

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In re: ZYPREXA PRODUCTS LIABILITY : MDL No. 1596
LITIGATION :
-----X
THIS DOCUMENT RELATES TO: :
 :
ALL ACTIONS :
 :
-----X

**ELI LILLY AND COMPANY’S MEMORANDUM OF POINTS AND AUTHORITIES
CONCERNING ITS REQUEST TO MODIFY AND EXTEND THE COURT’S
JANUARY 3, 2007 TEMPORARY MANDATORY INJUNCTION**

I. INTRODUCTION

Dr. David Egilman, an experienced expert witness widely retained by plaintiffs' firms, and attorney James Gottstein, who was willing to manufacture a case in order to issue a sham subpoena, sought to harm Eli Lilly and Company (“Lilly”) by selectively releasing documents in a calculated breach of this Court’s Confidentiality Order. Egilman and Gottstein both fully appreciated the significance of the Court's Order, but chose to disregard it, in order to advance their own agendas. On the eve of settlement of thousands of cases, with trials in other cases fast approaching, Egilman and Gottstein released a biased selection of confidential documents to the media and collaborators in their plan. They were aided by a group of individuals all too ready to assist them in disseminating these confidential documents quickly and broadly so that Lilly could not cure the harm. Even when caught, members of this group continued to violate the injunctions that followed.

Lilly recognizes that this Court can not undo the harm and prejudice it has suffered; the punishment for the violation of the Court’s Orders must await separate contempt proceedings. Nonetheless, a continued injunction against each of those persons that aided and abetted this brazen breach is necessary to prevent these individuals from using the information

they obtained through their illegal scheme to cause additional harm to Lilly and further undermine this Court's authority.

Now, in arguments that thinly mask their contempt for this Court, and its Orders, they say that the "genie is out of the bottle," and proudly assert that they have, in effect, eviscerated this Court's Orders and stripped it of its enforcement authority. They believe that, by flouting a legitimate Order of this Court – entered nearly three years ago and faithfully obeyed since then by scores of lawyers and their experts – they could undermine the laudable goals underlying that Order, including the principles that:

- Court Orders have meaning and must be respected;
- Protective Orders serve a critical role in the administration of justice;
- Litigants can rely on the protections that Court Orders provide, and will not be prejudiced;
- Companies with products on the market should compete in the marketplace without fear that confidential, competitive information would be illegally disseminated in a selective or distorted way;
- Cases should be tried in court, and not based on information taken out of context in the media; and
- Vulnerable patients taking lifesaving medications should be guided by their doctors and not by the selective leaking of documents that cause them to stop taking their medications.

To vindicate its authority, to ensure that this case is tried in the courthouse, and to prevent the wrongdoers from inflicting additional harm to the judicial system, to vulnerable patients and to the litigants in this matter, this Court should (a) continue the narrow, content-

neutral injunction that has been in place for the last month, but only against the following wrongdoers who either violated existing Court orders, refused the return the unlawfully obtained Zyprexa documents provided by Mr. Gottstein, or took active steps to aid and abet the violation of Case Management Order No. 3: Terri Gottstein, Dr. Peter Breggin, Dr. David Cohen, Bruce Whittington, Laura Ziegler, Judi Chamberlin, Vera Sharav, Robert Whittaker, Will Hall, Eric Whalen, and David Oaks,¹ (b) order the return of the improperly disseminated documents from these same persons, and (c) continue this injunction against the following websites, to the extent they seek to act in concert with any of these individuals or others who acted in concert with Dr. Egilman or Mr. Gottstein to disseminate the unlawfully obtained Zyprexa documents:

www.joysoup.net , www.mindfreedom.org , www.ahrp.org , www.ahrp.blogspot.com , and zyprexa.pbwiki.com.

II. BACKGROUND²

A. Dr. Egilman Was Bound by This Court's Order

On August 3, 2004, following a hearing before Magistrate Judge Chrein in July 2004, this Court entered Case Management Order No. 3 (“CMO-3”) prohibiting the dissemination, with certain limited exceptions, of “Confidential Discovery Materials” to any person not bound by the non-disclosure provisions of the Order itself. The Order enabled the parties to exchange voluminous information that permitted extensive discovery concerning the

¹ The basis for Lilly’s request to continue the injunction as to these individuals is detailed in Eli Lilly and Company’s Amended Proposed Findings of Fact, dated January 31, 2007: Terri Gottstein (*see* ¶¶ 103-105), Dr. Peter Breggin (*see* ¶¶ 74-89), Dr. 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). Mr. Gottstein and Dr. Egilman are already permanently enjoined, by virtue of the Honorable Brian M. Cogan’s December 18 Mandatory Injunction, which has not been challenged.

