

Brewster H. Jamieson, ASBA No. 8411122
LANE POWELL LLC
301 West Northern Lights Boulevard, Suite 301
Anchorage, Alaska 99503-2648
Telephone: 907-277-9511
Facsimile: 907-276-2631
Email: jamiesonb@lanepowell.com
Attorneys for Intervenor

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

Eli Lilly and Company,

Proposed Intervenors,

In the Matter of the Guardianship of B.B.

Respondent.

Case No. 3AN-04-545 P/G

**ELI LILLY AND COMPANY'S MOTION TO
INTERVENE AND QUASH SUBPOENA
DUCES TECUM ISSUED BY RESPONDENT**

Intervenor, Eli Lilly and Company (hereinafter referred to as "Intervenor" or "Lilly"), by and through its undersigned counsel, hereby moves to intervene in this matter pursuant to Civil Rule 24(a). Additionally, Lilly hereby moves to quash the subpoena duces tecum served on David Egilman, MD issued by counsel for Respondent. In support of its motions, Lilly avers the following:

1. Lilly is a defendant in federal multidistrict litigation captioned In re Zyprexa Products Liability Litigation, MDL No. 1596 (E.D.N.Y.). Pursuant to Case Management Order No. 3 ("CMO-3") issued by the MDL (see Exhibit A), Lilly has produced voluminous materials that have been marked confidential.

2. Pursuant to CMO-3, David Egilman, MD, who agreed to be bound by the terms of said order, possesses certain confidential materials.

3. Dr. Egilman has been subpoenaed in this matter (see Exhibit B), and has been directed by counsel for Respondent to produce certain documents. In response – and in violation of CMO-3 – Dr. Egilman has produced confidential Lilly materials to counsel for Respondent.

4. Intervention as a matter of right is proper under Rule 24(a) for the following reasons: (1) the application to intervene is timely; (2) Lilly has an interest in the property at issue in this action; (3) the disposition of the current action will impair or impede Lilly's ability to protect its interests; and (4) Lilly's interests are not adequately represented or protected by the existing parties.

5. Lilly respectfully requests this Court to issue an order (a) requiring the return of such confidential materials to Lilly, (b) prohibiting the use of such materials in this matter, and (c) prohibiting Dr. Egilman from testifying about such confidential material.

6. Lilly requests permission to fully brief this matter.

WHEREFORE, Lilly, as Intervenor, respectfully moves the Court for leave to intervene in this action as a matter of right pursuant to Civil Rule 24(a), to quash the subpoena duces tecum served on Dr. Egilman by counsel for Respondent, and for such other relief as the Court deems just and proper.

DATED this 15th day of December, 2006.

LANE POWELL LLC
Attorneys for Intervenor

By: 

Brewster H. Jamieson, ASBA No. 8411122

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

PROTECTIVE 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 olanzapine, 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.

6. Permissible Disclosures of Confidential Discovery Material

Notwithstanding paragraph 5, Confidential Discovery Materials may be disclosed to and used only by:

- a. counsel of record for the parties in this Litigation and to his/her partners, associates, secretaries, legal assistants, and employees to the extent considered reasonably necessary to render professional services in the Litigation ,
- b. inside counsel of the parties, to the extent reasonably necessary to render professional services in the Litigation;
- c. court officials involved in this Litigation (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, a 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 with this Litigation, 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. To the extent a defendant does not have in-house counsel, it may designate two individuals employed by such defendant (in addition to outside counsel) to receive Confidential Discovery Materials produced by plaintiff;
- f. where produced by defendant Eli Lilly and Company, in addition to the persons described in subsections (a) and (b) of this section, plaintiff's attorneys in other filed litigation alleging injuries or damages resulting from the use of Zyprexa® including their paralegal, clerical, secretarial and other staff employed or retained by such counsel, provided that

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:

