

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’S MEMORANDUM OF POINTS AND AUTHORITIES ON
MOTION FOR RE-ARGUMENT OF THE COURT’S ORDER EXTENDING THE
DECEMBER 29, 2006, TEMPORARY MANDATORY INJUNCTION**

On January 4, 2007, this Court received a letter from Judi Chamberlin and MindFreedom International (“Movants” or “MFI”) requesting re-argument of the Court’s order extending and modifying the December 29 Temporary Mandatory Injunction (the “Movants’ Letter”). The Electronic Frontier Foundation (“EFF”) has filed a motion to intervene in the motion for re-argument. For the reasons discussed below, the motion for re-argument should be denied.

**FACTUAL AND PROCEDURAL BACKGROUND ON THE CONCERTED ACTIONS
TO VIOLATE THIS COURT’S ORDERS**

On December 15, 2006, counsel for Eli Lilly and Company (“Lilly”) learned that David Egilman, M.D., M.P.H., violated Case Management Order No. 3 (“CMO-3”) by sending documents provided to him pursuant to the confidentiality provisions of CMO-3 to James Gottstein. Mr. Gottstein is an attorney in Anchorage, Alaska and President and CEO of the Law Project for Psychiatric Rights (“PsychRights”). That same day (which was a Friday)—upon the joint application of members of the *In Re Zyprexa Products Liability Litigation* Plaintiffs’ Steering Committee (“PSC”) and Lilly, and, after giving Mr. Gottstein notice and an opportunity to be heard on the matter, Special Master Peter H. Woodin entered an order requiring Mr.

Gottstein and Dr. Egilman to immediately return to the Special Master's office in New York any and all documents produced by Lilly pursuant to CMO-3 (including all copies of any electronic documents, hard copy documents and CDs/DVDs). (Order of Dec. 15, 2006, attached Ex. A.)

Mr. Gottstein did not comply with the Court's order. Instead, he sent a letter to Special Master Woodin on Sunday evening, December 17, 2006, at 11:30 p.m., questioning Special Master Woodin's authority and providing his version of the events that led to his possession of CMO-3 protected Zyprexa® documents. (Ltr. from James Gottstein to Special Master Woodin, (Dec. 17, 2006), attached Ex. B.) Mr. Gottstein's December 17 letter made clear that Dr. Egilman had violated CMO-3, and described in detail Mr. Gottstein's collusion in that violation. (*See id.*)

According to Mr. Gottstein, Dr. Egilman contacted him "out of the blue" on November 29, 2006. (*Id.* at 5.) During their discussion, Dr. Egilman informed Mr. Gottstein that he had had access to "secret Eli Lilly documents pertaining to Zyprexa." (*Id.*) Mr. Gottstein told Dr. Egilman he did not have a pending case that would allow him to subpoena the documents, but that he wanted access to the documents. (*Id.*) Mr. Gottstein and Dr. Egilman then agreed that Mr. Gottstein would "undertake a [forced drugging] case" that would "occur very quickly" in order to subpoena the CMO-3 protected documents. (*Id.*) Although Mr. Gottstein then "proceeded to try to find a suitable case in earnest," he was unable to find a forced drugging case, with its quick deadlines. Instead, on December 5, he found a situation where the Alaska Office of Public Advocacy had been granted guardianship rights over a patient (identified as "B.B."), which allowed them to make treatment decisions on behalf of B.B. There is no evidence that B.B. was taking Zyprexa on December 5, or at any time thereafter.

The next morning, on December 6, Mr. Gottstein filed papers to terminate the guardianship of B.B., and asked an Alaska state court to issue a subpoena to Dr. Egilman. *Id.* Mr. Gottstein then sent Dr. Egilman the Alaska state court subpoena, which called for the production of Zyprexa documents on December 20. (*Id.*) Although Dr. Egilman now claims that Mr. Gottstein told him on December 6 that the subpoenaed material “was needed for an emergency hearing,” there is no evidence of any emergency hearing in the B.B. case, and this claim is entirely inconsistent with Mr. Gottstein’s admissions regarding his November 29 discussion with Dr. Egilman. (*Compare* Ltr. from Dr. Egilman to Brewster Jamieson, Esquire (counsel for Lilly in Alaska) (Dec. 15, 2006), attached Ex. C, *with* Ex. B at 5.)

