

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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 In re: ZYPREXA PRODUCTS LIABILITY : MDL No. 1596
 LITIGATION :
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 THIS DOCUMENT RELATES TO: :
 : No. 07-cv-0504 (JBW) (RLM)
 ZYPREXA LITIGATION et al. :
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**ELI LILLY AND COMPANY’S REPLY MEMORANDUM IN SUPPORT OF ITS
MOTION TO MODIFY AND EXTEND THE COURT’S JANUARY 3, 2007
TEMPORARY MANDATORY INJUNCTION**

I. INTRODUCTION

The arguments set forth in the enjoined parties’ joint briefing demonstrate that a permanent injunction, revised to reflect additional information received from Special Master Woodin, is warranted. The narrowly drawn injunction will insure (a) the return of stolen property, protected by the Court’s Case Management Order No. 3 (“CMO-3), and (b) prevent the enjoined parties – who actively worked to further the goals of those who conspired to violate CMO-3 – from further disseminating their copies of this stolen property.

Mr. Gottstein and Dr. Egilman are already permanently enjoined.¹ Once the more recently enjoined parties return the stolen property to the Court, and certify that all copies of these documents have been returned, Lilly will concentrate its future efforts on contempt proceedings against the appropriate parties, including Mr. Gottstein and Dr. Egilman.

¹ Mr. Gottstein’s challenge to the separate December 18, 2006 permanent mandatory injunction against him, raised for the first time two days ago, in an opposition brief to the January 3, 2007, Temporary Mandatory Injunction (an order in which he is not even named), is procedurally deficient and, for the reasons set forth in Lilly’s Amended Proposed Findings of Fact, and prior rulings of Magistrate Judge Mann and Judge Cogan, wholly without merit. (See, e.g., Lilly’s Amended Proposed Findings of Fact (Docket Entry No. 43), 07-cv-0504.)

CMO-3 was designed to allow the parties to litigate these cases in Court, not the media. Dr. Egilman had other plans. The illegally leaked documents were carefully selected by Dr. Egilman, in connection with his work for plaintiffs' lawyers, and are a tiny fraction of the more than 15 million pages of documents produced by Lilly as part of the litigation process. Some of the leaked documents are drafts or preliminary planning or discussion documents, and include the discussion of issues and ideas that were never implemented. These documents have been used to report a distorted picture about the safety of Zyprexa. These reports do not in any way represent an accurate view of Zyprexa, or Lilly company strategy and activities. It is unfortunate that both Dr. Egilman and *The New York Times* reporter who reported Dr. Egilman's distorted story about Zyprexa and Lilly have now refused to testify about their actions.

Despite the efforts of others to manufacture a First Amendment issue, Lilly's requested relief has never implicated that body of law. As this Court emphasized on January 3 and 8, 2007, the injunctions issued to date, and the permanent injunction sought now, do not enjoin anyone "from discussing anything they wish to discuss." (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 8, 2007) at 28; attached Ex. A.) The enjoined parties have demonstrated their appreciation for this distinction by exercising their right to speak about Zyprexa and Lilly on websites and blogs without pause since the injunctions were entered.

As Magistrate Judge A. Simon Chrein understood when discussing the entry of CMO-3, the dissemination of distorted information does not serve the public interest. Nevertheless, the enjoined parties have made, and will surely continue to make, outrageous claims about Zyprexa and Lilly. That most of them now admit they made these claims without even reviewing the distorted set of documents leaked by Dr. Egilman does not seem bother them. Again, this disturbing issue is not before the Court.

The proposed injunction does not seek to restrict the enjoined parties from continuing their baseless attacks on Zyprexa and Lilly. Moreover, if the enjoined parties' conduct has resulted in the stolen Zyprexa documents being as widely available on the Internet as they now claim – albeit without the submission of any evidence during the January 16 and 17 hearing – Lilly also understands that, once the enjoined parties comply with the proposed injunction, they may seek out other copies of these materials.

Lilly's proposed permanent injunction is limited in scope, and designed to vindicate the Court's authority, prevent the wrongdoers from inflicting additional harm to the judicial system and the litigants, and prevent them from continuing to benefit from their bad acts. The injunction is directed only to those who violated existing Court orders, refused to return the unlawfully obtained Zyprexa documents provided by Mr. Gottstein (and certify that they had returned all copies), or took active steps to aid and abet the violation of CMO-3. Accordingly, a permanent injunction should be entered.

II. ARGUMENT

A. The Evidence Demonstrates that a Permanent Injunction Is Warranted

Special Master Woodin's letter to the Court reports that Grace Jackson and Stefan Kruszewski have returned the Zyprexa documents provided by Mr. Gottstein. (Ltr. from Special Master Woodin to the Honorable Jack B. Weinstein (February 1, 2007), attached Ex. B.) Communications from Dr. Jackson and Dr. Kruszewski, attached to Special Master Woodin's letter, confirm these individuals have not retained copies of the Zyprexa documents. (*Id.*) As a result, Lilly's proposed injunction seeks no further relief against these presently enjoined individuals.

With respect to the remaining enjoined individuals, however, the evidence, demonstrates that these individuals violated existing Court orders, refused to return the

unlawfully obtained Zyprexa documents provided by Mr. Gottstein (and certify that they had returned all copies), or took active steps to aid and abet the violation of CMO-3.² This evidence will not be repeated here.

Mr. Gottstein believed that the enjoined parties would assist him in disseminating the Zyprexa documents more broadly, and he testified that he sent the documents to these individuals to “make it impossible” for Lilly to “get them back.” (Tr. of Hearing Before the Honorable Jack. B. Weinstein (Jan. 16, 2007) at 48–49, attached Ex. C.) This belief was well-founded.

1. Enjoined Parties’ Joint Submission

In their joint submission, the enjoined parties now claim they had “no involvement in the disclosure” of the unlawfully obtained Zyprexa documents. (*See* Joint Proposed Findings of Fact and Objections to Eli Lilly’s Amended Proposed Findings of Fact (Docket Entry No. 48), 07-cv-0504 at 1). They contradict this claim fewer than three pages later, stating: “Mr. Oaks’ testimony shows that he acknowledged, several times, posting links pointing to other websites that purported to have the Lilly documents.” (*Id.* at 4; *see also* fn. 2, *supra*). The enjoined parties’ ruse, including that of “John Doe,” who finally acknowledges that he was working with the enjoined parties,³ has fooled no one.

² Although Special Master Woodin confirms that Mr. Breggin, Mr. Hall, Mr. Whittington and Ms. Ziegler have also returned discs of Zyprexa documents, these individuals did not confirm that they had returned all copies of these materials, or assure the Court that they had not further distributed these documents. The basis for Lilly’s request to continue the injunction as to these individuals, and remaining enjoined parties, is detailed in Eli Lilly and Company’s Amended Proposed Findings of Fact: Terri Gottstein (*see* ¶¶ 103-105), Dr. Peter Breggin (*see* ¶¶ 74-89), David Cohen (*see* ¶¶ 90-94), Bruce Whittington (*see* ¶¶ 102, 105), Laura Ziegler (*see* ¶¶ 100-101), Judi Chamberlin (*see* ¶¶ 74-89), Vera Sharav (*see* ¶¶ 90-94), Robert Whittaker (*see* ¶¶ 94, 97-99), Will Hall (*see* ¶¶ 94-97), Eric Whalen (*see* ¶¶ 74-89), and David Oaks (*see* ¶¶ 74-89). (*See* Lilly’s Amended Proposed Findings of Fact (Docket Entry No. 43), 07-cv-0504.)

³ (*See* Joint Proposed Findings of Fact and Objections to Eli Lilly’s Amended Proposed Findings of Fact (Docket Entry No. 48) at 8.)