² For a full statement of the relevant factual record, Lilly incorporates its proposed Amended Proposed Findings of Fact, dated January 31, 2007, which was filed with this Memorandum.

allegations in the underlying dispute to proceed. Lilly, in fact, produced over 15 million pages of documents to attorneys representing plaintiffs. Without the protections afforded by CMO-3, discovery disputes would have dominated this litigation, document production would have stalled, and ultimately the parties would not have been able to address and resolve nearly 30,000 individual claims.

In 2006, The Lanier Law Firm retained Dr. David Egilman as an expert.³

Egilman received a copy of CMO-3 and signed an endorsement acknowledging that he would be bound by the protective order and that he would be subject to sanctions for failure to abide by the order. After signing the endorsement, Egilman was given access to the extensive volume of confidential discovery materials that had been produced by Lilly.

B. Dr. Egilman Violated the Order in Concert with Others

After having obtained documents covered by CMO-3, but before November 28, 2006, Egilman contacted Alex Berenson, a reporter for *The New York Times*. Egilman and Berenson knew each other from the litigation surrounding Vioxx – Berenson as a reporter for *The New York Times* and Egilman as an expert for the plaintiffs. Berenson learned from Egilman that he had access to confidential Lilly documents related to Zyprexa. Egilman wanted to leak these documents to *The New York Times* and discussed with Berenson a scheme by which Egilman could evade CMO-3 by giving the documents to a third party, who would quickly deliver the documents to Berenson.

³ Dr. Egilman has refused to testify in this matter, asserting his Fifth Amendment right against self-incrimination. (Ltr. from Mr. Hayes to Mr. Gussack (Jan. 23, 2007), attached Ex. 5.) Dr. Egilman's counsel agreed that such a letter "will have the equivalence of his taking the Fifth for purposes of evidence." (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 17, 2007) at 250–51, attached Ex. 4.) As a result, Lilly asks the Court — in the context of these present proceedings — to draw a number of adverse inferences based on Dr. Egilman's refusal to testify. These adverse inferences are not inconsistent with any evidence submitted by any of the parties in these proceedings.

The scheme, however, required a third party, a lawyer who would be willing to subpoena the documents and follow Egilman's instructions to turn the documents over to Berenson. Berenson was acquainted with such an individual, James Gottstein, a lawyer practicing in Alaska. Gottstein's legal practice focuses on representing mentally ill individuals who object to what they term "forced drugging" by state mental health officials. Gottstein had earlier tried to interest Berenson, to no avail, in writing a story about such cases.

Berenson was, however, interested in writing a story about the Zyprexa litigation, so he told Egilman to call Gottstein and ask Gottstein if he could subpoena the confidential discovery documents. "Out of the blue," Egilman called Gottstein on November 28th and told Gottstein that he (Egilman) had confidential Lilly documents related to Zyprexa that he wanted to get to *The New York Times*. Egilman asked whether Gottstein could subpoena the documents.

Gottstein jumped at the opportunity, and began his quest for a case in which a subpoena could be issued for Egilman to produce the confidential documents. Gottstein found a client – but not one using Zyprexa – and issued a subpoena on December 6, 2006, that called for Egilman to produce all Zyprexa-related documents in his possession on December 20, 2006. Mr. Gottstein understood that the documents were subject to a protective order, but he did not obtain a copy of the Order or attempt to inform himself of the legal requirements contained in the Order. Egilman thought it would be safer that way.

When Egilman received a copy of the subpoena, he faxed a copy of it to the General Counsel of Eli Lilly and Company, who promptly provided it to outside counsel. Mindful of the prohibition that it could not contact the expert directly, counsel took immediate steps to determine who had had retained Egilman. On December 13, 2006, more than a week before the disclosed December 20 production date, Lilly's counsel had confirmed with The

Lanier Law Firm that it had spoken with Egilman, and that no documents would be produced by him until Lilly's motion to quash the Alaska subpoena was ruled upon.

