filed under seal numerous motions and exhibits containing confidential information, including internal Lilly documents and confidential communications with the FDA. The parties also filed several iterations of confidential deposition designations discussing trade secrets and other confidential business information.

As Lilly’s document-by-document analysis⁴ demonstrates, this Court should preserve the confidentiality of all remaining documents and information that were not released to the public during trial, either in content or form. Under Court Administrative Rule (“Admin.R.”) 37.7, all of the documents at issue should be kept confidential because whatever interest Bloomberg has in disclosure is outweighed by the potential harm to Lilly’s

² *Id.* at 2.

³ Admin.R. 37.6 permits this Court, as under Alaska Rule of Civil Procedure 26(c), to keep documents filed with the court confidential. Admin.R. 37.5(e)(1)(C) provides that any document deemed “sealed or confidential pursuant to . . . court order” is “not accessible to the public.” These are, therefore, “non-public records” under the definition of Admin.R. 37.5, and Bloomberg’s argument to the contrary is without basis. *Cf.* Bloomberg’s Mem. in Supp. of Mot. to Intervene and to Unseal Records at 12.

⁴ See *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986) (if confidentiality of document produced pursuant to blanket or umbrella protective order is challenged, party seeking protection may then offer good cause showing); see also Manual for Complex Litigation (Fourth) § 11.432 (2004) (blanket or umbrella protective orders expedite production, reduce costs, and avoid the burden of document-by-document adjudication by delaying necessity of such a document-by-document adjudication until a challenge to confidentiality arises).

privacy, proprietary business, and other interests.⁵ Moreover, those documents filed with non-dispositive motions meet the requisite “good cause” standard of Alaska Rule of Civil Procedure 26(c),⁶ and Bloomberg cannot justify their release to the public. Those few documents not admitted at trial, but filed with dispositive motions, meet the requisite “compelling reasons” standard, and their confidentiality should likewise be maintained. Regardless of the applicable standard, this Court should deny Bloomberg’s motion as to the documents still at issue.

II. This Court Entered the Protective Order to Facilitate Discovery

Bloomberg’s demand that the Court lift the Protective Order ignores the value and necessity of such orders, which allow parties to freely conduct discovery and exchange information without risking irreparable harm through a breach of confidentiality. “[P]rotective orders issued under Rule 26(c) serve the vital function of securing the just, speedy, and inexpensive determination of civil disputes by encouraging full disclosure of all evidence that might conceivably be relevant.”⁷

⁵ Admin.R. 37.7 allows a court to order public access to otherwise non-public information, in limited circumstances, depending on the potential harm and the particular interests being protected. The interests considered include “but [are] not limited to . . . individual privacy rights and interests” and “proprietary business information”. Admin. R. 37.7(a).

⁶ See *Phillips ex. rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002) (remanding to district court for further proceedings to “identify and discuss the factors it considered in its ‘good cause’ examination to allow appellate review of the exercise of its discretion”).

⁷ *S.E.C. v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (internal quotation omitted).

Lilly designated these documents as confidential because of its good faith belief that they contain valuable trade secret information as well as other highly confidential information, the disclosure of which would place Lilly at a severe competitive disadvantage.⁸ Lilly's document-by-document analysis demonstrates the importance of keeping these documents confidential and the harm that would come to Lilly if this confidentiality were breached.

III. Rule 26(C) Protects Confidential Lilly Documents Attached to Non-Dispositive Filings Under the Good Cause Standard

Bloomberg's motion fails to distinguish between the legal standards applicable to

- 1) judicial documents attached to dispositive pleadings or admitted into evidence, and
- 2) documents attached to non-dispositive pleadings. Ignoring the distinction, Bloomberg urges this Court to apply the wrong standard to the great majority of documents at issue.

There is a strong presumption against the disclosure of confidential documents attached to non-dispositive motions.⁹ Where documents attached to non-dispositive motions are at issue, a party seeking their protection needs to show "good cause," as defined by

⁸ The pharmaceutical industry is highly competitive, and the value of commercially sensitive information to competitors is high. *See, e.g.*, Exhibit B, Declaration of Gerald Hoffman filed in connection with confidentiality challenges currently pending in the Zyprexa MDL ("Hoffman Decl.") at ¶¶ 10–11, 18; Exhibit C, Decl. of Timothy Franson at ¶ 16–17 ("Franson Decl.").

⁹ *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143 (2d Cir. 2004); *TheStreet.com*, 273 F.3d at 233.

Alaska Rule of Civil Procedure 26(c).¹⁰ Rule 26(c) authorizes a court to enter, "on such terms and conditions as are just," any order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The court may enter such an order to protect, *inter alia*, Lilly's "trade secret[s] or other confidential research, development, or commercial information."¹¹ Given the "potential for abuse" attendant to liberal discovery rules,¹² Rule 26(c), like its federal counterpart, permits a party to seek a protective order prohibiting dissemination of information produced in discovery upon a showing of "good cause." "This provision . . . applies primarily to commercially sensitive information that might cause the defendant some competitive harm."¹³

¹⁰ See *Phillips*, 307 F.3d at 1210 (where good cause is shown the court must balance the public and private interests to decide whether a protective order is necessary); see also *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 415 (E.D.N.Y. 2007) ("The balance struck should incorporate consideration of the overarching purpose of the discovery process: Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public.") (internal quotation marks omitted).

¹¹ *Phillips*, 307 F.3d at 1211 (courts have "broad latitude to grant protective orders to prevent disclosure of materials for many types of information, including, *but not limited to*, trade secrets or other confidential research, development, or commercial information."); see also Admin. R. 37.7(a) (stating that the interests considered include, "but [are] not limited to . . . individual privacy rights and interests" and "proprietary business information").

¹² *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984).

¹³ Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & Pol'y 53, 57 (2000) ("This provision does not specifically refer to the public interest. Rather, it applies primarily to commercially sensitive information that might cause the defendant some competitive harm.").

"Good cause" can be demonstrated by showing that particularized harm will result from the disclosure of information.¹⁴ Among the factors considered for confidentiality protection under Fed. R. Civ. P. 26(c)(7) are (1) the extent to which information is known to those outside the business; (2) the extent to which the information is known to those inside the business; (3) the measures taken to guard the secrecy of the information; and (4) the value of the information to the business and its competitors.¹⁵ Bloomberg asserts that the filings that correspond to the docket entries listed below,¹⁶ previously designated as confidential, should be released to the public. For the reasons that follow, Lilly agrees that certain of these entries may be de-designated. The remaining entries, however, must be kept confidential, either in whole or in part, because they meet the Rule 26 "good cause" standard.

1. 02/29/2008 Notice of Filing Under Seal; Attorney: Jamieson, Brewster H.

This docket entry corresponds to Lilly's Motion to Seal Exhibits to Eli Lilly and Company's Petition for Review. The Petition for Review was withdrawn before any court

¹⁴ *Phillips*, 307 F.3d at 1211.

¹⁵ *Sullivan Mktg. v. Valassis Comm'n*, No. 93 Civ. 6350 (PKL), 1994 WL 177795 at *2 (S.D.N.Y. May 5, 1994); see *Wilcock v. Equidev Capital L.L.C.* No. 99 Civ. 10781LTSDFE, 2001 WL 913957, at *1 (S.D.N.Y. Aug. 14, 2001). Courts in the Ninth Circuit have focused primarily on the potential for irreparable harm to the party seeking a protective order. See *Phillips*, 307 F.3d at 1210-11 (focusing on harm if no protective order is entered); *Nutratech, Inc. v. Syntech (SSPF) Intern., Inc.* 242 F.R.D. 552, 555 (C.D. Cal. 2007) (entering protective order to protect against competitive harm); *In re Worlds of Wonder Sec. Litig.*, 147 F.R.D. 214, 216 (N.D. Cal. 1992) (entering a protective order covering "closely-guarded" documents because "their disclosure to competitors probably would be harmful").

¹⁶ Mem. in Supp. of Mot. to Intervene and to Unseal Records at 3-6.

action and the exhibits thereto were returned to Lilly by the Supreme Court of Alaska. Accordingly, there can be no public interest in the contents of the exhibits. The Motion to Seal Exhibits itself is not confidential and may be de-designated, but the exhibits may not be released.

2. 02/28/2008 Defendant Eli Lilly and Company's Notice of Filing Under Seal; Attorney: Jamieson, Brewster H.

This docket entry corresponds to Defendant Eli Lilly and Company's Motion Requesting Confidential Protections of Regulatory Communications Not Subject to Public Disclosure. There are no confidential Lilly documents attached to this motion, but several confidential documents are referenced therein. Although a handful of those documents were admitted into evidence at trial,¹⁷ four documents remain confidential: Plaintiff's Ex. Nos. 10105, 10106, 10107, and 10111. These four documents were recently sent by Lilly to the FDA, responding to particular FDA requests. As set forth in the Declaration of Timothy Franson, they are not publicly available and not widely disseminated within Lilly.¹⁸ Both Lilly and the FDA take numerous steps to protect their confidentiality, including exempting these documents from the Freedom of Information Act ("FOIA").¹⁹ Moreover, "the 2007 submissions and communications . . . are so current that companies with products in

¹⁷ These documents are Plaintiff's Ex. Nos. 10094, 10104, 10108, 10109, and 10110. Plaintiff's Ex. Nos. 10153 and 10154, referenced in this motion, are duplicates of exhibits admitted at trial.

¹⁸ Exhibit C, Franson Decl. at ¶¶ 8-13.

¹⁹ *Id.*

competition with Zyprexa and Symbyax could use this information to gain unfair insight to their benefit, as well as to exploit this information to harm Lilly in the marketplace today.”²⁰

For the foregoing reasons, this motion should be kept under seal. At a minimum, these four documents must be withheld from release and any reference to the content of these documents must be redacted from the motion and attached affidavit before de-designation of the motion and affidavit.

3. 02/25/2008 Notice of Filing Under Seal a pleading titled “State of Alaska’s Request for Clarification of the Court’s Order Excluding Evidence of the Defendant’s Profits, Net Worth, and the Price of Zyprexa;” Attorney: Sanders, Eric T.

The State attached several confidential Lilly documents to this filing. At this time, Lilly de-designates an un-redacted version of Plaintiff’s Ex. No. 10025.²¹ Although some of the remaining attached documents were later admitted at trial,²² two documents were not admitted and have retained their confidential status:

- Plaintiff’s Ex. No. 4121 – This document contains Lilly market research and strategic marketing discussions. Lilly has taken steps to keep this document from being disclosed to the public or widely circulated within the company because competitors would use the information contained within the document to Lilly’s competitive disadvantage. Additionally, Lilly expended time, money, and effort to conduct the market research reflected in this document. Permitting competitors to have the benefits of that research without the attendant costs would harm Lilly’s competitive edge.

²⁰ *Id.* at ¶ 17.

²¹ Exhibit D, the un-redacted version of Plaintiff’s Ex. No. 10025.

²² Plaintiffs’ Ex. Nos. 1079, 5913 and 1079.

- Plaintiff's Ex. No. 8262 – This internal Lilly email was disseminated only to the recipients listed therein – it was neither widely circulated in the company nor released to the public. This email reflects internal Lilly discussion about its products and plans for further medical and regulatory development. Permitting Lilly's competitors access to this email could give them insight into Lilly's development plans for Zyprexa and other medications, allowing them to counter-detail Lilly products in the marketplace.

For the foregoing reasons, this pleading should be kept under seal. At a minimum, these two documents must be withheld from release and any reference to the content of these documents must be redacted from the motion before the motion is de-designated.

4. 02/25/2008 Notice of Filing Under Seal a pleading titled "Request for Clarification of the Court's Order Excluding Testimony Regarding Other Drugs Manufactured by Defendant Eli Lilly and Company;" Attorney: Sanders, Eric T.

The State attached several confidential Lilly documents to this filing. Although some of the attached documents were later admitted at trial or are otherwise not confidential,²³ two documents were not admitted and have retained their confidential status:

- Plaintiff's Ex. No. 8262 – discussed in Section III.3, *supra*.
- Plaintiff's Ex. No. 10052 – This document contains a presentation to Lilly's Global Management Team, setting forth priorities and business strategies. This document is not publicly available and was not widely disseminated within the company because competitors could use this information to Lilly's competitive disadvantage.

Also attached to this motion are excerpts from the depositions of Sidney Taurel and John Lechleiter. In light of factual development at trial, Lilly is not contesting the de-

²³ Plaintiffs' Ex. Nos. 5913, 9070, 8584, 10094, 10095, 10108, 1453, and 1962.

designation of the Lechleiter transcript excerpts. The Taurel excerpt, however, was never played at trial; indeed, plaintiffs withdrew all of their Taurel designations before presenting them to this Court for a ruling on admissibility. The Taurel deposition excerpt references internal Lilly discussions regarding both Zyprexa and Prozac, reflects internal Lilly planning, and is not available to Lilly's competitors. This information could be used by Lilly's competitors to Lilly's competitive disadvantage.²⁴

For the foregoing reasons, this pleading should be kept under seal. At a minimum, these two documents and the excerpt of the Sidney Taurel deposition must be withheld from release, and any reference to the content of these documents must be redacted from the motion before the motion is de-designated.

5. 02/20/2008 Lilly's Notice of: Reply re: Mtn Exclude Evidence New York Times Articles, Filed Under Seal; Attorney: Jamieson, Brewster H.

This docket entry corresponds to Defendant Eli Lilly and Company's Reply in Further Support of its Motion in Limine to Exclude Evidence Relating to New York Times Articles. Attached to this motion is an excerpt from Plaintiff's Ex. No. 10106, which, as noted above, has not been admitted and deserves continued confidentiality protection. See *supra*, Section III.2. At a minimum, this exhibit excerpt must be withheld from release before de-designation of the motion.

²⁴ Exhibit B, Hoffman Decl. at ¶¶ 11, 18.

6. 02/20/2008 Reply: Motion in Limine Exclude Regulatory Communications, filed under seal; Attorney: Jamieson, Brewster H.

Defendant Eli Lilly and Company's Reply in Further Support of its Motion in Limine to References to Recent Regulatory Communications and Developments should be de-designated in light of factual development at trial.

7. 02/20/2008 Eli Lilly and Company's Notice of Filing its Reply in Further Support of Its Motion in Limine to Exclude Evidence Relating to New York Times Articles Under Seal

This docket entry, listed in Bloomberg's motion, appears to refer to the same docket entry discussed in Subsection 5, *supra*.

8. 02/19/2008 Notice of Filing Under Seal – Objection to the State's Motions in Limine to Exclude Evidence; Eli Lilly and Company (Defendant)

This docket entry, listed in Bloomberg's motion, appears to correspond to Defendant Eli Lilly and Company's Objection to the State of Alaska's Motions in Limine to Exclude Evidence Relating to Zyprexa's Efficacy or Benefits of Zyprexa for (1) Indicated Uses, and (2) Non-Indicated or "Off-Label" Uses, filed February 14, 2008. At trial, many of the attachments to this motion were admitted in open court, or were otherwise disclosed to the public.²⁵ Therefore, Lilly has no objection to the de-designation of this motion or its attachments.

²⁵ Plaintiff's Ex. Nos. 0284, 2368, and 10093. Plaintiff's Ex No. 0229 was not admitted in open court, but Lilly is not contesting de-designation of this document at this time. Neither is Lilly contesting the confidentiality of the State's Responses to Fourth Set of Interrogatories in the form attached to this motion.

9. 02/20/2008 Plaintiff's Response to Defendant's Motion in Limine to Exclude References to Foreign Regulatory Action

The documents attached to this pleading were admitted at trial and Lilly does not contest the de-designation of this motion at this time.

10. 02/14/2008 Plaintiff's Response to Defendant's Motion in Limine to Exclude Testimony and Call Notes of Non-Alaska Based Sales Representatives

The confidential document attached to this motion was admitted in open court. However, the attached excerpts of the deposition transcript of David Noesges were not read at trial.²⁶ These excerpts contain discussion of confidential Lilly documents, Lilly's training plans and policies for its sales force, and Lilly's computer and communication systems. Information pertaining to the training of Lilly's sales force is of particular interest to Lilly's competitors, and Lilly would suffer competitive harm from its disclosure.²⁷

11. 02/14/2008 Plaintiff's Response to Defendant's Motion in Limine to Exclude References to Recent Regulatory Communications and Developments

In light of developments at trial, Lilly does not contest the de-designation of this Response or the attachments thereto.

12. 02/11/2008 Notice of Filing Plaintiff's Objections to Defendant's Page/Line Counter Designations Under Seal

The exhibits attached to these Objections are excerpts of confidential deposition testimony by Lilly witnesses Charles Beasley Jr., M.D., Alan Breier, M.D., John C.

²⁶ These excerpts are pages 34-41 and 194-201. Twelve lines of these deposition excerpts were read into evidence at trial, but the remaining pages of testimony were not.

²⁷ Exhibit B, *see generally* Hoffman Decl.

Lechleiter, Ph.D., David Noesges, Sidney Taurel, Gary Tollefson, M.D., and Robin Pitts Wojcieszek, including discussions of trade secrets, internal business documents, and other confidential business information. As discussed in this Supplemental Response, that information, if released, could be used by Lilly's competitors to Lilly's disadvantage in the marketplace.²⁸ To the extent that relevant portions of these designations were played in open court, the public already has access to the information contained therein. To the extent that portions of these designations were not played in open court, there can be no public interest in their contents.

The parties submitted several versions of deposition designations to the Court, with each version superseding the version before it. Each version covered the testimony of several different witnesses and was comprised of several hundred pages. The exhibits at issue represent prior, preliminary versions of deposition designations intended to be played in open court. All of these were superseded by the testimony that the parties actually chose to play in open court. Prior versions were therefore rendered obsolete and effectively withdrawn by the parties through the testimony played in court, and did not contribute to the conduct of the trial. Moreover, it would be a waste of judicial resources to wade through each prior, obsolete round of designations for each separate witness and analyze which lines of testimony were not played in open court.

²⁸ See generally Exhibit B, Hoffman Decl. and Exhibit C, Franson Decl.

13. 02/11/2008 Eli Lilly's Notice of Filing Deposition Designations Under Seal; Attorney Jamieson, Brewster H.

The exhibits attached to Eli Lilly and Company's Deposition Counter-Designations for Trial are excerpts of confidential deposition testimony by Lilly witnesses Michael Bandick, Jack E. Jordan, Bruce Kinon, M.D., and Denice M. Torres. For the reasons stated above, these deposition designations should be kept confidential. *See supra* Section III.12.

14. 02/04/2008 Notice of Filing Counter-Designations and Excerpts of Depositions under Seal; Brewster H. Jamieson (Attorney) on Behalf of Eli Lilly and Company

These Counter-Designations contain many of the same transcript excerpts from Lilly witnesses Beasley, Breier, Lechleiter, Noesges, Taurel, Tollefson, and Wojcieszek as included in the State's Objections thereto. *See supra* Section III.12. For the same reasons as above, these exhibits should not be de-designated.

15. 02/04/2008 Notice of Filing Motion in Limine to Exclude Certain Testimony of the State's Experts Under Seal; Brewster H. Jamieson (Attorney) on Behalf of Eli Lilly and Company

This motion attaches excerpts of the deposition transcript of Dr. John Gueriguian, in which he discusses a document bates numbered FDACDER 2154-2168. The document itself is attached to this motion. The document was produced by FDA to the Plaintiffs' Liaison Committee in the Zyprexa Multidistrict Litigation pending before Judge Jack B. Weinstein, pursuant to the protective order in the MDL.²⁹ The confidentiality rights to this

²⁹ Exhibit E, letter from J. Zeller to M. Miller (Nov. 20, 2006).

document are held by FDA, and this Court should not disclose it to the public without permitting FDA the opportunity to assert its document's confidentiality.³⁰

16. 02/04/2008 Notice of Filing Motion in Limine to Exclude Evidence Relating to New York Times Articles Under Seal

This motion should be de-designated in light of factual development at trial.