The enjoined parties further argue that there is no evidence that they “conspired” with Dr. Egilman or Mr. Gottstein. (*See id.* at 4-5.) While the evidence submitted by Lilly supports an inference of conspiracy, Lilly has not sought such a finding, nor is such a finding necessary to continue the injunction. A person subject to an injunction (such as Mr. Gottstein) may not work through or enlist others to effect a violation of that order: Such an order “binds not only the parties subject thereto, but also nonparties who act with the enjoined party.” *Waffenschmidt v. MacKay*, 763 F.2d 711, 717 (5th Cir. 1985); *accord United States v. Schine*, 260 F.2d 552, 556 (2d Cir. 1958); Fed. R. Civ. P. 65(d) (orders of injunction binding on parties and “those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise”).

The Court should assess “the actuality of concert or participation, without regard to the motives that prompt the concert or participation.” *N.Y. State Nat’l Org. for Women v. Terry*, 961 F.2d 390, 397 (2d Cir. 1992), *vacated on other grounds*, 41 F.3d 794 (2d Cir. 1994). That MindFreedom, AHRP and the other enjoined parties may have been independently motivated by their political, social and moral positions on antipsychotic medications is of no matter. *See id.*; (*see also* Joint Proposed Findings of Fact and Objections to Eli Lilly’s Amended Proposed Findings of Fact (Docket Entry No. 48), 07-cv-0504 at 5.)

The balance of the enjoined parties’ joint submission seeks to explain away, justify, or contextualize the documentary evidence submitted by Lilly. Lilly stands by its description of these documents, and will not burden the Court with another lengthy discussion of these written materials, which have been submitted to the Court, and speak for themselves.

One remaining argument, not related to the documents, must be addressed. Ms. Sharav, Mr. Cohen and AHRP allege that there is no evidence that any of them ever

communicated with Dr. Egilman regarding the Zyprexa documents. (See Joint Proposed Findings of Fact and Objections to Eli Lilly's Amended Proposed Findings of Fact (Docket Entry No. 48), 07-cv-0504 at 6.) Dr. Egilman's telephone records suggest otherwise. These records show that Dr. Egilman spoke with Ms. Sharav on two occasions on December 14, 2006, which is during the time Dr. Egilman was transferring documents to Mr. Gottstein. (See Summary of Phone Dr. Egilman's Phone Records (December 14, 2006), attached Ex. D.)⁴

2. **Gottstein and Egilman Submissions**

Rather than dealing with the injunction issues, the briefing of Mr. Gottstein and Dr. Egilman anticipate the contempt motions that will be filed against them.

Mr. Gottstein's submission was received on Saturday, February 10, 2007. Modest he is not. When stripped of the self-congratulation and unsettling self-comparisons to those who have used (rather than abused) the legal system to redress grievances, Mr. Gottstein's submission advances two principal factual arguments, each of which lacks merit.

First, Mr. Gottstein claims that Dr. Egilman did not refuse to testify in these proceedings and, therefore, Lilly cannot ask the Court to draw adverse inferences based on Dr. Egilman's assertion of his Fifth Amendment right against self-incrimination. This is not true. As the Court confirmed, Dr. Egilman's scheduled deposition, and his subsequent refusal to testify at that deposition, are part of the evidentiary record in these proceedings. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 249-251, attached Ex. E.)

⁴ As the Court is aware, in advance of his deposition, Dr. Egilman was required to produce his computers to permit the forensic recovery of materials that he deleted and destroyed after his violation of CMO-3. Dr. Egilman's counsel also produced phone records, which confirm the December 14, 2006 calls between him and Ms. Sharav. Had Dr. Egilman not refused to testify, Lilly would have authenticated these documents during this deposition. In light of his refusal to testify, and production of these documents by his counsel, the authenticity of these documents cannot seriously be challenged, and are properly before the Court. (See Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 249-51, attached Ex. E.)