Dr. Egilman did not notify Pepper Hamilton LLP, Lilly’s National Counsel in these cases, of this subpoena but instead sent a fax to the General Counsel of Lilly informing him that the production of documents was to occur on December 20. Despite efforts to delay Lilly’s counsel’s involvement in this issue, Pepper Hamilton spoke with the Lanier Law Firm a full week before the announced production date and received assurances that plaintiff’s counsel had spoken with Dr. Egilman and that no documents would be produced until Lilly’s motion to quash the Alaska subpoena was ruled upon. (Ltr. from Richard Meadow to Andrew Rogoff (Dec. 15, 2006), attached Ex. D).

The parties later learned that Dr. Egilman and Mr. Gottstein had worked in concert to issue a secret “amended” subpoena on December 11, which called for the immediate production of documents. (*See* Ex. B at 6.) There is no evidence that any of the parties in the Alaska case received notice of this amended subpoena. Neither Lilly’s counsel nor The Lanier Law Firm received notice of this amended subpoena.

On December 12, three business days after receiving the original subpoena, and a day after receiving the secret amended subpoena, Dr. Egilman began electronically transferring documents to Mr. Gottstein without the knowledge of Lilly, Pepper Hamilton, or the Lanier Law Firm. (Ex. B at 5-6.) According to Mr. Gottstein, Dr. Egilman continued to transfer documents—even after speaking with Mr. Meadow on December 13, and falsely telling Mr. Meadow that no documents would be produced—until Mr. Gottstein received communication from Lilly’s lawyers on December 15. (*See id.*)

Based on the admissions in Mr. Gottstein’s December 17 letter, and Mr. Gottstein’s continued refusal to comply with Special Master Woodin’s order, further court involvement was necessary. The next day, December 18, the Honorable Roanne L. Mann held a telephonic hearing relating to Mr. Gottstein’s failure to comply with Special Master Woodin’s December 15 order. Mr. Gottstein participated in the hearing. During the hearing, Magistrate Judge Mann made findings relating to Mr. Gottstein, based on admissions in his December 17 letter and his own statements during the hearing:

I think what happened here was an intentional violation of Judge Weinstein’s orders. I think it was inappropriate.

* * *

I personally [as a Magistrate Judge, without authority to grant injunctive relief] am not in a position to order you to return the documents. I can’t make you return them but I can wish you had because I think this is highly improper not only to have obtained the documents on short notice without Lilly being advised of the amendment but then to disseminate them publicly before it could be litigated. It certainly smacks of bad faith.

So this is the extent of what I’m prepared to do is simply state my views on the record and if counsel in the MDL case want to go before a District Court Judge who has more authority – I understand Judge Cogan is on miscellaneous duty today.

(Tr. of Telephone Conf. before the Honorable Roanne L. Mann (Dec. 18, 2006) at 10, attached Ex. E; *see also* Rulings of the Honorable Roanne L. Mann, attached Ex. F (“The Court concludes that the dissemination of the documents to Mr. Gottstein, and his public dissemination of the documents, violated [CMO-3] and that the E.D.N.Y. has jurisdiction to enforce its orders.”))

Shortly thereafter—and again upon the joint application of members of the PSC and Lilly, and after hearing argument from Mr. Gottstein (through his counsel, Mr. McKay)—the Honorable Brian M. Cogan issued an Order for Mandatory Injunction. (Order for Mandatory Injunction of Dec. 18, 2006, attached Ex. G.) The Mandatory Injunction enjoined Mr. Gottstein from further dissemination of the CMO-3 protected Zyprexa documents, enforced Special Master Woodin’s December 15 order requiring Mr. Gottstein to immediately return all such documents to the Special Master, required Mr. Gottstein to immediately identify any person, organization or entity to which he had disseminated the documents, and required the retrieval and return of any and all copies of the disseminated documents, regardless of their current location, including the removal of any such documents posted to any website. (*Id.*) The Mandatory Injunction also included a specific finding by Judge Cogan that Mr. Gottstein had “deliberately and knowingly aided and abetted Dr. David Egilman’s breach of CMO-3.” (*Id.*)

This Mandatory Injunction was not entered lightly, and, as the Court made clear, the findings by the Court were made “exclusively” on the admissions made by Mr. Gottstein in his December 17 letter contesting Special Master Peter Woodin’s authority in this case:

I think it’s clear not only that the facts are as stated in the Magistrate’s report and recommendation, but I can tell from the December 17th draft letter from Mr. Gottstein that he was aware that these documents were restricted, and that he undertook procedures to help the expert, Dr. Egilman, try to circumvent the restrictions that were on him. He deliberately aided and abetted Dr. Egilman in getting these documents released from the restriction that they were under, under the protective order. He

knew what he was doing, and he did it deliberately. Those are my findings, and it's on that basis that I grant the relief.

* * *

I will say any findings I have made have been made exclusively on the basis of [Mr. Gottstein's December 17 letter]. That's the only evidence I have in front of me.

(Tr. of Phone Conf. before the Honorable Brian M. Cogan (Dec. 18, 2006) at 19–20, 22, attached Ex. H.)

In connection with Mr. Gottstein's compliance with this Mandatory Injunction, the parties learned that as soon as Mr. Gottstein received these documents, he began creating DVD copies. On December 12 and 13, Mr. Gottstein sent DVDs to fifteen individuals, including all of the individuals specifically named in the Order for Temporary Mandatory Injunction, dated December 29, 2006, entered by the Honorable Brian M. Cogan. (Email from John McKay to Special Master Woodin (Dec, 22, 2006), attached Ex. I.) Mr. Gottstein understood that these individuals, with whom he was affiliated, would assist in disseminating the improperly obtained CMO-3 protected documents more broadly.

After the December 18 hearing, Mr. Gottstein put the recipients of his DVDs on notice that Judge Cogan had concluded that the documents were improperly disseminated in violation of CMO-3. (*See, e.g.*, Email from James Gottstein to Judi Chamberlain (Board Member of MFI), email from James Gottstein to Vera Sharav (President and Founder of the Alliance for Human Research Protection), attached Ex. J.). Mr. Gottstein specifically informed these individuals that there was a Court Order requiring the return the DVD that he had sent to them and that the Order required the return of all physical and electronic copies of the documents. (*Id.*) Mr. Gottstein further specifically informed these individuals that the Order required the removal of any copies of these documents from their computers "or any other computer equipment, or in any other format, website(s), or FTP site(s), or otherwise on the

Internet.” (*Id.*) After providing this information, Mr. Gottstein then questioned the validity of the Order, said that he strenuously disagreed with it, and thereby implied that the recipients of the emails did not need to comply with the Court’s order. (*Id.* (“A copy of the proposed written order is posted at <http://psychrights.org/States/Alaska/CaseXX/EliLilly/ProposedOrder.pdf> with a comment about certain language which I strenuously disagree with and we are trying to get eliminated from the signed order. . . .There is a question in my mind that the court actually has jurisdiction over me to issue the order.”).)

When the parties presented to Judge Cogan the substance of these emails, as well as Lilly’s concerns about the mixed messages being sent to the recipients regarding their need to comply with the Mandatory Injunction—during a hearing on December 20, 2006 relating to Mr. Gottstein’s failure to comply with other aspects of the December 18 Mandatory Injunction— Judge Cogan noted:

It seems clear from the way that you have described the emails going out that he has at least directed the people to comply, and I think what you’re suggesting is that he’s done it in a kind of backhanded way, which might dissuade them from actually complying

* * *

Okay. It does seem to me, Mr. McKay, that at the very least, there was no need for him to assert his position to third parties, and it may have been ill-advised for him to do so.

(Tr. of Phone Conf. before the Honorable Brian M. Cogan (Dec. 20, 2006) at 23–24, 28, attached Ex. K.) Judge Cogan also specifically reaffirmed the Court’s jurisdiction over Mr. Gottstein. (*Id.* at 24-25.)

On December 21, 2006, Mr. Gottstein told Special Master Woodin that he had informed everyone to whom he had given copies of the unlawfully obtained documents to return those documents to the Special Master and to ensure that they retained no additional copies of

those documents. (James Gottstein Certification (Dec. 21, 2006) at 2–3, attached Ex. L.) The next day, Mr. Gottstein’s counsel informed Special Master Woodin that none of the recipients of the unlawfully obtained documents had refused to return the documents. (Ex. I.)

Since Mr. Gottstein’s notice of the Mandatory Injunction, certain recipients have returned the documents improperly disseminated by Mr. Gottstein. On December 21, 2006, Congressman Henry A. Waxman, then Ranking Member of the Committee on Government Reform and now Chairman of that Committee, returned the documents that Mr. Gottstein sent to Mr. Cha (of the House Committee on Government Reform), “out of a sense of comity and respect for a coordinate branch of the federal government.” (Ltr. from Congressman Henry A. Waxman to Special Master Woodin (Dec. 21, 2006) attached Ex. M.) Similarly, on December 20, Dr. Grace Jackson returned the DVDs that Mr. Gottstein had shipped to her. Mr. Gottstein also certified that he personally retrieved the DVDs that he gave to Terri Gottstein and Jerry Winchester.