17. 02/04/2008 Notice of Filing Plaintiff's Amended Trial Deposition Designations Under Seal; Eric T. Sanders (attorney) on behalf of State of Alaska (Plaintiff)

The exhibits attached to these designations are excerpts of the deposition transcripts of Lilly witnesses Bandick, Jordan, Kinon, and Torres. For the reasons stated above, these deposition designations should be kept confidential. *See supra* Sections III.12 and 13.

18. 1/28/2008 Notice of Filing Plaintiff's Objections to Defendant's Page/Line Designations and Exhibits Under Seal; Eric T. Sanders (Attorney) on behalf of State of Alaska (Plaintiff)

The exhibits attached to these objections are excerpts of the deposition transcripts of Lilly witnesses Beasley and Tollefson. For the reasons stated above, these deposition designations should be kept confidential. *See supra* Sections III.12 and 14.

19. 1/28/2008 Notice of Filing Plaintiff's Counter Designations to Defendant's Deposition Designations and Exhibits Under Seal; Eric T. Sanders (Attorney) on behalf of State of Alaska (Plaintiff)

The exhibits attached to these objections are excerpts of the deposition transcripts of Lilly witnesses Beasley and Tollefson. As set forth above, these exhibits should not be de-designated. *See supra* Sections III.12 and 18.

³⁰ Exhibit F, *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, Case Management Order No. 3 at ¶¶ 7, 9.

20. 01/25/2008 Notice of Filing Supplemental Exhibits in Opposition to Lilly's Motion for Summary Judgment Under Seal

Because this motion is analyzed under a different standard, it is discussed in Section IV.1, below.

21. 01/25/2008 Notice of Filing Supplemental Page 77 Under Seal; Eric T. Sanders (Attorney) on behalf of State of Alaska (Plaintiff)

The exhibit attached to this designation are excerpts of the deposition transcript of Lilly witness Bandick. For the reasons set forth above, it should not be de-designated. *See supra* Sections 12, 13 and 17.

22. 01/23/2008 Notice of Filing Deposition Designations Under Seal; Brewster H. Jamieson (Attorney) on Behalf of Eli Lilly and Company

The exhibits attached to these objections are excerpts of the deposition transcripts of Lilly witnesses Beasley and Tollefson. As set forth above, these exhibits should not be de-designated. *See supra* Section III.12 and 19.

23. 01/22/2008 Notice of Filing Pleadings Under Seal; Eric T. Sanders (Attorney) on behalf of State of Alaska (Plaintiff)

The exhibits attached to the State's original Trial Deposition Designations are excerpts of the deposition transcripts of several Lilly witnesses. Some of these witnesses' designations for trial were later withdrawn completely by the State, *e.g.*, Jerry Clewell, Kenneth Kwong M.D., Susan Schuler, Michelle Sharp, and Sidney Taurel. As noted in Section III.12 above, the remaining witnesses' trial designations were later presented after numerous superseding versions were served, *e.g.*, Bandick, Beasley, Breier, Jordan, Kinon,

Lechleither, Noesges, Tollefson, Torres, Wojcieszek. For the reasons set forth above, these exhibits should not be de-designated. *See supra* Section III.12.

24. 01/08/2008 Notice of Filing Pleadings Under Seal: Attorney: Orlansky, Susan C.

Because this motion is analyzed under a different standard, it is discussed in Section IV.2, below.

25. 12/20/2007 Notice of Filing Pleading and Exhibits Under Seal, Re: Defendant's Motion to Compel Discovery: Eric T. Sanders (Attorney) on behalf of State of Alaska (Plaintiff)

Most of the attachments to Plaintiff's Response to Defendant's Motion to Compel Discovery are either not confidential or were introduced at trial.³¹ However, attached excerpts from Plaintiff's Zyprexa Backgrounder include block quotations from a confidential Lilly document, Plaintiff's Ex. No. 3909. This draft letter to healthcare professionals was not available outside of the company, not widely disseminated within the company, and Lilly takes steps to ensure the security of its document and computer systems.³² Lilly would be at a severe competitive disadvantage if this document were released because draft documents give competitors insight into Lilly's clinical analysis and thought processes.

Although the confidential document itself is not attached to this motion, the content of that document must be redacted from the motion before the motion is de-designated.

³¹ Moreover, in light of developments at trial, Lilly does not contest the de-designation of the excerpts of the deposition transcript of Robin Wojcieszek attached to this Response.

³² See Exhibit B, Hoffman Decl. at ¶¶ 12-15.

IV. Documents Attached To Dispositive Motions are Protected Under the "Compelling Reasons" Standard

When evaluating the confidentiality of documents attached to dispositive motions,³³ courts employ a "compelling reasons" standard to balance the public's interest in accessing the court with a litigant's interest in protecting confidential commercial information.³⁴ Under this standard, a "court must weigh relevant factors, base its decision on a compelling reason, and articulate the factual basis for its ruling . . . without relying on hypothesis or conjecture."³⁵ "Relevant factors include the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets."³⁶ "A well-settled exception to the right of access is the protection of a party's interest in confidential commercial information, such as a trade secret, where there is a sufficient threat of irreparable harm."³⁷ "[C]ourts may deny access to judicial records . . . where they are

³³ The public's interest in accessing the courts is confined to the trial setting, and does not bear on documents disclosed during the course of pre-trial hearings. See, e.g., *In re Zyprexa Injunction*, 474 F. Supp. 2d at 412-13 (public interest is to monitor the courts, documents exchanged during pre-trial do not implicate this interest).

³⁴ *In re Gabapentin Patent Litig.*, 312 F. Supp. 2d. 653, 664 (D.N.J. 2004).

³⁵ *Pintos v. Pacific Creditors Assoc.*, 504 F.3d 792, 802 (9th Cir. 2007) (alteration in original, internal quotation marks and footnote omitted).

³⁶ *Id.* at 802 n.9 (internal quotation marks omitted).

³⁷ *In re Gabapentin Patent Litig.*, 312 F. Supp. 2d. at 664 (internal quotation marks omitted).

sources of business information that might harm a litigant's competitive standing."³⁸ As demonstrated herein, the sealed Lilly documents attached to the following two dispositive pleadings meet the "compelling reasons" standard, and should be kept confidential.

1. 01/25/2008 Notice of Filing Supplemental Exhibits in Opposition to Lilly's Motion for Summary Judgment Under Seal

This supplemental filing attaches two confidential Lilly documents that were not admitted at trial and should be kept confidential. Plaintiff's Ex. Nos. 10098 and 10099 are excerpted "call notes" from Lilly sales representatives.³⁹ Call notes are rough notes concerning sales representatives' discussions with physicians. Lilly takes numerous steps to ensure that call notes are not available to the public and are not widely disseminated within the company. Nevertheless, these call notes would be very useful to Lilly's competitors. Competitors could use the call notes to approximate what concerns Lilly's customers – doctors – share with Lilly about its products as well as its competitors' products. In this way, call notes could be used like market research, costing Lilly the time, expense, and good will it has expended to compile this information.⁴⁰

³⁸ *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 662 (3d Cir. 1991) (internal quotation marks omitted); see also Admin. R. 37.7(a) (stating that the interests considered include "but [are] not limited to . . . individual privacy rights and interests" and "proprietary business information").

³⁹ Plaintiff's Ex. No. 10100, also attached to this supplemental filing, was admitted in court.

⁴⁰ See Exhibit B, Hoffman Decl. at ¶¶ 17–18 (explaining "competitive intelligence gathering" in the pharmaceutical industry).

At a minimum, these two documents must be withheld from release and any reference to the content of these documents must be redacted from the motion before de-designation of the motion.

2. 01/08/2008 Notice of Filing Pleadings Under Seal; Attorney: Orlansky, Susan C.

The confidential documents attached to the State of Alaska's Opposition to Summary Judgment were admitted at trial or otherwise have lost their confidential protections.⁴¹ However, the attached excerpts of the deposition of Robin Wojcieszek contain references to confidential communications between Lilly and the FDA, as well as internal communications to Lilly's sales force. As discussed above, both Lilly and FDA have taken great measures to preserve the confidentiality of the communications between them. *See supra* Section III.2. Moreover, the content of internal Lilly communications with its sales force is not accessible by competitors and could easily be used to Lilly's commercial disadvantage.⁴²

V. Conclusion

For the foregoing reasons, Lilly requests that this Court deny Bloomberg's Motion to Intervene and to Unseal Records, protecting from disclosure those confidential Lilly documents that were filed under seal and have not been disclosed to the public.

⁴¹ Plaintiff's Ex. Nos. 2368, 10017, 10094, and 10095. Plaintiff's Ex. No. 10138 was not admitted at trial, but the contents of the form of exhibit attached to this motion were divulged at trial and Lilly does not contest is de-designation at this time.

⁴² *See generally* Hoffman Decl., Attached Ex. B.

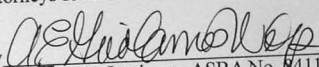
LANE POWELL LLC
301 West Northern Lights Boulevard, Suite 301
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Telephone 907.277.9511 Facsimile 907.276.2631

DATED this 25th day of April, 2008.

PEPPER HAMILTON LLP
Nina M. Gussack, admitted *pro hac vice*
George A. Lehner, admitted *pro hac vice*
John F. Brenner, admitted *pro hac vice*
Andrew R. Rogoff, admitted *pro hac vice*
Eric J. Rothschild, admitted *pro hac vice*
and

LANE POWELL LLC
Attorneys for Defendant

By


Brewster H. Jamieson, ASBA No. 8411122
Andrea E. Girolamo-Welp, ASBA No. 0211044

I certify that on April 25, 2008, a copy of the foregoing was served by e-mail and mail on:

Eric T. Sanders, Esq.
Feldman Orlansky & Sanders
500 L Street, Suite 400
Anchorage, Alaska 99501-5941


009867.0038/164393.1

Defendant Eli Lilly and Company's Supplemental Response to Bloomberg, LLC d/b/a Bloomberg News's Motion to Intervene and to Unseal Records State of Alaska v. Eli Lilly and Company (Case No. 3AN-06-05630 CI)

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-05630 CI

PROTECTIVE ORDER

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

1. Discovery Materials

This Order applies to all products of discovery and all information derived therefrom, including but not limited to, all documents, objects or things, deposition testimony and interrogatory/request for admission responses and any copies, excerpts or summaries thereof, obtained by any party pursuant to the requirements of any court order, requests for production of documents, requests for admissions, interrogatories, or subpoena ("discovery materials"). This Order is limited to the litigation or appeal of this action ("Action").