Second, Mr. Gottstein alleges that CMO-3 is ambiguous and, therefore, he could not have violated the provisions of the protective order. To the contrary, CMO-3 explicitly requires any recipient of Confidential Discovery Materials, if subpoenaed by another court, to promptly notify the party that produced the Confidential Discovery Materials of, *inter alia*, the “the date on which compliance with the subpoena is requested.” (See Lilly’s Amended Proposed Findings of Fact (Docket Entry No. 43), 07-cv-0504 at ¶ 6.) Mr. Gottstein has admitted that he knew, before receiving any documents from Dr. Egilman, that Dr. Egilman was not going to notify Lilly that the subpoena compliance date had changed. (*Id.* at ¶ 50.) He further admitted that he chose not to notify Lilly of this fact himself. (*Id.*)

Dr. Egilman’s submission is similarly without merit. Having invoked his Fifth Amendment privilege against self-incrimination, in the precise manner suggested by his attorney and approved by this Court to avoid “wasting a lot of time,” Dr. Egilman now attempts to avoid the implication of this invocation and convince this Court that if he testified, he could clear his name. (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 249-251, attached Ex. E.) Dr. Egilman had the right to testify, but refused on the grounds that his testimony might be incriminating. (See Lilly’s Amended Proposed Findings of Fact (Docket Entry No. 43), 07-cv-0504 at ¶ 12.) He cannot have it both ways. United States v. Certain Real Property and Premises known as 4003-4005 5th Ave., 55 F.3d 78, 84 (2d Cir. 1995). Lilly has not asked this Court to draw any impermissible inferences from this invocation. Mitchell v. United States, 526 U.S. 314, 329 (1999) (assertion of Fifth Amendment privilege comes with risk of adverse inferences or even default in civil litigation).

B. The Documents Subject to Disclosure in the Injunction Proceedings are Still Confidential and Precisely the Types of Documents that CMO-3 and Fed. R. Civ. 26(c)(7) were Designed to Protect

Mr. Gottstein tries to excuse his breach of CMO-3 by suggesting that the documents he unlawfully distributed are not actually confidential. This argument is a classic red herring; factually inaccurate, procedurally improper and legally irrelevant. CMO-3 provides the method for challenging Lilly's confidentiality designations, and an injunction proceeding does not provide that opportunity. Similarly, during the January 17, 2007, hearing, Ms. Sharav's counsel argued that her client could not have aided and abetted a violation of CMO-3 because the confidentiality designations were not appropriate, and subject to challenge. The Court immediately noted:

Now, if in addition [to challenging the injunction] you want to proceed pursuant to CMO-3 for the independent release of documents, you can do so, but I don't consider sufficiently formal your papers in the present procedures to raise those issues in the clear cut way they should be raised. . . . I'm not satisfied to approach such an important motion by the informal papers I have now.

(Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 240, attached Ex. E.)

On January 22, 2007, Ms. Sharav and AHRP sought to challenge the designation of documents subject to this injunction proceeding. On January 25, 2007, the Court entered an Order directing that the challenge be scheduled for argument and briefing "after the pending injunction proceedings, and related contempt actions, if any, are completed." (*See* Order of January 25, 2007, (Docket Entry No. 36), 07-cv-0504.) The Court then issued an amended Order denying the motion, with leave to renew. (*See* Order of February 8, 2007, (Docket Entry No. 1152), 04-md-01596.) The Court issued a similar Order on February 8, 2007, in connection with another challenge to these documents. (*See* Order of February 8, 2007, (Docket Entry No. 1150), 04-md-01596.)

There is good reason for dealing with a confidentiality challenge after the completion of the injunction and sanction proceedings: they involve different issues. On February 7, 2007 Special Master Woodin suggested that the challenge made by UFCW in the Third Party Payor Litigation be consolidated with these other challenges, and has informed the parties he is prepared to undertake a document-by-document review, if necessary. (Ltr. from Special Master Woodin to the Honorable Jack B. Weinstein (February 7, 2007), attached Ex. F.)

Belatedly, Mr. Gottstein is now borrowing a page from the Sharav playbook. To the extent Mr. Gottstein is now, for the first time, procedurally challenging the confidentiality of the documents he received, then he should follow the procedure of CMO-3, and like the other challenges, this can be heard by Special Master Woodin “after the pending injunction proceedings, and related contempt actions, if any, are completed.” (*See* Order of January 25, 2007, (Docket Entry No. 36), 07-cv-0504; Order of February 8, 2007, (Docket Entry No. 1150), 04-md-01596.)

Mr. Gottstein also suggests that the challenge by UFCW that is *pending* before Special Master Woodin – about which Special Master Woodin wrote the Court in the last 5 days (*see* Ltr. from Special Master Woodin to the Honorable Jack B. Weinstein (February 7, 2007) attached Ex. F.) – is actually moot. The argument goes that, based on a conversation his counsel had with another lawyer, Lilly did not actually contest the confidentiality of the documents subject to the UFCW challenge. (*See* Declaration of J. McKay (Docket Entry No. 62), 07-cv-0504 at ¶¶ 3-5.) This argument is nonsense. The Plaintiffs’ Steering Committee (“PSC”), of which the lawyer who apparently spoke to Mr. McKay is a member, **jointly requested** (with Lilly) the January 3, 2007, Temporary Mandatory Injunction, and has stated that **it supports** Lilly’s efforts to protect the confidentiality of the documents subject to CMO-3. (*See* Ltr. from

the Plaintiffs' Steering Committee to S. Fahey (December 19, 2006), attached G.) The argument is so frivolous it was never raised in the pending challenge in the UFCW matter, but instead the parties agreed upon a briefing schedule, later adopted by Special Master Woodin. If more evidence was needed to put this argument to rest, one need look no further than the fact that the challenge is pending before Special Master Woodin, which belies the argument that the documents have already been de-designated. (*See* Ltr. from Special Master Woodin to the Honorable Jack B. Weinstein (February 7, 2007), attached Ex. F.)

At most, Mr. Gottstein is repeating a baseless argument another lawyer may try to make concerning a challenge by the UFCW plaintiffs. This injunction briefing is not the time for making the argument, which (to the extent even preserved by the UFCW plaintiffs) will be heard by Special Master Woodin, and covers a smaller universe of documents, albeit of a similar nature, than those leaked by Mr. Gottstein. Mr. Gottstein's argument that Lilly waived CMO-3 protection as to the documents he leaked should be summarily rejected.

In its principal memorandum, Lilly specifies that, with the exception of less than two dozen documents, every document designated was done so properly. (*See* Memorandum and Points of Authorities (Docket Entry No. 40), 07-cv-0504 at 9-12, citing the Hoffmann Declaration.) The documents at issue before the Court include the very documents which Rule 26(c)(7) and CMO-3 are designed to protect, including confidential, and often draft or preliminary research and development information; strategic planning documents; employee training techniques; regulatory strategy; product development; competitor analyses; market

research; potential marketing plans and strategies, or otherwise confidential material.⁵

Lilly detailed the harm caused by their disclosure, including refraining from disclosing additional confidential data in order to place draft, preliminary or planning documents in context, and the competitive harm, including valuable insight into Lilly's structure, decision tree, internal workings, and processes for implementation of strategies. (*See id.*) Competing sales forces may also use this confidential information to their advantage in their interactions with physicians to the detriment of Lilly. (*See id.*)

Lilly also detailed the potential harm to patients, who could be misled by information or documents taken out of context, or selective information taken from preliminary data, or other draft documents, which do not reflect the final analyses of the company or the FDA.⁶ (*See id.*)