However, unbeknownst to Lilly and contrary to representations made by Egilman to The Lanier Law Firm, Egilman had already begun on December 12th to transmit electronically confidential documents to Gottstein. Gottstein and Egilman had determined to move up the production date and, therefore, Gottstein issued a second "amended" subpoena on December 11th which called for the production of the documents prior to December 20. This second subpoena was not provided to Lilly or to any other party in the litigation in which it was issued.

Immediately upon receipt of the documents from Egilman, Gottstein began to make numerous DVD copies of the confidential documents. Following instructions received from Egilman, Gottstein sent copies of the confidential documents to *New York Times* reporter Alex Berenson, to National Public Radio, and to staff members of various Congressional committees. In addition, by December 13th, and as more fully detailed in the Findings of Facts, Gottstein had provided copies to his collaborators, who he knew would further his scheme to disseminate these documents.⁴ Moreover, anticipating the prejudice to Lilly and knowing that Lilly would try to retrieve the documents once it learned of the illegal dissemination, Gottstein made every effort to distribute the documents in a way that would make it impossible to get them back. The Court should, therefore, continue the injunction, as described above, against those

⁴ The testimony of David Oaks, one of Gottstein's co-collaborators, is illustrative of the extent to which at least one participant was willing to go to hide his involvement from the Court in this scheme. When asked whether he had any discussions with Gottstein before, during, or after Gottstein obtained the documents as to what should be done with them, Oaks testified, "Absolutely not." That testimony however is misleading at best, but fundamentally not true. As documents provided by Gottstein demonstrate, Oaks and Gottstein were in constant communication about the Zyprexa documents, and efforts to further disseminate them. (*See* Amended Proposed Findings of Fact, dated January 31, 2007, at ¶ 85.)

wrongdoers who participated in the scheme of illegal disclosure from engaging in conduct that would further their scheme, or otherwise prejudice Lilly's substantial rights.

III. ARGUMENT

A. **This Court Has Power to Enforce Its Orders and Protect the Judicial Process Which Extends to Enjoining Each Individual That Aided and Abetted the Breach of CMO-3**

This Court enjoys the inherent authority to enter orders designed to effectuate any of its orders, including CMO-3. *See, e.g., Wards Co. v. Jonnet Dev. Corp. (In re Lafayette Radio Elecs.)*, 761 F.2d 84, 92 (2d Cir. 1985). This Court's authority extends to Dr. Egilman, who consented to its jurisdiction, and everyone who aided and abetted a breach of CMO-3. *See Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932); *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963) ("The mandate of an injunction issued by a federal district court runs throughout the United States."); *Waffenschmidt v. MacKay*, 763 F.2d 711, 717 (5th Cir. 1985).

A person subject to an injunctive or protective order 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*, 763 F.2d at 717; *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").⁵ When nonparties work in concert with parties to violate the order of a court, those nonparties subject themselves to

⁵ Moreover, a court's jurisdiction over nonparties is "directed to 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 others may have been "independently motivated" by their "political, social and moral positions" on antipsychotic medications is of no matter. *See id.*

the jurisdiction of the issuing court: “The nationwide scope of an injunction carries with it the concomitant power of the court to reach out to nonparties who knowingly violate its orders.”

(Id.)

Here, after Dr. Egilman signed CMO-3, and subjected himself to this Court’s jurisdiction, he and Mr. Gottstein entered into an arrangement whereby “Mr. Gottstein . . . deliberately and knowingly aided and abetted [Dr. Egilman’s] breach of CMO-3.” (*See* Eli Lilly and Company’s Amended Proposed Findings of Fact, dated January 31, 2007, at ¶ 57.) The court also has jurisdiction over Terri Gottstein, Dr. Peter Breggin, Dr. David Cohen, Bruce Whittington, Laura Ziegler, Judi Chamberlin, Vera Sharav, Robert Whittaker, Will Hall, Eric Whalen, and David Oaks, who were aware that Mr. Gottstein was bound by an injunction of this Court and that Mr. Gottstein had been ordered to retrieve the illegally obtained documents. (*See* Eli Lilly and Company’s Amended Proposed Findings of Fact, dated January 31, 2007, at ¶¶ 64-66).