2. Use of Discovery Materials

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

#BES996 v2

EXHIBIT

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

3. "Confidential Discovery Materials" Defined

For the purposes of this Order, "Confidential Discovery Materials" shall mean any information that the producing party in good faith believes is properly protected under Alaska Rule of Civil Procedure 26(c)(7); under any Federal or state statutes, regulations or court rules; or under Federal or state constitutions. Federal and state regulations may preclude the parties under certain circumstances from producing personal identifying information. In such cases, the parties may produce redacted or de-identified information for use in this litigation and under the protection of this Order, provided, however, that the Court nevertheless retains the authority to review any such action by any party.

The terms of this Order shall in no way affect the right of any person (a) to withhold information on alleged grounds of immunity from discovery such as, for example, attorney-client privilege, work product or privacy rights of such third parties as patients, physicians, clinical investigators, or reporters of claimed adverse reactions; or (b) to withhold information on alleged grounds that such information is neither relevant to any claim or defense nor reasonably calculated to lead to the discovery of admissible evidence; or (c) as

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required by Federal or state law. If information is redacted for any reason, the redacting party shall produce a separate log that identifies the document subject to redaction by bates number, the reason for such redaction, and describes the nature of the information redacted so that other parties may assess the applicability of any privilege or production. Nothing in this Order shall be interpreted to require Lilly to prepare new privilege logs for the MDL production or supplement the privilege logs produced in the MDL.

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

4. Designation of Documents as "Confidential"

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

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

brings the legend to the attention of a reasonable examiner) with a notation substantially similar to the following:

State of Alaska v. Eli Lilly and Company: Confidential-Subject to Protective Order

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

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

5. Non-Disclosure of Confidential Discovery Materials

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

6. Permissible Disclosures of Confidential Discovery Material

Confidential Discovery Materials may be disclosed to and used only by:

- a. counsel of record for the parties in this Action and to his/her partners, associates, secretaries, legal assistants, and employees to the extent considered reasonably necessary to render professional services in the Action;
- b. inside counsel of the parties, to the extent reasonably necessary to render professional services in the Action;
- c. court officials involved in this Action (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Court);
- d. any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper;
- e. where produced by a plaintiff, in addition to the persons described in subsections (a) and (b) of this section, defendant's in-house paralegals and outside counsel, including any attorneys employed by or retained by defendant's outside counsel who are assisting in connection within this Action, and the paralegal, clerical, secretarial, and other staff employed or retained by such outside counsel or retained by the attorneys employed by or retained by defendant's outside counsel.

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

g. outside consultants or outside experts retained for the purpose of assisting counsel in the Action;

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

i. employees of non-party contractors performing one or more of the functions set forth in (h) above;

j. any employee of a party or former employee of a party, but only to the extent considered necessary for the preparation and trial of this Action; and, any other person, if consented to by the producing party;

k. Any individual to whom disclosure is to be made under subparagraphs (d) through (j) above, shall sign, prior to such disclosure, a copy of the Endorsement of Protective Order, attached as Exhibit A. Counsel providing access to Confidential Discovery Materials shall retain copies of the executed Endorsement(s) of Protective Order. Any party seeking a copy of an endorsement may make a demand setting forth the reasons therefore to which the opposing party will respond in writing. If the dispute cannot be resolved the

YOU make us Number 1 !!!

YOU, the Neuroscience division of Lilly:

- Made us "Number 1" in the PAST with:

Bill Robinson

- Are NOW making us "Number 1" with:

Zenon, Prozac, Paxil, Celexa, Miltrex, Miltrex, Depression

- Will continue to make us "Number 1" in the FUTURE with:

the additional pipeline

Duloxetine, Atomoxetine, OPC - Depression, ACT-101, new antidepressant

Thank You for making us "Number 1":
PAST, PRESENT, ALWAYS!

YOU make us Number 1 !!!

YOU, the Neuroscience division of Lilly:

- ▶ Made us "Number 1" in the **PAST** with:
Prozac - Depression
- ▶ Are **NOW** making us "Number 1" with:
Zyprexa, Prozac Weekly - Schizophrenia, Bipolar Mania, Depression
- ▶ Will continue to make us "Number 1" in the **FUTURE** with:
the additional products from the neuroscience research
pipeline
Duloxetine, Atomoxetine, OFC - Depression, ADHD, resistant depression

Thank You for making us "Number 1":
PAST, PRESENT, ALWAYS!

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the General Counsel

Office of the Chief Counsel
Food and Drug Administration
5600 Fishers Lane, GCF-1
Rockville, MD 20857

November 20, 2006

Michael Miller, Esq.
Miller & Associates
105 North Alfred Street
Alexandria, VA 22314

Re: Zyprexa Plaintiff's Steering Committee v. FDA
Multi District Litigation No. MDL-1596 (JBW)

Dear Mr. Miller:

Please find enclosed a CD containing documents that are responsive to the PSC's subpoena issued to the FDA in the above-captioned case, as narrowed by letter from Michael Goldberger, Esq. to you dated July 18, 2006, and a corresponding privilege log. FDA considers these documents, along with the withheld pages, as indicated on the privilege log, to be a full response to the above-referenced subpoena.

It is further FDA's understanding that, pursuant to agreement between the parties and the FDA, as set forth in the letter from Andrew Rogoff, Esq. to AUSA Goldberger dated July 26, 2006, we are producing documents pursuant to the terms of Case Management Order No. 3 ("Protective Order") dated August 3, 2004, entered by the magistrate judge in the underlying case in the Eastern District of New York.

Please note that certain information within the documents contained on the enclosed CD has been withheld. These withholdings, detailed on the privilege log, include third-party confidential commercial information, personal privacy information, information about which the government will assert the deliberative process privilege, and information outside the scope of discovery as agreed to by the parties.

EXHIBIT E
PAGE 1 OF 2

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Please feel free to contact me with any questions you may have.

Very truly yours,

Jessica L. Zeller / HRP

Jessica L. Zeller
Assistant Chief Counsel

Enclosures (2)

CD

cc: Michael Goldberger, Esq. (without attachments)
Andrew Rogoff, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

MDL No. 1596

THIS DOCUMENT RELATES TO:
ALL ACTIONS

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

CASE MANAGEMENT

FEDERAL ORDER NO. 3 (PROTECTIVE ORDER)

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

1. Discovery Materials

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

2. Use of Discovery Materials

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

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

3. "Confidential Discovery Materials" Defined

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

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

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

4. Designation of Documents as "Confidential"

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

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

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

Zyprexa MDL 1596: Confidential-Subject to Protective Order

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

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

5. Non-Disclosure of Confidential Discovery Materials

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Production of Confidential Materials by Non-Parties

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

8. Inadvertent Disclosures

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

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

9. Declassification

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

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

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

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

10. Confidential Discovery Materials in Depositions

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

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

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

11. Confidential Discovery Materials Offered as Evidence at Trial

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

12. Filing

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

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

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

13. Client Consultation

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

14. Subpoena by other Courts or Agencies

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

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

15. Non-termination

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


16. Modification Permitted

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

17. Responsibility of Attorneys; Copies

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

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



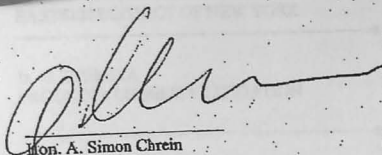
be made only by those persons specified in sections (a); (b) and (c) of paragraph 6 above. Any copy provided to a person listed in paragraph 6 shall be returned to counsel of record upon completion of the purpose for which such copy was provided. In the event of a change in counsel, retiring counsel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

18. No Waiver of Rights or Implication of Discoverability

- a. No disclosure pursuant to any provision of this Order shall waive any rights or privileges of any party granted by this Order.
- b. This Order shall not enlarge or affect the proper scope of discovery in this or any other litigation; nor shall this order imply that Confidential Discovery Materials are properly discoverable, relevant, or admissible in this or any other litigation. Each party reserves the right to object to any disclosure of information or production of any documents that the producing party designates as Confidential Discovery Materials on any other ground it may deem appropriate.
- c. The entry of this Order shall be without prejudice to the rights of the parties, or any one of them, or of any non-party to assert or apply for additional or different protection. Nothing in this Order shall prevent any party from seeking an appropriate protective order to further govern the use of Confidential Discovery Materials at trial.

19. Improper Disclosure of Confidential Discovery Material

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




Hon. A. Simon Chrein
United States Magistrate Judge

Dated: August 3, 2004.
Brooklyn, New York

SO ORDERED as appearing act of
Magistrate Judge and Justice.
No objection being taken.
J.B.W.

Hon. Jack B. Weinstein
Senior District Judge

Dated: 8/3, 2004
Brooklyn, New York



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

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

Date: _____

By: _____

6/20/08
E. Thornton

- ☒ 9. Forward the following to ACRO in Anchorage:
- ☒ Original AP-410wp Notice. (This form will be signed and returned to you by ACRO. When received, tie into substitute file or suspense file.)
 - ☒ Original trial court case file
 - ☒ All confidential and sealed documents filed in case (e.g. pre-sentence reports, custody reports, etc.)
 - ☐ If case is Administrative Appeal, also forward Agency Record.
 - ☒ **Non-Anchorage Courts:** Also send full copies of hearing/trial tapes (four channel cassette or CD) as designated.
- Do NOT send exhibits until directed to do so by Appellate Courts.

Step 3: PREPARATION OF RECORD ON APPEAL

ACRO

- ☒ 1. Verify contents of record against Notice of Transmittal of Record. If ok, sign Notice and return Notice to trial courts. Tie copy of Notice into trial court file. If not ok, notify trial courts.
- ☒ 2. Note date record received in spread sheet.
- ☐ N/A 3. If Anchorage case, order tapes from Tape Duplication if necessary.
- ☐ N/A 4. Check designation and log notes to verify that all tapes have been received.
- ☐ N/A 5. Order transcript if necessary.
- ☒ 6. Paginate the record.
- ☒ 7. Certify record by filling out form AP-405.
- ☒ 8. Forward record and two copies of AP-410 to ACCO.
- ☐ 9. **215 Sentence Appeals:**

ACRO

Trial Clerk

- ☐ Return original trial court file to trial court. (In Anchorage, return to Criminal or Traffic.
- ☐ Retrieve "Notice of Transmittal of Record" from suspense file and tie it into trial court file. Return file to shelf. No further action required unless requested by Appellate Courts or appeal concluded.