⁵ *Sullivan Mktg. v. Valassis Comm.*, 1994 U.S. Dist. LEXIS 5824, at *4 (S.D.N.Y. 1994) (citing *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 203 (S.D.N.Y. 1977)); see *Wilcock v. Equidev Capital L.L.C.*, 2001 U.S. Dist. LEXIS 11744, at *2 (S.D.N.Y. 2001); *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139, 145 (2d Cir. 1987); see also, *Moore U.S.A., Inc. & Toppan Forms Co., Ltd. v. The Standard Register Co.*, 2000 U.S. Dist. LEXIS 9137 (W.D.N.Y. 2000) (protecting competitor information); *Cumberland Packing Corp. & Stadt Corp. v. Monsanto Co., et al.*, 184 F.R.D. 504 (E.D.N.Y. 1999) (noting that courts commonly protect "trade secrets, confidential research and development information, marketing plans, revenue information, pricing information, and the like"); *Vesta Corset Co, Inc. & Brown v. Carmen Foundations, Inc. & Howard Lehman*, 1999 U.S. Dist. LEXIS 124 (S.D.N.Y. 1999) (protecting financial information, including price structure, profits, costs, overhead, etc.); *DDS, Inc., et al. v. Lucas Aerospace Power Transmission Corp.*, 182 F.R.D. 1 (N.D.N.Y. 1998) (qualifying competitor information, manufacturing processes, and customer lists as trade secrets); *Sullivan Mktg. v. Valassis Comm.*, 1994 U.S. Dist. LEXIS 5824 (S.D.N.Y. 1994) (noting that pricing and marketing information are widely held to be "confidential business information"). Should the Court request a further showing as to any particular document, as it has with the proceedings before Special Master Woodin, Lilly can detail how each document fits within a category protected by CMO-3 and Rule 26(c)(7).

⁶ A study by the AEI-Brookings Joint Center for Regulatory Studies found that 25% of patients who had seen lawyer advertising relating to a drug they were taking would stop taking the drug immediately. (*See* Judyth Pendell, AEI-Brookings Joint Center for Regulatory Studies, *The Adverse Effects of Pharmaceutical Litigation* 10 (Sept. 2003), attached Ex. H.) The study also found that 43% of physicians have avoided prescribing the most appropriate drug for their patients because the drug was the subject of product liability litigation. (*Id.*) Of course, Mr. Gottstein does not address these issues, and would like nothing more than to try to force Lilly to exacerbate the harm he has caused by disclosing additional confidential materials, or otherwise be baited into trying this case in the press.

C. Lilly's Proposed Injunction Seeks Only to Enjoin Wrongdoers from Continuing Conduct in Violation of CMO-3

As Lilly established in its principal memorandum, the Supreme Court has rejected the argument that the First Amendment confers a right of access to documents produced between private parties in discovery. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31–37 (1984); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“The right to speak and publish does not carry with it the unrestrained right to gather information.”)⁷ This is particularly true where access to those documents has been obtained illegally. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (“[T]he truthful information sought to be published must have been lawfully acquired.”)

Seattle Times is supported by several considerations, including the fact that there is no First Amendment right of access to documents in discovery and that the courts must be able to protect the integrity of their orders and of the discovery process if litigation is to proceed in an orderly manner. *See Seattle Times*, 467 U.S. at 31-37. The enjoined parties “may not violate the law and then hide behind the protective cloak” of the First Amendment. *Marin Independent Journal v. Municipal Court*, 12 Cal. App. 4th 1712, 1721 (Cal. Ct. App. 1993).

1. **The Case Law that the Enjoined Parties Cite Does Not Apply**

a. *Proctor & Gamble* Is Inapposite

The enjoined parties rely principally on one case: *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996) (“*P&G*”). This case is distinguishable on the facts and marked by errors of law. In *P&G*, the parties stipulated to a “protective order.” *P&G*, 78 F.3d at 222. That stipulated agreement permitted the “parties and not the court [to] determine

⁷ Although the enjoined parties insist that *Seattle Times* applies only to “parties,” they ignore the fact that their collusion with Mr. Gottstein to aid and abet his continued violation of several Court orders subjects them to treatment as parties. *See Waffenschmidt*, 763 F.2d at 717.

whether particular documents met the requirements of Rule 26,” and allowed the parties to modify the terms of the protective order *without court approval*. *Id.*

When *Business Week* later obtained documents from the *P&G* litigation, the parties obtained a temporary restraining order without any supporting evidence presented at a hearing. None of the parties knew how *Business Week* had obtained the documents, *i.e.*, whether *Business Week* was a good-faith, independent recipient of the documents or whether *Business Week* had aided and abetted those who had obtained the documents. *P&G*, 78 F.3d at 222. The TRO provided no date for a hearing. *Id.* Further hearings revealed that the documents were submitted by *P&G* to the court in support of an argument for a judicial act rather than documents merely exchanged in discovery. *Id.* These hearings also demonstrated that the documents were obtained by *Business Week* without knowledge of the protective order, and without deception. *Id.* at 223.

The facts and legal issues before this Court stand in stark contrast to *P&G*. In this case, this Court, after lengthy proceedings, crafted an appropriate protective order that is not subject to unilateral amendment by the parties. Lilly has provided the Court with evidence at various hearings (many contested) sufficient to permit the Court to make findings of fact. Moreover, in specific reference to the Temporary Mandatory Injunction, this Court provided an injunction of limited duration and extended the Temporary Mandatory Injunction only after notice to all parties and an opportunity to be heard.

The documents at issue here have not been submitted to the Court for judicial action. This is a critical difference as documents used by the court in its decision-making process enjoy less protection than documents merely exchanged between the parties in discovery. Because the documents in *P&G* were judicial documents, there was a First Amendment

presumption of public access. *See, e.g., Lugosch v. Pyramid Co. of Onodaga*, 435 F.3d 110 (2d Cir. 2006). Lilly's stolen documents have not been used by a party to support an argument for a judicial act and there is a presumption *against* public access. *See, e.g., SEC v. TheStreet.com*, 273 F.3d 222 (2d Cir. 2001). In addition, Lilly has shown that its confidential documents have been obtained only through the knowing violation of CMO-3, and that the enjoined parties have worked in concert to exploit that violation and evade this Court's efforts to give effect to its orders. *See, e.g., fn. 2, supra*.

Lastly, the district court in *P&G* prohibited the publication of an article that discussed the documents in question and did not distinguish, as has this Court, between prohibiting the publishing of protected documents and absolutely prohibiting any publication of news, articles, or discussions on the same topic.

b. *Seattle Times* and Not *Bartnicki* Controls this Case

In *Bartnicki v. Vopper*, the Supreme Court addressed a case where a publisher of information obtained an intercepted telephone conversation in a lawful manner from a source who had obtained it unlawfully. *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001). In that circumstance, the Court held that the First Amendment protected the publication of the telephone conversation. *Id.* at 535.

Bartnicki does not apply to the issue here for several reasons. First, the Supreme Court's holding was narrow, as the Court noted the "important interests to be considered on *both* sides of the constitutional calculus," and explicitly reserved judgment in cases presenting different factual scenarios, such as the publication of confidential business information. *Id.* at 529. In fact, the Court explicitly reserved judgment whether the outcome would be different in a case involving "disclosures of trade secrets or domestic gossip or other information of purely

private concern.” *Id.* at 533. Accordingly, under the very terms of *Bartnicki*, its holding does not encompass the publication of Lilly’s confidential business documents.

Second, unlike the Supreme Court’s decision in *Seattle Times*, *Bartnicki* did not address a situation where the information at issue was available only because it was produced in discovery subject to a preexisting court-issued protective order. In *Bartnicki*, the parties voluntarily communicated the information that was illegally obtained – the government did not order either party to the communication to so communicate. *Id.* at 514. Here, however, the Court’s discovery processes have compelled Lilly to communicate with others over its objection. As the Supreme Court explained in *Seattle Times*, this Court has “coerced production of information” that Lilly would otherwise have the right to keep private. *Seattle Times*, 467 U.S. at 36. Accordingly, as the Supreme Court has recognized, the government interest in this case is much greater than in *Bartnicki* – by forcing Lilly to disclose information “for the sole purpose of assisting in the preparation and trial, or the settlements of litigated disputes,” “the government,” and this Court in particular, “clearly has a substantial interest in preventing this sort of abuse of its processes.” *Id.* at 34-35. Thus, compared to the balance struck in *Bartnicki*, the balancing of interests in this case must take account of the enjoined parties’ reduced First Amendment interests, this Court’s greater interests in protecting litigants and its processes from abuse, and Lilly’s greater interest in protecting its property rights. *Seattle Times* and not *Bartnicki* controls here.