By contrast, Judi Chamberlain, a member of the Board of Directors for MFI did not return the unlawfully obtained Zyprexa documents. MFI is an organization of Affiliates (other organizations that use the MFI name) and Sponsors (organizations with their own name) who share a common goal relating to pharmaceutical use in the mental health system. Sponsors and Affiliates form a “Support Coalition” for MFI. A Sponsor is an already existing organization that has joined this coalition. Mr. Gottstein’s organization, PsychRights, is a Sponsor of MFI. Mr. Gottstein is also the President of the National Association of Rights Protection and Advocacy (“NARPA”), a founding Sponsor Group of MFI. Freedom Center, founded by Will Hall (Ex. L), is also a Sponsor of MFI. *See* MindFreedom.org, Public List – MFI Sponsor & Affilliate, <http://www.mindfreedom.org/affspo/mfi-sponsor-affiliate-public-list/>

(last visited Jan. 7, 2007). Mr. Gottstein is displayed prominently in the “We are MFI” segment of the MFI website. (Screen shot of www.mindfreedom.org. (Jan. 7, 2007), attached Ex. N.)

On December 25, 2006, the Director of MFI, David Oaks, sent out an email alert to several thousand people. (Email alert (Dec. 25, 2006), attached Ex. O.) In the alert, Mr. Oaks proclaimed, “We are all Jim [Gottstein]!” and went on to inform the recipients of the alert about a “grassroots Internet campaign” to disseminate the unlawfully obtained Zyprexa documents. (*Id.*) Mr. Oaks said that this campaign was distributing an “unusual Christmas Gift” and “counting on the fact that many courts are closed today.” (*Id.*) The alert provided a link to the www.mindfreedom.org website where the recipients could link to a free-file sharing website and download the unlawfully obtained Zyprexa documents. By midnight on December 25, Mr. Oaks was warning people that Mr. Gottstein had to “save any relevant emails he receives (or sends) on the matter of the suppressed and released Zyprexa documents.” (*Id.*) Another MFI member, Eric Whalen, stored the unlawfully obtained Zyprexa documents on his website server, and made these documents available for download for a short time at www.joysoup.net. David Oaks added this URL to the MFI website. (*See* Message Bd. Posting by David Oaks (Dec. 25, 2006), attached Ex. P.; *see* also Update 11, MFI Webpage, attached Ex. Q.)

Mr. Oaks also is involved with another website, zyprexa.pbwiki.com. This website is used to “anonymously” post information about the location of the unlawfully obtained Zyprexa documents, but there is nothing anonymous about Mr. Oaks’s involvement. (*See* Message Bd. Posting by David Oaks (Dec. 30, 2006), attached Ex. R (Mr. Oaks asks: “The big question I have though . . . is can people still get the documents [through the TOR network] . . . but how to let anyone know it still works without disclosing identity? via the wiki?))

Vera Sharav, the President and Founder of the Alliance for Human Research Protection (“AHRP”), and two AHRP Board Members—David Cohen and Stefan Kruszewski—also did not return the unlawfully obtained Zyprexa documents. The AHRP websites (www.ahrp.org and www.ahrp.blogspot.com) have provided links to the unlawfully obtained Zyprexa documents. (See Blog Posting of Vera Sharav (Dec. 29, 2006), attached Ex. S (announcing the receipt of Temporary Mandatory Injunction: “Something is warped in this picture. The court is helping Lilly intimidate public advocates by issuing Temporary Mandatory Injunctions. See the court injunction several of us received below. But the internet is an uncontrolled information highway --you never know where or when the court suppressed documents may surface! The documents appear to be downloadable at <http://files-upload.com/files/34070/ZyprexaKills.tar.gz.html> at least as of now. It also appears to be at <http://joysoup.net/archives/06/12/23/08052.html>)).

On December 29, 2006, Lilly first saw evidence of the beginnings of the “grassroots Internet campaign” referenced and coordinated by Mr. Oaks, and joined with members of the PSC to stop it. Within an hour of this information being known members of the PSC and Lilly sought a Temporary Mandatory Injunction directed to certain individuals, entities, and organizations (and any related individuals, entities or organizations) who had unlawfully received documents produced by Lilly. This Temporary Mandatory Injunction was entered by the Judge Cogan on December 29, 2006. The Temporary Mandatory Injunction enjoined further dissemination of the unlawfully obtained Zyprexa documents by those covered by the Temporary Mandatory Injunction, required the removal of any such documents posted at any website, and required communication of the Temporary Mandatory Injunction to anyone to whom these documents had been disseminated.

Despite a concerted effort by a small group of individuals to further abuse Dr. Egilman and Mr. Gottstein's violation of CMO-3, this effort fell flat, as confirmed by Mr. Oaks in a web posting on December 30, 2006:

Someone said that they thought the tor download link on [Zyprexa.pbwiki.com] was working it is not as of now . . . it goes nowhere. So its apparently conclusive: I know of no source for anyone to download these documents at this time. If someone does know, they may want to edit the wiki to reflect that . . .