Step 4: SUPPLEMENTAL RECORDS

When an order to supplement the record is entered:

Appellate Clerk

ACRO

Trial Clerk

- ☐ 1. Send copy of order and trial court file to ACRO.
- ☐ 2. Note date supplemental record due in spread sheet
- ☐ 3. Order tapes/documents as needed from trial courts.

Within 7 days of receipt of order:

- ☐ 4. Make copies of post-judgment documents and tie into substitute file, if required.

	<input type="checkbox"/> 5. Prepare Notice of Transmittal of Supplemental Record (3AN-____). <input type="checkbox"/> 6. Tie copy of Notice into substitute file. <input type="checkbox"/> 7. Forward requested tapes/documents with Notice of Transmittal of Supplemental Record to ACRO.
ACRO	Upon receipt of supplemental record: <input type="checkbox"/> 8. Verify contents of record against Notice of Transmittal of Supplemental Record. If everything is received, sign Notice and return Notice to trial courts. Tie copy of Notice into trial court file. <input type="checkbox"/> 9. Note date supplemental record received in spread sheet. <input type="checkbox"/> 10. Paginate the supplemental record, if necessary. <input type="checkbox"/> 11. Certify supplemental record when transcript and paginated record are ready. <input type="checkbox"/> 12. Forward entire record to ACCO.
Appellate Clerk	<p>Step 5: RETURN OF RECORD AT CONCLUSION OF APPEAL</p> <p>Do the following 20 days after appeal decision is distributed or after decision on petition for rehearing/hearing:</p> <input type="checkbox"/> 1. Prepare Return of Record Transmittal form. <input type="checkbox"/> 2. Tie copy of Return of Record into appeal case file. <input type="checkbox"/> 3. Tie copy of appeal decision or order on top right side of trial court file. <input type="checkbox"/> 4. Return record and transmittal form to _____ <input type="checkbox"/> Non-Anchorage cases: Return by certified mail. <input type="checkbox"/> Anchorage cases: Bar code to appropriate division.
Trial Clerk	<p>Upon receipt of the trial court file from the Appellate Courts, do the following:</p> <input type="checkbox"/> 215 Sentence Appeals: The record will be returned. Remove contents of records file and tie into original trial court case file. <input type="checkbox"/> 5. Verify contents of record against Notice of Return of Record. If everything is received, a) sign Notice, b) tie copy of Notice into trial court file, and c) return original to the appellate courts and a copy to ACRO. <input type="checkbox"/> 6. Ensure that a copy of the appeal decision has been tied into the trial court file. If not, obtain copy from Appellate Courts. <input type="checkbox"/> 7. Place an "X" through the Appeal Id Label. <input type="checkbox"/> 8. <u>Administrative Appeals Only:</u> Check for bonds on Filing Checklist form in case file. If an appeal bond has been posted: <input type="checkbox"/> Prepare and distribute AP-340, Notice and Order on Appeal Bond. <input type="checkbox"/> Tickle 14 days for response. (Use motion code MTCA .) Go to Step 10 below. <input type="checkbox"/> After time for response has expired, forward file to judge for ruling.

Secretary	<input type="checkbox"/>	<p>9. After Appeal Bond Order signed, distribute to all parties.</p> <ul style="list-style-type: none"> <input type="checkbox"/> If cash bond exonerated, route file to TCA for release of bond. <input type="checkbox"/> If surety bond exonerated, write "Exonerated" across face of surety bond. Then route file to Civil.
Trial Clerk	<input type="checkbox"/>	<p>10. Prepare AP-335 Order Upon Conclusion of Appeal.</p> <ul style="list-style-type: none"> <input type="checkbox"/> Create motion screen (use code OUCA) indicating file routed to trial court judge. <input type="checkbox"/> Route file and AP-335 Order to trial court judge.
Secretary	<input type="checkbox"/>	<p>11. After judge signs AP-335 signs Order:</p> <ul style="list-style-type: none"> <input type="checkbox"/> If judge orders hearing, schedule hearing (in District Court, contact Calendaring to schedule date and time.) Insert calendaring information into AP-335 form. <input type="checkbox"/> Distribute Order to all parties (and Administrative Agency if appropriate.) <input type="checkbox"/> Close out "OUCA" motion screen. <input type="checkbox"/> Route file to appropriate division.
Trial Clerk	<input type="checkbox"/>	<p>12. <u>Administrative Appeals Only</u>: Review Order Upon Conclusion of Appeal. If no further court action required, return agency record by doing the following:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Prepare AP-350, Return of Agency Record. Make copy of appeal decision. <input type="checkbox"/> Call Agency to find out if they will pick up record or whether you should mail it. <input type="checkbox"/> If record is to be returned by mail, mail the following to Agency by <u>certified mail</u>. <ul style="list-style-type: none"> <input type="checkbox"/> Original AP-350 <input type="checkbox"/> Copy of appeal decision. <input type="checkbox"/> Agency record. NOTE: Address to Agency, not to an individual at agency. <input type="checkbox"/> Place copy of AP-350 and postal forms in case file.

TRIAL COURT and COURT OF APPEALS

- Instructions: 1. Initial box when completed.
 2. ACRO = Appellate Court Records Office
 (formerly known as the Transcript Office)

Case Name: *El. Lilly & Co. v. Blooming*
News and State of Ab...
 Trial Court No. *3AN-06-05630 CI*
 Appellate Case No. *5-13/52*

ACRO

Step 1: ORDER THE RECORD.

Upon receipt of the Opening Notice:

- ☒ 1. Review for pertinent information.
☒ 2. Note due date of trial court file in spreadsheet.
☒ 3. Send copy of Opening Notice and this Checklist to the appropriate trial court clerk.
☒ If Anchorage case, send to (a) Records Division for criminal and civil cases or
 (b) Children's Division or (c) Traffic

6/19/08
@ Gusham

Step 2: ASSEMBLING AND FORWARDING THE CASE FILE

Do the following **within 7 days** of receiving the Opening Notice and Checklist:

Trial Ct.
 Clerk

- ☒ 1. Pull trial court case file.
☐ If traffic/minor offense case, tie citation and related documents into plain manila file folder. Write case caption and case number on tab.
☒ 2. Gather all confidential/sealed documents filed in case.
☒ 3. If civil or criminal case, Records clerk to forward files to Civil or Criminal Division for further processing.
☒ 4. Tie this Checklist on the top, right side of trial court file.
☒ 5. Place an Appeal ID Label (AP-475) on front of trial court case file.
☒ 6. ☐ **215 Sentence Appeals:** Go to Step 7. Do NOT make substitute file.
☒ **All Other Appeals:** Make substitute file Tie the following into the substitute file:
☒ Copy of the final judgment
☒ Opening Notice
☒ Original of any pending trial court motions.
☒ If traffic/minor offense case, also tie copy of citation in file.
☒ 7. Create an ROA in computer to cross-reference appeal case number.
 - Enter date appeal filed in date field.
 - For event code, use Q + initials for trial court judge.
 - On text line, enter "APPEAL FROM + APPEAL CASE NUMBER"☐ If traffic/minor offense case, do NOT create ROA. Instead, note "Appeal From + Appeal Case Number" on Text Line of the Traffic/Minor Offense Record in the RUG system.
☒ 8. Prepare a Notice of Transmittal of Record form (AP-410wp). Tie a copy of the AP-410wp Notice into the substitute case file.
☐ **215 Sentence Appeals:** Keep copy in suspense file in Criminal Division.

LANE POWELL, LLC
301 West Northern Lights Boulevard, Suite 301
Anchorage, Alaska 99503-2648
Telephone 907.277.9511 Facsimile 907.276.2631

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

ELI LILLY AND COMPANY,

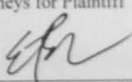
Defendant.

Case No. 3AN-06-05630 CI

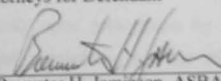
**STIPULATION FOR
DISMISSAL WITH PREJUDICE**

COME NOW, the parties, by and through their respective counsel, pursuant to Rule 41(a)(1)[b] of the Alaska Rules of Civil Procedure, and stipulate that this action may be dismissed with prejudice, with each of the parties to bear their own costs and attorney's fees. In accordance with Rule 41(a)(1)[b], such dismissal shall be effective upon filing of this stipulation and without further order of court. The undersigned certify that information required under AS 09.68.130 has been submitted to the Alaska Judicial Council.

FELDMAN ORLANSKY & SANDERS
Attorneys for Plaintiff

By 
Eric T. Sanders, ASBA No. 75100083

PEPPER HAMILTON LLP
and
LANE POWELL LLC
Attorneys for Defendant

By 
Brewster H. Jamieson, ASBA No. 8444122

Date

005477

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-05630 CI

FILED
STATE OF ALASKA
JUL 31 2006
CLERK OF COURT
BY DEPUTY CLERK

ANSWER

Defendant Eli Lilly and Company ("Lilly"), by its counsel, hereby responds to plaintiff's Complaint as follows:

JURISDICTION AND PARTIES

1. Lilly denies the allegations contained in Paragraph 1 of the Complaint, except admits that this Court has jurisdiction over this matter.

2. Lilly admits the allegations contained in Paragraph 2 of the Complaint.

3. Lilly admits the allegations contained in Paragraph 3 of the Complaint.

4. Lilly denies the allegations contained in Paragraph 4 of the Complaint, except admits that, at certain times, it has been authorized to do business in the State of Alaska and in the Third Judicial District.