As detailed in Lilly’s Proposed Findings of Facts (*see, e.g., id.* at ¶¶ 73-105), since that time, the individuals Lilly seeks to enjoin have repeatedly attempted to evade this Court’s orders by, among other things, (1) attempting dissemination on days when the Court was closed (*see id.* at ¶ 86); (2) cautioning people working in concert with them not to send emails documenting their efforts to Mr. Gottstein because his email could be provided to the Court (*see id.*); and (3) seeking to transfer the documents to the website now represented by EFF to hide involvement in the dissemination (*see id.* at ¶¶ 77-83, 86-87). Thus, the parties have collaborated to violate several of this Court’s orders and, through their actions, have subjected

themselves to the jurisdiction of this Court.⁶

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

When entering the Protective Order, Magistrate Judge Chrein foresaw how the select disclosures of information could harm Lilly and, potentially, the vulnerable patient population whom Zyprexa benefits: “[I]f the newspapers are slathered with material that might be misunderstood by the lay reader, that might do some harm or prejudice a case that is still pending.” (See Eli Lilly and Company’s Amended Proposed Findings of Fact, dated January 31, 2007, at ¶ 1). The documents at issue here have been packaged in a misleading way to harm the company. They were gathered from different points in the Zyprexa lifecycle and relate to events taking place in different parts of the world. Any dissemination of documents poses a substantial risk of further public misinterpretation because the documents will continue to be reviewed outside of their proper context.

Lilly should not be placed in the untenable position of having to disclose additional confidential documents, at competitive harm, just to place in context any dissemination of intentionally misleading documents. See Jack B. Weinstein, Secrecy in Civil Trials: Some Tentative Views, 9 J.L. & Pol’y 53, 58 (2000) (“First, the cost and time to explain a single document taken out of context by a plaintiff’s lawyer creates an incentive not to prepare memoranda. Second, what appears damning may, in context after difficult proof, be shown to be

⁶ Moreover, MFI, Judi Chamberlin, Robert Whittaker, AHRP, Vera Sharav, David Cohen, Terri Gottstein and EFF have waived any objection to this Court’s jurisdiction. Personal jurisdiction may be waived, and it is settled that “an individual may submit to the jurisdiction of the court by appearance.” *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–05 (1982). At no point have these parties contested personal jurisdiction and have, therefore, waived any argument that this Court lacks personal jurisdiction over them.

neutral or even favorable to the defendant.”) Without a continued injunction, however, the wrongdoers can place Lilly in such an untenable position.

The documents at issue before the Court include the very documents which Rule 26(c)(7) and CMO-3 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.⁷

The pharmaceutical industry in general, and the antipsychotic marketplace in particular, are fiercely competitive, and the proprietary information contained in Lilly’s documents is of great value to competitors of Lilly. As detailed in the attached Hoffmann Declaration⁸, the nature of the documents at issue constitutes valuable and confidential competitive intelligence data. With access to Lilly’s confidential documents, a competitor could obtain, among other information, valuable insight into Lilly’s structure, decision tree, internal workings, and processes for implementation of strategies. (See Dec. Gerald Hoffmann, attached

⁷ *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”).

⁸ Lilly has submitted this Declaration in response to a confidentiality challenge pending before Special Master Woodin, relevant portions of which are attached hereto. The documents subject to that challenge and the documents subject to the injunction proceedings are of similar nature, and indeed, there is a substantial overlap in the documents in these two actions. Mr. Hoffmann’s statements about how Lilly protects its documents, limits their disclosure, and the resulting harm caused upon disclosure apply with equal force here.

Ex. A at ¶¶ 18-20.) Competing sales forces may also use this confidential information to their advantage in their interactions with physicians to the detriment of Lilly. (See Dec. Gerald Hoffmann, attached Ex. A.)

Moreover, the harm here goes beyond that inflicted on Lilly, but includes patients as well, 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. Instead, vulnerable patients would be exposed to wrongfully disseminated documents that a former expert witness, who is not a psychiatrist or medical doctor specially trained to treat mental illness, selectively chose to disseminate.

This injunction proceeding is not the proper proceeding to challenge Lilly's designations. CMO-3 sets a process for challenging the confidentiality designation of any documents and the Court, working with the Special Discovery Master, has in place a procedure to make such determinations.⁹

CMO-3, paragraph 2 makes plain that documents that are in the public domain, **not as a result of a breach of CMO-3**, are not subject to protection. At the Court's request, Lilly reviewed the thousands of pages of documents at issue, and has identified less than two dozen additional documents that would not qualify for protection under CMO-3 and Rule

⁹ See CMO-3, paragraph 9 (requiring Lilly to move for a Protective Order to maintain the confidentiality of documents within 45 days of receiving such a challenge). On January 22, 2007 Vera Sharaz and the Alliance for Human Research Protection have sought to challenge the designation of documents subject to this injunction proceeding. Lilly will respond within 45 days of that challenge. Consistent with CMO-3, paragraph 9 and the potential overlap with the current injunction proceedings, on January 25, 2007, the Court entered an Order requiring that such a challenge should be scheduled for argument and briefing upon completion of the injunction and any contempt proceedings. The Court has previously referred such discovery challenges to Special Master Woodin, who could set a briefing schedule, and undertake a document by document review, should, that be necessary.

29(c)(7).¹⁰ The remaining documents meet the standards under Rule 26(c)(7)(1) and the requirements under CMO-3, paragraph 3 (protecting from disclosure documents any party in good faith believes is properly protected from disclosure).

C. Lilly Seeks to Enjoin Wrongdoers from Continuing Conduct in Violation of CMO-3

The Supreme Court has specifically rejected the argument that the First Amendment confers a right to access 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.”). This is particularly true where access to those documents has been obtained in an illegal manner in the first instance. (*See id.* (citing *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 Co.*, 467 U.S. at 37).)

Under the Supreme Court’s cases, only content-based injunctions are subject to prior-restraint analysis. *See Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 372 (1997). Injunctions against disseminating confidential discovery material are not content-based. *See Seattle Times Co. v. Reinehart*, 467 U.S. 20, 33 (1984)(“an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny”). Injunctions based on illegal conduct or the wrongful

¹⁰ Prior to this dispute, Lilly had de-designated following bates ranges, each of which is among those at issue here: ZY 397-1142; ZY 994 613-14; ZY 2152 681-82; ZY 3062 22-45; ZY 3065 8-9; ZY 4099 534-36; ZY 4099 538-39; ZY 8413 1233-50; ZY 8492 254; ZY 9063 653-68; ZY 9296 467; ZY 9423 375-76; ZY 200371166; ZY 200371752-55; ZY 200427046-47; ZY 200622359-60; ZY 202261471-73. In addition to references with these ranges, Lilly does not claim confidentiality as to the following pages: ZY 2152 680; ZY 4099 539; ZY 8413 1250; ZY 100000834-49; ZY 100002285; ZY100003232-39; ZY100588858-62; ZY200189358-59; ZY 200269763; ZY200381770-71; ZY200391031-38; ZY200572922-23; ZY200573675-77; ZY200609040-42; ZY201116579-81; ZY201234202-06; ZY201321744-46; and ZY201386949-50.

disclosure of trade secrets or copyrighted material are not content based. *Schenck*, 519 U.S. at 374 n. 6; *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (injunction enforcing Digital Millennium Copyright Act’s prohibitions against posting or linking to decryption computer program held content-neutral); *DVD Copy Control Assoc., Inc. v. Bunner*, 31 Cal. 4th 864, 75 P.3d 1 (Cal. 2003) (injunction against posting misappropriated trade secrets held content-neutral); *see also Dallas Cowboys Cheerleaders Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979) (“This is not a case of government censorship, but a private plaintiff’s attempt to protect its property right.”).