(Message Bd. Posting by David Oaks (Dec. 30, 2006), attached Ex. T.)

With the Temporary Mandatory Injunction set to expire on January 3, 2007, this Court, upon notice to all enjoined parties, held a hearing "to determine whether the order signed by Judge Cogan on December 29, 2006 . . . should be extended, modified, or limited in any way." (Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 3, 2006) at 4–5, attached Ex. U.) At that hearing, counsel for MFI, Ted Chabasinski, asked this Court for an extension of time—"[a] date as far in advance as possible"—to prepare an argument. (*Id.* at 15.) Upon consent of parties present, including MFI, Judi Chamberlin, and James and Terrie Gottstein, this Court extended the Temporary Mandatory Injunction until the conclusion of the hearing set for January 16, 2007. (*Id.* at 16.)

This Court not only extended the duration of the Temporary Mandatory Injunction but also extended its scope to address the persistent efforts to evade the effect of the Court's orders. This modification of the injunction's terms was the subject of explicit discussion by the parties (including MFI) and the Court at the January 3 hearing. In particular, Lilly notified the Court that certain persons and organizations named in the Temporary Mandatory Injunction, were "currently . . . still providing, despite the order on the 29th, still providing information, links and such, to what they believe to be the documents." (*Id.* at 18.) Accordingly,

Lilly asked for “clarification” that such actions violated the Temporary Mandatory Injunction. (*Id.*) In response, MFI argued that it “[did] not have any way to disseminate” the documents. (*Id.*) The Court replied: “Then there is no objection to expanding the order to that extent.” (*Id.*) Accordingly, the Court ordered Lilly to “provide that” in the Draft Form of Order “and we’ll expand the order.” (*Id.*) During the hearing, the Court reaffirmed that the Temporary Mandatory Injunction remained in effect against all persons named in the December 29 Temporary Mandatory Injunction, as well as those added during the hearing on January 3, 2007. (*Id.* 28–29.)

Despite the fact that MFI and the Court had expressly debated the modification of the Temporary Mandatory Injunction at the January 3 hearing, the following day MFI and Judi Chamberlin sent a letter to the Court accusing this Court and Lilly’s Lawyer of *ex parte* communications leading to the entry of the extended Temporary Mandatory Injunction. (*See* Movants’ Letter at 1-2.) On the same date, MFI modified its webpage to accuse Lilly’s lawyer of “slipp[ing] new addition wording in [to the Temporary Mandatory Injunction], apparently without [the Court’s] full knowledge or consent.” (Update 20, MFI webpage, Attached Ex. V.)

JURISDICTION AND AUTHORITY TO PROTECT THE INTEGRITY OF THE COURT’S PROCESSES

The recent filings from Movants and EFF seeking rehearing do not contest the fact that this Court has personal and subject matter jurisdiction over their motion for rehearing and any related injunctions. Nor could they. This Court has personal jurisdiction over the parties and ample authority to protect its ongoing judicial proceedings while preventing efforts to circumvent its orders.

A. This Court Has Personal Jurisdiction.

This Court has obtained personal jurisdiction over Dr. Egilman, Mr. Gottstein, and every other person, entity, and organization named in its Orders of December 15, December 18, December 29, and January 3. The mandate of a protective order, like the mandate of an injunction, issued by a federal court runs nationwide and binds those persons subject to that order wherever they may be found in the United States. *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 then work through or enlist others to affect the 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”).¹ When nonparties work in concert with parties to violate the order of a court, those nonparties subject themselves to 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.” *Waffenschmidt* 763 F.2d at 717; *see also Estate of Greene v. Glucksman*, No. 86 Civ. 9184, 1987 WL 17994 at *1 (S.D.N.Y. Apr. 1, 1987) (“[A] court may enforce a restraining order against a non-party who otherwise would not

¹ 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 MFI or other activists may have been “independently motivated” by their “political, social and moral positions” on antipsychotic medications is of no matter. *See id.*

be subject to that court's jurisdiction, if, with actual notice of the court's order, the non-party actively aids and abets a party in violating that order").

Here, it cannot be contested that this Court had jurisdiction over Dr. Egilman by virtue of his signed Endorsement of CMO-3, agreeing to be subject to this Court's jurisdiction. As this Court has previously concluded, Dr. Egilman and Mr. Gottstein then entered into an arrangement whereby "Mr. Gottstein . . . deliberately and knowingly aided and abetted [Dr. Egilman's] breach of CMO-3." (Ex. G.) The persons, entities, and organizations named in this Court's Temporary Mandatory Injunctions of December 29 and January 3 worked in concert with Mr. Gottstein to violate this Court's orders. All of the enjoined parties 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* Ex. I at 3–4.) As discussed above, since that time, MFI has repeatedly attempted to evade this Court's orders by, among other things, (1) deliberately attempting dissemination on days when the Court was closed (*see* Ex. O); (2) cautioning people working in concert with MFI not to send emails documenting their efforts to Mr. Gottstein because his email could be provided to the Court (*see id.*); (3) seeking to transfer the documents to the website now represented by EFF to hide MFI's involvement in the dissemination (*see* Ex. R); and (4) demeaning and questioning this Court's orders to MFI's supporters in an attempt to persuade them to disobey the Court (*see* Ex. J). Thus, the parties have worked in concert to violate several of this Court's orders and, through their actions, have subjected themselves to the jurisdiction of this Court.

Moreover, MFI, Judi Chamberlin, 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). MFI and Judi Chamberlin have already made an appearance before, and submitted pleadings to, this Court. EFF has moved to intervene in the case. At no point have MFI, Chamberlin, or EFF contested personal jurisdiction. These parties have, therefore, waived any argument that this Court lacks personal jurisdiction over them.

B. This Court Has Power To Enforce Its Orders and Protect the Judicial Process.

Similarly, Movants and EFF do not and cannot contest this Court’s authority to protect ongoing judicial proceedings and to prevent efforts to circumvent or “end-run” its orders. A federal court that has entered a decree within its jurisdiction has inherent authority to enter an injunctive order designed to effectuate that decree. *See, e.g., Wards Co. v. Jonnet Dev. Corp. (In re Lafayette Radio Elecs.)*, 761 F.2d 84, 92 (2d Cir. 1985) (“[A] federal court sitting in equity that has jurisdiction to issue a decree necessarily has ancillary and supplemental jurisdiction to enter orders and judgments designed to effectuate that decree.”). Moreover, “the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the [ordering] court.” *In re Debbs*, 158 U.S. 564, 594–95 (1895); *see also Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452 (1932) (“Disobedience [of a court order] constituted contempt of the court which rendered the decree, and was none the less contempt because the act was committed outside the district, as the contempt lay in the fact, not in the place, of the disobedience to the requirement.”); *Waffenschmidt*, 763 F.2d at 716 (“Enforcement of an injunction through a contempt proceeding must occur in the issuing jurisdiction because contempt is an affront to the court issuing the order.”).

It cannot be contested that this Court was within its jurisdiction to enter CMO-3’s protective order. Accordingly, this Court has inherent authority to give effect to that order

through injunctive relief against those who would violate it. Moreover, this Court has jurisdiction to conduct contempt proceedings to either enforce its orders or punish their violations.

C. This Court Has Authority To Modify the Terms and Extend the Duration of the December 29 Injunction.

Ex parte temporary restraining orders, such as the Court's December 29 Order must comply with Fed. R. Civ. P. 65(b). The procedural safeguards in Rule 65(b) are designed to "assure the restrained party some measure of protection in lieu of receiving formal notice and the opportunity to participate in a hearing." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2951 (2d ed. 1995). But, in instances where the opposing party participates in a hearing, as MFI did on January 3, such safeguards are not necessary and the procedure is functionally the same as that on an application for a preliminary injunction. (*Id.*) Moreover, when the opposing party participates in a hearing on the injunction, the Court is not bound by Rule 65(b)'s proscription against injunctions in excess of ten days. (*Id.*)

Courts in this Circuit have held that the standards for granting a temporary restraining order and a preliminary injunction are identical. *See, e.g., Spencer Trask Software and Information Servs., LLC v. RPost Intern. Ltd.*, 190 F. Supp. 2d 577, 580 (S.D.N.Y. 2002). An applicant for a preliminary injunction preserving the status quo must establish (1) that, absent injunctive relief, it will suffer irreparable harm, and (2) either (a) that it is likely to succeed on the merits, or (b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation, and that the balance of hardships tips decidedly in favor of the moving party. *N. Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38, 43 (2d Cir. 1999). Courts have applied heightened standards of varying degree in cases in which the injunction is designed to

modify the status quo. See *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025-26 (2d Cir. 1985), *overruled on other grounds*, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). It is unnecessary, however, to apply a heightened standard in this case because those portions of the injunction requiring affirmative action merely serve to reinforce the injunction's negative provisions (maintaining the status quo).