5. Lilly denies the allegations contained in Paragraph 5 of the Complaint, except admits that (A) it is a corporation organized and existing under the laws of the State of Indiana, with its principal place of business in Indianapolis, Indiana; (B) at certain times, it has been authorized to do business in the State of Alaska and in the Third Judicial District; and (C) it researched, tested, developed, manufactured, marketed, and/or sold Zyprexa® to independent pharmaceutical wholesalers for use only upon prescription by a licensed physician, in accordance with applicable laws and regulations, and for its approved

005478

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indications with warnings approved by the Food and Drug Administration ("FDA") regarding the risks and benefits of the medication.

ALLEGATIONS OF FACT

6. Lilly denies the allegations contained in Paragraph 6 of the Complaint.
7. Lilly denies the allegations contained in Paragraph 7 of the Complaint.
8. Lilly denies the allegations contained in Paragraph 8 of the Complaint, except

admits that it researched, tested, developed, manufactured, marketed, and/or sold Zyprexa to independent pharmaceutical wholesalers, for use only upon prescription by a licensed physician, in accordance with applicable laws and regulations, and for its approved indications with FDA-approved warnings regarding the risks and benefits of the medication.

9. Lilly denies the allegations contained in Paragraph 9 of the Complaint, except admits that on September 30, 1996, the FDA approved Zyprexa for use in the management of manifestations of psychotic disorder.

10. Lilly denies the allegations contained in Paragraph 10 of the Complaint, except admits that on March 17, 2000, the FDA approved Zyprexa for use in the short-term treatment of acute manic episodes associated with Bipolar I Disorder.

11. Lilly denies the allegations contained in Paragraph 11 of the Complaint, except admits that on January 14, 2004, the FDA approved Zyprexa for maintenance monotherapy for Bipolar Disorder.

12. Lilly denies the allegations contained in Paragraph 12 of the Complaint.

13. Lilly denies the allegations contained in Paragraph 13 of the Complaint, except Lilly is without knowledge as to which "reports" plaintiff refers and denies plaintiff's description of the unidentified "reports" to the extent that it conflicts with such reports.

14. Lilly admits that medical literature reporting on medical research involving Zyprexa is published in multiple medical journals, but denies plaintiff's description of the

literature to the extent that it conflicts with such literature when read in context and in its entirety.

15. Lilly denies the allegations contained in Paragraph 15 of the Complaint to the extent that the allegations are inconsistent with any statements issued by the United Kingdom's Medicines Control Agency when read in context and in their entirety.

16. Lilly denies the allegations contained in Paragraph 16 of the Complaint to the extent that the allegations are inconsistent with any statements or warnings issued by the Japanese Health and Welfare Ministry when read in context and in their entirety.

17. Lilly denies the allegations contained in Paragraph 17 of the Complaint, including the allegation that Zyprexa has serious risks of diabetes, hyperglycemia, diabetic ketoacidosis, and other serious conditions.

18. Lilly denies the allegations contained in Paragraph 18 of the Complaint, except admits that medical literature reporting on medical research involving Zyprexa is published in multiple medical journals, but denies plaintiff's description of the unidentified "journal articles" to the extent that it conflicts with such literature when read in context and in its entirety.

19. Lilly denies the allegations contained in Paragraph 19 of the Complaint, including the allegation that Zyprexa causes dangerous and permanent health consequences.

20. Lilly denies the allegations contained in Paragraph 20 of the Complaint.

21. Lilly denies the allegations contained in Paragraph 21 of the Complaint.

22. Lilly denies the allegations contained in Paragraph 22 of the Complaint.

23. Lilly (A) is without knowledge or information as to plaintiff's meaning of the term "top selling drug," and therefore denies the allegations contained in Paragraph 23 of the Complaint, and (B) admits that the sales figures for Zyprexa are disclosed in its filings with the Securities and Exchange Commission ("SEC"), which are publicly available, and denies

any characterization or interpretation inconsistent with these documents when read in context and in their entirety.

24. Lilly denies the allegations contained in Paragraph 24 of the Complaint.

25. Lilly denies the allegations contained in Paragraph 25 of the Complaint, except is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations relating to plaintiff.

26. Lilly denies the allegations contained in Paragraph 26 of the Complaint, except is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations relating to plaintiff.

27. Lilly denies the allegations contained in Paragraph 27 of the Complaint, except is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations relating to plaintiff.

ANSWERING THE FIRST CLAIM FOR RELIEF

(Strict Products Liability: Failure to Warn)

28. Lilly incorporates its responses to paragraph 1-27 of the Complaint.

29. Lilly denies the allegations contained in Paragraph 29 of the Complaint, except admits that Lilly researched, tested, developed, manufactured marketed, and/or sold Zyprexa to independent pharmaceutical wholesalers, for use only upon prescription by a licensed physician, in accordance with applicable laws and regulations, and for its approved indications with FDA-approved warnings regarding the risks and benefits of the medication.

30. Lilly denies the allegations contained in Paragraph 30 of the Complaint.

31. Lilly denies the allegations contained in Paragraph 31 of the Complaint.

32. Lilly denies the allegations contained in Paragraph 32 of the Complaint.

33. Lilly denies the allegations contained in Paragraph 33 of the Complaint.

34. Lilly denies the allegations contained in Paragraph 34 of the Complaint.

ANSWERING THE SECOND CLAIM FOR RELIEF

(Strict Products Liability: Design Defect)

35. Lilly incorporates its responses to paragraph 1-34 of the Complaint.
36. Lilly denies the allegations contained in Paragraph 36 of the Complaint.
37. Lilly denies the allegations contained in Paragraph 37 of the Complaint, including the allegation that Zyprexa had defects.
38. Lilly is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations.

39. Lilly denies the allegations contained in Paragraph 39 of the Complaint.
40. Lilly denies the allegations contained in Paragraph 40 of the Complaint.

ANSWERING THE THIRD CLAIM FOR RELIEF

(Fraud and Negligent Misrepresentation)

41. Lilly incorporates its responses to paragraph 1-40 of the Complaint.
42. Lilly denies the allegations contained in Paragraph 42 of the Complaint.
43. Lilly denies the allegations contained in Paragraph 43 of the Complaint, including the allegation that Lilly made claims concerning off-label use.

44. Lilly denies the allegations contained in Paragraph 44 of the Complaint.
45. Lilly denies the allegations contained in Paragraph 45 of the Complaint.
46. Lilly denies the allegations contained in Paragraph 46 of the Complaint.
47. Lilly denies the allegations contained in Paragraph 47 of the Complaint.

ANSWERING THE FOURTH CLAIM FOR RELIEF

(Negligence)

48. Lilly incorporates its responses to paragraph 1-47 of the Complaint
49. Lilly denies the allegations contained in Paragraph 49 of the Complaint, except admits that it had a duty to exercise reasonable care in the research, testing, development, manufacturing, labeling, warning, marketing, and sale of Zyprexa. Lilly denies that it breached such a duty.

50. Lilly denies the allegations contained in Paragraph 50 of the Complaint.

51. Lilly denies the allegations contained in Paragraph 51 of the Complaint.

ANSWERING THE FIFTH CLAIM FOR RELIEF

(Violations of the Unfair Trade Practices and Consumer Protection Act)

52. Lilly incorporates its responses to paragraph 1-51 of the Complaint

53. Lilly denies the allegations contained in Paragraph 53 of the Complaint and all of its subparts.

54. Lilly denies the allegations contained in Paragraph 54 of the Complaint.

55. Lilly denies the allegations contained in Paragraph 55 of the Complaint.

WHEREFORE, defendant Eli Lilly and Company requests that Plaintiff's Complaint, and all claims alleged therein, be dismissed with prejudice, that Lilly be awarded the costs, disbursements, and attorney's fees incurred in the defense of this action, and that Lilly be granted any other relief to which it may be entitled.

AFFIRMATIVE DEFENSES

Defendant Eli Lilly and Company ("Lilly"), by its counsel, pleading in the alternative and without prejudice to its other pleadings, states the following affirmative defenses. By virtue of asserting additional defenses, Lilly does not assume any burden of proof not otherwise legally assigned to it.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted against Lilly.

SECOND AFFIRMATIVE DEFENSE

Discovery may show that plaintiff's claims are barred, in whole or in part, by applicable statutes of limitations, statutes of repose, the doctrine of laches and/or as a result of the failure to allege and/or comply with conditions precedent to applicable periods of limitations and repose.

THIRD AFFIRMATIVE DEFENSE

Some or all of the plaintiff's claims are barred by the learned intermediary doctrine. At all relevant times herein, the physicians who prescribed Zyprexa to the individual patients

reimbursed by the State of Alaska were in the position of sophisticated purchasers, fully knowledgeable and informed with respect to the risks and benefits of Zyprexa.

FOURTH AFFIRMATIVE DEFENSE

The injuries, damages, and losses alleged in the Complaint, none being admitted, were caused in whole or in part by the negligence of the plaintiff and/or others, over whom Lilly exercised no control, had no opportunity to anticipate or right to control, and with whom Lilly had no legal relationship by which liability could be attributed to it because of the actions of the plaintiff and/or others, which by comparison was far greater than any conduct alleged as to Lilly.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's alleged loss, damage, injury, harm, expense, diminution, or deprivation alleged, if any, was caused in whole or in part by plaintiff's failure to exercise reasonable care and diligence to mitigate alleged damages.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are preempted by federal law in that Zyprexa was researched, tested, developed, manufactured, labeled, marketed and sold in a manner consistent with the state of the art at the pertinent time and approved by the FDA.

SEVENTH AFFIRMATIVE DEFENSE

Some or all of plaintiff's claims are barred by the doctrines concerning unavoidably unsafe products, including, but not limited to, the operation of comments j and k to Section 402A of the Restatement (Second) of Torts and/or barred by the Restatement (Third) of Torts.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by the applicable provisions of the United States Constitution, the Constitution of the State of Alaska and/or the applicable Constitution of any other State or Commonwealth of the United States whose laws might be

deemed controlling in this case. These provisions include, but are not limited to, the First Amendment to the Constitution of the United States and Article I, Section 5 of the Constitution of the State of Alaska because Lilly's commercial speech regarding Zyprexa was neither false nor misleading.