“[T]he proper test for evaluating content-neutral injunctions under the First Amendment [is] ‘whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.’” *Schenck*, 519 U.S. at 372 (quoting *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 765 (1994)). Here, the Court’s injunctions are tailored to “serve purposes unrelated to the content of expression.” *See Universal City Studios*, 273 F.3d at 450. This Court did not select any type of speech to restrain due to a dislike of what is being said. Rather, the Court has sought to protect the litigants from the illegal, piecemeal appropriation of confidential information produced pursuant to this Court’s protective orders—a decidedly content-neutral purpose. *See Seattle Times*, 467 U.S. at 35; *DVD Copy Control Assoc.*, 31 Cal. 4th at 82, 75 P.3d at 12 (injunction based on content of information misappropriated is not content-based). That the injunctions have an incidental effect on the speech of those who have obtained Lilly’s stolen documents has no bearing on this Court’s inquiry. *See Universal City Studios*, 273 F.3d at 450. Even if the effect on speech were a relevant inquiry, however, this Court has made clear that no speech is prohibited:

I should like to emphasize again, as I did I thought on the 3rd, that no one is enjoined from discussing anything they wish to discuss.

New York Times is not enjoined from doing anything it wishes to do. The injunction only covers 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. B.)

The injunction that Lilly seeks burdens no more speech than necessary to serve a significant government interest. As noted above, the requested injunction prohibits only the publication of the confidential materials—the minimum burden required to protect those materials' confidentiality—and has no effect on any discussion or publication otherwise. Moreover, whatever minimum amount of speech is burdened is done so in the service of protecting the significant government interest in this Court's ability to administer justice, prevent abuses of its processes, and give effect to its own orders. *See Seattle Times*, 467 U.S. at 33–34; *see also DVD Copy Control Assoc.*, 31 Cal. 4th at 81–82, 84, 75 P.3d at 12, 14.

There is no relevant difference between posting the illegally obtained documents and “merely” linking to them. Controlling Second Circuit precedent recognizes that “a hyperlink has both a speech and a nonspeech component” and that an injunction against hyperlinking may be “justified solely by the functional capability of the hyperlink.” *Universal City Studios*, 273 F.3d at 456. Although a link may be formatted to convey information to readers, it also “has the functional capacity to bring the content of the linked web page to the user's computer screen” *Id.* An injunction that prohibits linking to websites that contain illegally posted material, such as the Temporary Mandatory Injunction, “is content-neutral because it is justified without regard to the speech component of the hyperlink. The linking prohibition applies whether or not the hyperlink contains any information, comprehensible to a human being, as to the Internet address of the web page being accessed.” (*Id.*)

In *Universal City Studios*, the Second Circuit also recognized how quickly and broadly materials travel on the Internet. The court rejected the defendant's argument that a link to a website containing illegally posted materials is indistinguishable from a newspaper article informing readers where they might purchase obscene books. *Id.* at 457. As the court explained:

“[I]f others publish the location of the bookstore, preventive relief against a distributor can be effective before any significant distribution of the prohibited materials has occurred. The digital world, however, creates a very different problem. If obscene materials are posted on one website and other sites post hyperlinks to the first site, the materials are available for instantaneous worldwide distribution before any preventive measures can be effectively taken.”

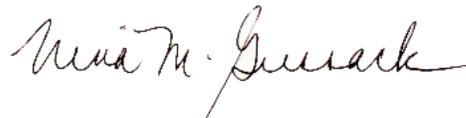
Id.

The injunction sought by Lilly is content-neutral because it serves several purposes unrelated to the content of expression: prohibiting the continuing violation of this Court's protective and injunctive orders, facilitating the orderly resolution of disputes through court-supervised discovery, and protecting Lilly's property interest in its confidential information. As a content-neutral order, the requested injunction burdens the minimum amount of speech necessary to serve the significant government interests of preventing abuse of court processes, promoting confidence and legitimacy in the litigation discovery system, giving meaningful effect to this Court's discovery orders, and protecting litigants' confidential information and privacy. The requested injunction in no way violates the First Amendment. For these reasons, and those set forth in *Eli Lilly and Company's Memorandum in Response to Motions Filed by John Doe, Vera Sharav, David Cohen, and the Alliance for Human Research Protection*, there are no First Amendment issues presented by the entry of a injunction.

IV. 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,



Nina M. Gussack
George A. Lehner
Sean P. Fahey
PEPPER HAMILTON LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 981-4000

Sam J. Abate, Jr. (SA 0915)
MCCARTER & ENGLISH LLP
245 Park Avenue
27th floor
New York, NY 10167

Dated: January 31, 2007

Counsel for Defendant, Eli Lilly and Company