Demonstrating irreparable harm "is the single most important prerequisite for the issuance of a preliminary injunction." *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990) (internal quotations and citations omitted). An irreparable harm is an injury that is actual and imminent, as opposed to remote and speculative, and so serious that it cannot later be fully remedied by a monetary award. *Id.* It is well settled law that the harm caused by loss of trade secrets cannot be measured in monetary damages. *N. Atlantic Instruments, Inc.*, 188 F.3d at 49 (quoting *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir. 1984)). The materials at issue here are subject to a valid protective order under Rule 26(c)(7) for trade secrets and other confidential information, and thus irreparable harm will result in the absence of an injunction.

Likelihood of success on the merits does not require that the party demonstrate that success is an absolute certainty; rather the party need only show that the probability of its prevailing is greater than fifty percent. *Abdul Wali*, 754 F.2d at 1025. As the foregoing factual background indicates, and as highlighted by the statements and orders of Special Master Woodin, Judge Mann, and Judge Cogan, it is probable that Lilly will be successful in establishing violations of this Court's orders and the necessity of the return of all illegally obtained documents.

Moreover, MFI's counsel has acknowledged that there are sufficiently serious questions going to the merits to make them a fair ground for litigation. (*See* Ex. U at 15 (Mr. Ted Chabasinski, noting that he would prefer that the hearing take place "as far in advance as possible," so that he might better prepare his arguments).) Thus, Lilly is entitled to the injunction for an additional reason: There are acknowledged sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships rests solely on Lilly.

LEGAL STANDARDS ON A MOTION FOR RE-ARGUMENT BASED ON CLAIMED DEPRIVATION OF DUE PROCESS

Movants request re-argument based on a claim that this Court has denied them due process. (Movants' Letter at 1.)

A. Motions for Re-argument Are Subject to a High Standard and Are Rarely Granted.

The standard for granting a motion for reconsideration or re-argument pursuant to either Fed. R. Civ. P. 59(e) or Local Civ. Rule 6.3 is strict and reconsideration is generally denied. *Shrader v. CSX Trans., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *Hershaft v. New York City Campaign Fin. Bd.*, 139 F. Supp. 2d 282, 283 (E.D.N.Y. 2001). Reconsideration or re-argument may be appropriate only in two unusual circumstances. First, reconsideration or re-argument may be appropriate when the moving party can demonstrate that the court overlooked "controlling decisions or factual matters that were put before it on the underlying motion . . . and which, had they been considered, might have reasonably altered the result before the court." *Hershaft*, 139 F. Supp. 2d at 283-84 (internal quotations and citations omitted). Second, reconsideration or re-argument may be appropriate when necessary "to correct a clear error or prevent manifest injustice." *Id.* at 284.

This extraordinarily narrow standard preserves the resources of the parties and the court by discouraging the natural inclination of non-prevailing parties to assert that the court has failed to adequately consider the issues. *Range Road Music, Inc. v. Music Sales Corp.*, 90 F. Supp. 2d 390, 391–92 (S.D.N.Y. 2000). This high standard also “prevents the practice of a losing party examining a decision and then plugging the gaps of the lost motion with additional matters.” *Hershaft*, 139 F. Supp. 2d at 284 (internal quotations and citations omitted).

B. Due Process Does Not Require Endless Proceedings on Each Issue.

The procedural requirements mandated by the Due Process Clause are “minimal.” *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Martin v. Shawano-Gresham School Dist.*, 295 F.3d 701, 707 (7th Cir. 2002); *Locurto v. Safir*, 264 F.3d 154, 173 (2d Cir. 2001). “The Constitution requires due process of law; it does not require an endless number of opportunities for one to assert his rights.” *Silas v. Babbitt*, 96 F.3d 355, 358 (9th Cir. 1996); *see Goldberg*, 397 U.S. at 267 n.14 (“Due process does not, of course, require two hearings.”); 16B Am. Jur. 2D *Constitutional Law* § 917 (2006) (“Rehearings . . . are not essential to due process of law . . .”).

All that due process requires is notice and an opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 548 (1985) (the right to a hearing is satisfied when a party is given the “opportunity to respond”); *Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458, 466-67 (2d Cir. 2006) (“[T]he record suggests that this hearing afforded [appellant] notice and an opportunity to be heard; indeed, [appellant’s] attorney appeared at the hearing and voiced her position. Case law in analogous contexts suggests that such a hearing meets the essential requirements of due process.”); *Locurto*, 264 F.3d at 171.

Indeed, when a proceeding will be followed by more extensive proceedings, the due process threshold is even lower. *See Loudermill*, 470 U.S. at 545; *Smutka v. City of Hutchinson*, 451 F.3d 522, 527-28 (8th Cir. 2006); *Locurto*, 264 F.3d at 171 (2d Cir. 2001).