NINTH AFFIRMATIVE DEFENSE

Lilly alleges that Alaska Medicaid participants were fully informed of the risks of the use of the product made the subject of this action by their treating physician, and the informed consent given by the plaintiff is pleaded as an affirmative defense.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred and/or this Court should defer this matter, in whole or in part, pursuant to the doctrine of primary jurisdiction, in that the FDA is charged under the law with regulating prescription drugs, including Zyprexa, and is specifically charged with determining the content of the warnings and labeling for prescription drugs. The granting of the relief prayed for in the plaintiff's Complaint would impede, impair, frustrate or burden the effectiveness of such federal law and would violate the Supremacy Clause (Art. VI, cl. 2) of the United States Constitution.

ELEVENTH AFFIRMATIVE DEFENSE

To the extent plaintiff's claims are based on alleged misrepresentations made to the FDA, such claims are barred pursuant to *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001).

TWELFTH AFFIRMATIVE DEFENSE

Any verdict or judgment rendered against Lilly must be reduced by those amounts that have been, or will, with reasonable certainty, replace or indemnify the individual patients reimbursed by the State of Alaska, in whole or in part, for any past or future claimed economic loss, from any collateral source such as insurance, social security, worker's compensation or employee benefits programs. In addition, any amounts recovered by the

State of Alaska pursuant to its statutory liens from patients who made claims against Lilly should reduce any judgment in this action.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's purported allegations of misrepresentation and fraud do not comply with Rule 9(b) of the Alaska Rules of Civil Procedure in that they fail to state a cause of action as a matter of law because, among other deficiencies, plaintiff fails to plead with specificity any false misrepresentation as to a material fact and/or reliance on the part of plaintiff upon any such material fact.

FOURTEENTH AFFIRMATIVE DEFENSE

Lilly is entitled to the benefit of all defenses and presumptions contained in, or arising from, any rule of law or statute of any other state whose substantive law might control the action.

FIFTEENTH AFFIRMATIVE DEFENSE

To the extent that plaintiff requests attorneys' fees, such request is improper under applicable law.

SIXTEENTH AFFIRMATIVE DEFENSE

Discovery may show that plaintiff has failed to join indispensable parties and has improperly cumulated the claims of many patients on whose behalf the State of Alaska is bringing this suit.

SEVENTEENTH AFFIRMATIVE DEFENSE

To the extent plaintiff seeks equitable relief, those claims are barred because plaintiff has an adequate remedy at law.

EIGHTEENTH AFFIRMATIVE DEFENSE

To the extent plaintiff's claims are based on alleged violations of the Alaska Unfair Trade Practices Act that relate to acts or transactions regulated under the statutory authority of the United States, those claims are barred under AS § 45.50.481(a)(1).

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NINETEENTH AFFIRMATIVE DEFENSE

Plaintiff is not entitled to an award of damages under AS § 45.50.501(b) or civil penalties under AS § 45.50.551(b).

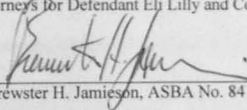
Lilly hereby gives notice that it intends to rely upon such other defenses as may become available or apparent during the course of discovery and thus reserves the right to amend this list to assert such defenses.

PRAYER FOR RELIEF

WHEREFORE, defendant Eli Lilly and Company requests that Plaintiff's Complaint, and all claims alleged therein, be dismissed with prejudice, that Lilly be awarded the costs, disbursements, and attorney's fees incurred in the defense of this action, and that Lilly be granted any other relief to which it may be entitled.

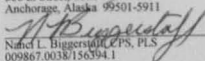
DATED this 31st day of August, 2006.

LANE POWELL LLC
Attorneys for Defendant Eli Lilly and Company

By 
Brewster H. Jamieson, ASBA No. 8411122

I certify that on August 31, 2006, a copy of the foregoing was served by hand on:

Eric T. Sanders, Esq.
Feldman Orlansky & Sanders
500 L Street, Suite 400
Anchorage, Alaska 99501-5911


Nathaniel L. Buggenicht, CPS, PLS
009867.0038/156394.1

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,

Plaintiff,

vs.

ELI LILLY AND COMPANY,

Defendant.

Case No. 3AN-06-5430 CIV

COMPLAINT

Plaintiff, the State of Alaska (hereinafter "the State"), hereby alleges for their Complaint against Defendant Eli Lilly and Company (hereinafter "Defendant" or "Eli Lilly") as follows:

JURISDICTION AND PARTIES

1. Jurisdiction over the subject matter of this cause of action is based upon AS 44.23.020 and 45.50.501, which grant the State authority to file suit against Defendant.
2. Personal jurisdiction over this Defendant is proper under the Alaska Long Arm Statute as codified in AS 09.05.015.

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3. Because the State of Alaska is not a citizen for purposes of diversity jurisdiction, no federal court can exercise subject matter jurisdiction over this case by virtue of diversity of citizenship.

4. Venue is proper in the Third Judicial District at Anchorage pursuant to Rule 3 of the Alaska Rules of Civil Procedure, in that many of the unlawful acts committed by Defendant were committed in Anchorage, including the making of false statements and misrepresentations of material fact to the State of Alaska, its departments, agencies, instrumentalities, and contractors, and to the Alaska Medicaid Program.

5. Defendant Eli Lilly and Company is an Indiana corporation with its principal place of business in Indianapolis, Indiana. At all times relevant hereto, Eli Lilly and Company was engaged in the business of licensing, manufacturing, distributing, and/or selling, either directly or indirectly, through third parties or related entities, the pharmaceutical prescription drug Zyprexa (hereinafter "Zyprexa" or "the product"). At all times relevant to this action, Eli Lilly did business within the State of Alaska by marketing and selling Zyprexa within the State to both the State and its agencies, and to the general public.

ALLEGATIONS OF FACT

6. This is a civil action for damages and penalties arising from the marketing and sale of the prescription drug Zyprexa.

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7. Prior to selling Zyprexa, Lilly knew there was a risk of Zyprexa users developing severe and harmful health conditions including, but not limited to, hyperglycemia, acute weight gain, exacerbation of diabetes mellitus, and pancreatitis. Furthermore, Defendant has been aware of studies linking Zyprexa to these conditions, yet has failed to warn the Food and Drug Administration, the State, physicians, and consumers of these risks. This failure to warn the Food and Drug Administration of these known risks is relevant to Plaintiff's complaint.

8. At all times relevant to this action, Defendant has been responsible for, or involved in, designing, manufacturing, marketing, advertising, distributing, and selling Zyprexa.

9. In 1996, the United States Food & Drug Administration (hereinafter "FDA") approved Zyprexa for use in the treatment of schizophrenia.

10. In 2000, the FDA approved Zyprexa for use in the short-term treatment of acute mixed or manic episodes associated with bipolar disorder.

11. In 2004, the FDA approved Zyprexa for maintenance in the treatment of bipolar disorder, also known as manic-depression.

12. Notwithstanding the limited uses approved by the FDA, Defendant advertised and sold Zyprexa for a number of non-approved or "off-label" uses including, but not limited to, Alzheimer Disease, Geriatric Dementia, Tourette's Syndrome,

Pervasive Developmental Delay, Autism, Anorexia Nervosa, and general depression. This was in spite of the fact that no testing approved by the FDA had demonstrated the effectiveness of Zyprexa for such uses. Lilly recognized that the small number of psychiatric patients would provide an undesirably small market for the product. In a continuing effort to illegitimately receive greater profits from Zyprexa, Lilly's sales force concentrated on primary care physicians, rather than psychiatrists, and focused upon marketing and selling the drug as treatment for depression and anxiety, rather than the psychotic conditions for which Zyprexa had been approved. To this end, Lilly employed its immense marketing resources to encourage and promote sales for unapproved uses. Lilly made this effort even though it knew Zyprexa was not approved for treatment for those conditions.

13. Shortly after the Defendant began selling Zyprexa, the FDA began to receive reports of Zyprexa consumers developing hyperglycemia, acute weight gain, exacerbation of diabetes mellitus, pancreatitis, and other severe diseases and conditions. These conditions occurred not only in patients with the psychiatric conditions for which Zyprexa had been approved but also in the non-approved or "off-label" uses.

14. Beginning in 1998, scientific journals began to publish studies that established a causal association between using Zyprexa and developing or exacerbating diabetes mellitus (hereinafter "diabetes") and development of dangerously high blood

sugar levels, also known as hyperglycemia. Studies have consistently continued to find a relationship between Zyprexa and these dangerous conditions.

15. In April, 2002, the British Medicines Control Agency warned about the risk of diabetes for patients prescribed Zyprexa. The agency reported forty known incidents of diabetes, hyperglycemia, diabetic ketoacidosis, diabetic coma, and one death among users of Zyprexa. Subsequently, the British government required Defendant to warn consumers about the risk of diabetes and diabetic ketoacidosis, and further required Defendant to instruct patients who were using Zyprexa to monitor their blood sugar levels.

16. In that same month, the Japanese Health and Welfare Ministry issued emergency safety information regarding the risk of diabetes, diabetic ketoacidosis, and diabetic coma for users of Zyprexa.

17. Defendant has failed to warn consumers in this country, including the State, about the serious risks of diabetes, hyperglycemia, diabetic ketoacidosis, and other serious conditions associated with the use of Zyprexa.

18. The Defendant knew, or was reckless in not knowing, of the risks involved in consuming Zyprexa. Furthermore, the Defendant has been aware of studies and journal articles linking use of Zyprexa with these and other severe and permanent diseases since 1998.

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19. Defendant failed to warn consumers, including the State, its physicians, and Medicaid recipients, of the dangerous and permanent health consequences caused by the use of Zyprexa. In fact, Defendant instructed its representatives to minimize and misrepresent the dangers of Zyprexa, affirmatively and consciously placing company profits above the public safety. This is particularly true of the prescriptions written for off-label uses. This failure to warn was designed and intended to maximize company profits, even after Lilly's own experts were questioning the safety of Zyprexa.

20. Beginning in the 1990s, Defendant's strategy has been to aggressively market and sell Zyprexa by willfully misleading potential users about serious dangers resulting from the use of Zyprexa. Defendant undertook an advertising blitz, extolling the virtues of Zyprexa in order to induce widespread use. This marketing campaign consisted of advertisements, telephone conferences, live conferences, direct promotional presentations to doctors and other healthcare providers, and other promotional materials provided directly to Zyprexa users. Defendant has also advertised the use of Zyprexa for off-label uses, including geriatric dementia, pediatric symptoms, and for general depression.

21. The advertising program sought to create the impression and belief by consumers and physicians that Zyprexa was safe for human use, and had fewer side effects and adverse reactions than other atypical antipsychotic medications. This was

done even though Defendant either knew these representations to be false or had no reasonable grounds to believe them to be true.

22. The advertising program purposefully disguised the risks associated with Zyprexa use, including serious illness and death. Eli Lilly relayed only positive information and relied upon manipulated statistics to suggest widespread acceptability, while at the same time concealing adverse factual material, including relevant information of serious health risks from the State, physicians, and the general public. In particular, the advertising materials produced by Defendant falsely represented the severity, frequency, and nature of adverse health effects caused by Zyprexa. Further, they falsely represented that adequate testing had been done on Zyprexa. In particular, Defendant misrepresented that testing had been performed for off-label uses when in fact, no such testing had been done and the FDA had not approved Zyprexa for such uses.

23. As a result of Defendant's advertising and marketing campaign, Zyprexa has become one of Defendant's top-selling drugs, and has been prescribed to over 12 million people worldwide. In 2003, approximately seven million prescriptions for Zyprexa were dispensed, resulting in more than \$2 billion in sales. In 2003, Zyprexa was the seventh largest selling drug in the country. In 2004, Zyprexa sales exceeded \$4.4 billion.

24. Shortly after Defendant began selling its product Zyprexa, it received reports of Zyprexa users developing severe and harmful health conditions including but not limited to, hyperglycemia, acute weight gain and associated cardiovascular risks, exacerbation of diabetes mellitus, and pancreatitis. These reports further confirmed known risks of Zyprexa. This information was knowingly withheld or misrepresented to the Federal Drug Administration, the State, and the general public. This information was material and relevant to Plaintiff.

25. In making Zyprexa available to Medicaid patients, Defendant knowingly misrepresented to the State of Alaska that Zyprexa was safe and effective. The State of Alaska allowed the purchase of Zyprexa for Alaska Medicaid recipients based upon such representations by Defendant.

26. Zyprexa has been prescribed by Alaska physicians to many recipients of the Medicaid program of the State. As a result of ingesting Zyprexa, Alaska Medicaid patients have suffered serious health effects, which now require further and more extensive medical treatment and health-related care and services. For these individuals, the State is the financially responsible party for these services. The State has thus suffered and will continue to suffer additional financial loss in the care of those Medicaid recipients who consumed prescriptions which were ineffective, unsafe, and actively

harmful. In addition, the State has paid for Zyprexa prescriptions for uses which were not approved.

27. The State, as the financially responsible party and in its *parens patriae*, has the right to bring this suit.

FIRST CLAIM FOR RELIEF
(Strict Products Liability – Failure to Warn)

28. Plaintiff incorporates paragraphs 1 through 27 as if fully set forth herein.

29. Defendant is the manufacturer and/or supplier of Zyprexa.

30. The Zyprexa manufactured and/or supplied by Defendant was and is unaccompanied by proper warnings or packaging regarding all possible side effects associated with the use of Zyprexa. The Defendant failed to warn of the comparative severity, incidence, and duration of such adverse effects. The warnings given to the State, physicians, and the general public did not accurately reflect the signs, symptoms, incidents, or severity of the side effects of Zyprexa.

31. Defendant failed to adequately test Zyprexa. Such testing would have shown that Zyprexa possessed serious potential side effects to which full and proper warnings should have been made.

32. The Zyprexa manufactured or supplied by Defendant was defective due to inadequate post-marketing warnings, packaging, or instructions. After the manufacturer knew or should have known of the risks of injury from Zyprexa, it failed to provide

adequate warnings to physicians, the general public, or the State as the prescribers, users, and financially responsible party, respectively. Further, Defendant continued to aggressively market Zyprexa for both approved and non-approved uses.

33. Defendant actually knew of the defective nature of Zyprexa, but continued to market and sell Zyprexa without proper warning, so as to maximize sales and profits, in conscious disregard for the foreseeable harm caused by Zyprexa.

34. As a proximate cause and legal result of Defendant's failure to warn of known and reasonably knowable dangers associated with the use of Zyprexa, the State has suffered and will continue to suffer damages as outlined in paragraph 26 above.

SECOND CLAIM FOR RELIEF
(Strict Products Liability: Design Defect)

35. Plaintiff incorporates paragraphs 1 through 34 as if fully set forth herein.

36. At all times material and relevant to this action, Zyprexa was defective in design and manufacture, and was so at the time it was prescribed by doctors participating in the State's Medicaid program. Zyprexa was defective and dangerous in that it caused serious injuries when used for its intended and foreseeable purpose, i.e., when ingested as prescribed and in the manner recommended by Defendant.

37. The defects in Zyprexa were known to Defendant at the time of approval by the Federal Food and Drug Administration. Such defects were concealed and withheld from the FDA. Disclosure by Defendant was inaccurate, incomplete, misleading, and

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fraudulent. Further, Defendant misrepresented and concealed the fact that Zyprexa was being used for off-label uses for which it had not been approved and was not known to be effective.

38. Defendant knew Zyprexa would be used by the consumer without inspection for defect and that the State, physicians, and medicinal users of Zyprexa were relying upon Defendant's representations that the product was safe.

39. Adequate post-approval testing would have revealed the further extent of the dangers of ingesting Zyprexa, and would have shown that the use of Zyprexa could cause extensive medical complications and costs for injuries relating to its use.

40. As a proximate and legal result of the design defect, as well as Defendant's failure to adequately test the product so as to discover the defect, the State has suffered and will continue to suffer the damages alleged in paragraph 26.

THIRD CLAIM FOR RELIEF
(Fraud and Negligent Misrepresentation)

41. Plaintiff incorporates paragraphs 1 through 40 as if fully set forth herein.

42. Defendant's warning of side effects associated with Zyprexa contained false representations and/or failed to accurately represent the material facts of the full range and severity of side effects and adverse reactions associated with the product. Further, Lilly fraudulently misrepresented the appropriateness of the suitability of Zyprexa for unapproved and off label uses.

Defendant's claims and assertions to the Food and Drug Administration, the State of Alaska, physicians, and the general public regarding Zyprexa contained false representations as to the safety of Zyprexa and its defective design. Further Defendant's claims concerning off-label use were false and fraudulent.

44. Defendant was negligent in not making accurate representations regarding the side effects and adverse medical conditions caused by the use of Zyprexa.

45. Defendant knew or reasonably should have known through adequate testing that the claims made to the State with regard to the safety and efficacy of Zyprexa were false or incomplete, and misrepresented the material facts of Zyprexa's unsafe and defective condition.

46. Defendant's misrepresentations in this regard were done with the intention of inducing the State to approve of the distribution of Zyprexa to participants in the Alaska Medicaid Program for both approved and off label uses.

47. As a proximate and legal result of Defendant's fraudulent misrepresentations, the State has suffered and will continue to suffer the damages alleged in paragraph 26.

FOURTH CLAIM FOR RELIEF
(Negligence)

48. Plaintiff incorporates paragraphs 1 through 47 as if fully set forth herein.

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49. Defendant had a duty to exercise reasonable care in the manufacture, sale, and/or distribution of Zyprexa, including a duty to ensure that users would not suffer from unreasonable, dangerous, undisclosed, or misrepresented side effects. This duty extends to the State of Alaska as the party ultimately bearing financial responsibility for Alaska Medicaid patients.

50. Defendant breached this duty, as it was negligent in the testing, marketing, manufacture, sale, and packaging of Zyprexa.

51. As a direct and proximate result of Defendant's negligence, the State has suffered and will suffer the damages alleged in paragraph 26 above.

FIFTH CLAIM FOR RELIEF

(Violations of the Unfair Trade Practices and Consumer Protection Act)

52. Plaintiff incorporates paragraphs 1 through 51 as if fully set forth herein.

53. Defendant violated the Alaska Unfair Trade Practices and Consumer Protection Act, as codified in AS 45.50.471, *et seq.*, by engaging in deceptive trade practices through the marketing and advertising of Zyprexa. These violations were made in the following particulars:

- a. Defendant represented that Zyprexa had characteristics, uses, benefits, and/or qualities that it did not have, in violation to AS 45.50.471(b)(4);
- b. Defendant represented that Zyprexa was of a particular standard, quality, and grade suitable for consumption when in fact it was not, in violation of AS 45.50.471(b)(6);

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- c. Defendant advertised Zyprexa with an intent not to sell it as advertised, in violation of AS 45.50.471(b)(8).
- d. Defendant engaged in conduct creating a likelihood of confusion or a misunderstanding and which misled or damaged buyers of Zyprexa, including the State of Alaska, in violation of AS 45.50.471(b)(11).
- e. Defendant used misrepresentations or omissions of material facts with the intent that others rely on the misrepresentations or omissions in connection with the sale of Zyprexa, in violation of AS 45.50.471(b)(12).
- f. Defendant violated the labeling and advertising provisions of AS 17.20, in violation of AS 45.50.471(b)(48).

54. Defendants knowing and intentional acts or omissions constitute repeated violations of Alaska law.

55. As a direct and proximate result of one or more of these violations, the State has suffered and will continue to suffer damages as alleged in paragraph 26. In addition to those damages, Defendant is also liable for actual attorneys' fees and costs incurred by Plaintiff, and penalties as set forth in AS 45.50.551.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant as permitted by Alaska law, as follows:

1. For an award of damages in excess of the \$100,000 jurisdictional limit of the court against Defendant Eli Lilly for the Zyprexa-related damages of past, present, and future medical expenses for recipients of the Alaska Medicaid program;

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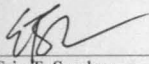
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2. For restitution damages for the cost of all Zyprexa prescriptions paid by the State;
3. For civil penalties of \$5,000 per violation of the Unfair Trade Practices Act;
4. For costs, interest and actual attorneys' fees; and
5. For all other relief deemed just by the court.

Respectfully SUBMITTED and DATED this 28 day of February, 2006

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BY


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