Finally, Lilly has demonstrated that the enjoined parties have worked in concert with one another and with Mr. Gottstein to violate several of the Court’s orders. *See, e.g.*, fn. 2, *supra*. *Bartnicki* is, therefore, inapplicable to this case even on the terms that the enjoined

parties assert. *See Bartnicki*, 532 U.S. at 518-25 (emphasizing that the publisher had no role in the unlawful interception of the phone conversations at issue).

At bottom, the First Amendment does not compel this Court to allow the enjoined parties to make a mockery of its Orders. Had the enjoined parties sought lawfully to obtain the confidential discovery materials in this case in the first instance, they would have enjoyed no First Amendment right to do so. *See TheStreet.com*, 273 F.3d at 233 (no presumption of public access to confidential discovery materials). Respondents now attempt to claim greater rights by virtue of their aiding and abetting of a violation of this Court's orders. Their argument demeans the Court's authority and, if adopted, would undermine confidence in the discovery process.

2. Respondents' Attempt To Categorize the Court's Injunction as Content-Based Is Unsupported

As Lilly established in its principal memorandum, under the Supreme Court's analysis, only content-based injunctions are subject to prior-restraint analysis. Although the enjoined parties offer footnote five in *United States v. Quattrone* to rebut this proposition, examination of the entire footnote and the cases that that the Second Circuit cites reveal that the Second Circuit's observations are not implicated here. *Quattrone*, 402 F.3d 304, 310 n.5 (2d Cir. 2005).⁸

The Court's January 3, 2007 Temporary Mandatory Injunction, and the permanent injunction now sought by Lilly are content-neutral, thereby demanding the lesser level of scrutiny, as set forth in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). The

⁸ Citing (1) *Hobbs v. County of Westchester*, 397 F.3d 133, 148-49 (2d Cir. 2005), which itself cites a 1975 Supreme Court case to support the proposition that "expressive conduct on property that has traditionally been open to the public for such activity, such as public streets and parks, is sharply circumscribed" and that requiring a permit obtained in advance of a proposed speech or conduct could result in a prior restraint on speech; and (2) *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 290 (5th Cir. 2003), which addresses the narrow circumstance of a government official enacting a regulation that gives government officials "unbridled discretion" to restrict speech. Neither of these circumstances is at issue before the Court.

injunction is “without reference to the content of the regulated speech” and was not constructed “because of disagreement with the message [the speech] conveys.” *Id.* at 763 (quoting *Ward v. Rock Against Racism* 491 U.S. 781, 791 (1989)).⁹

Here, the Court entered its injunction without reference to the enjoined parties’ viewpoint or message. Rather, other legitimate considerations were at issue, including: The protection of trade secrets and other confidential information subject to a Rule 26(c) protective order; the principles that court orders are substantial and must be respected, that they serve a critical role in the administration of justice, and that litigants should be able to rely on the protections that court orders provide without being prejudiced; and that vulnerable patients taking lifesaving medications should be guided by their doctors, and not by the selective leaking of documents that cause them to discontinue treatment. Because the Court’s injunction is justified without reference to the content of the enjoined parties’ communications, it is content neutral, and subject to scrutiny under *Madsen*.

⁹ The enjoined parties’ contention that “Eli Lilly has targeted particular documents for suppression based on the information contained therein” is baseless. Not one word of the Court’s Injunction references the expressive content of Lilly’s documents, and the Court made explicit that its injunction applied only to “the publication and the cooperation in publishing particular material which is alleged to have been stolen in violation of this Court’s orders.” (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 8, 2007) at 28, attached Ex. A.)

III. CONCLUSION

For the foregoing reasons, the Court should continue the injunction in the form set forth in the form of order attached hereto.

Respectfully submitted,



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