ARGUMENT

A. The Motion for Re-Argument Should Be Denied Because the Court Has Already Had a Full Hearing on the Issues and There Have Been No Relevant Ex Parte Communications.

In their letter to the Court, Movants acknowledge that the Court has already provided them with notice and opportunity to be heard on the Court's order extending the Temporary Mandatory Injunction order to January 16, 2007. (*See* Movants' Letter at 1.) In fact, Movants admit that the Court extended the Temporary Mandatory Injunction as a courtesy to them "in order to allow [their counsel] sufficient time to present arguments." (*Id.*) But, Movants now claim that they did not realize that the Court might modify the Temporary Mandatory Injunction to make its terms effective at accomplishing the Court's intended purpose during the extra days that Movants requested before a final hearing on the merits. (*See id.*) With their effort to end-run the purpose of the Court's Temporary Mandatory Injunction stymied, Movants now claim that this Court has denied them due process. It is on this basis—denial of due process—that Movants have requested re-argument. (*See id.* ("Due process would require that there should have been notice and an opportunity to be heard about this [modification of the Temporary Mandatory Injunction's terms]. I object to any ex parte communication the Lilly lawyers may have had with you. This is not a change which should have been granted ex parte."))

Movants' claim that this Court has denied them due process is wrong. The January 3 hearing fully complied with the minimal notice and hearing requirements necessary for due process. As an initial matter, Movants have no basis for challenging the notice provided by

the Court of the January 3 hearing. The Court contacted all parties subject to the Temporary Mandatory Injunction in advance of the hearing, and the Movants acknowledged on the record that they received such notice. Indeed, Movants stated that they had “no problem” with the notice they had received. (Ex. U at 4 (“MR. CHABASINSKI: . . . I was made aware of it by your staff. Unless there was some information other than the fact that you set the actual hearing, I have no problem with it.”).)

Moreover, Movants’ suggestion that they were not afforded an adequate opportunity to be heard is wholly inconsistent with the record of the January 3 proceeding. The continuance of the Temporary Mandatory Injunction until January 16 came, not at the request of Lilly, but rather at the request of the Movants. The January 3 Order in no way alters the scope of the December 29 Temporary Mandatory Injunction or imposes any new burdens on Movants’ First Amendment rights. Rather, the January 3 Order merely preserves the status quo until a full and fair hearing on Movants’ purported First Amendment claims is held on January 16.

Contrary to Movants’ accusation, this Court and the parties explicitly and repeatedly addressed the issue of modifying the temporary injunction in the hearing on January 3, and Movants’ counsel had every opportunity to respond to the issues during the hearing. *See Rivera-Powell*, 470 F.3d at 466–67 (“[T]he record suggests that this hearing afforded [appellant] notice and an opportunity to be heard; indeed, [appellant’s] attorney appeared at the hearing and voiced her position.”). In fact, this Court’s January 3 Order was dictated on the record. On multiple occasions Lilly alerted the Court that some of the enjoined parties, despite the injunction, were “providing information about where these documents may be found” through “links and such.” (Ex. U at 7, 18.) Lilly expressly asked that the Court clarify that such actions violated the injunction. (*Id.* at 18.) MFI argued that it “[did] not have any way to disseminate”

the documents. (*Id.*) The Court replied: “Then there is no objection to expanding the order to that extent.” (*Id.*) Accordingly, the Court ordered Lilly to “provide that” in the Draft Form of Order “and we’ll expand the order.” (*Id.*)

Finally, contrary to Movants’ accusation, counsel for Eli Lilly has not had any *ex parte* communications with the Court seeking to implement the Temporary Mandatory Injunction modifications about which Movants complain. These baseless allegations demean the courteous and open process that this Court has provided for those who have been engaged in a concerted effort to sidestep this Court’s orders.

Thus, as the record clearly reflects, the parties and the Court fully discussed the terms of the Order entered on January 3, and due process does not require the Court and the parties to retread this ground before the agreed-upon January 16 hearing. *See Silas v. Babbitt*, 96 F.3d 355, 358 (9th Cir. 1996) (“The Constitution requires due process of law; it does not require an endless number of opportunities for one to assert his rights.”).

B. Movants’ Baseless First Amendment Arguments Are Not Before the Court but Are Scheduled To Be Heard on January 16.

It is important to note what is not before the Court. Movants have *not* requested an immediate hearing on the claim that they have a First Amendment right to knowingly violate this Court’s orders by receiving and disseminating confidential documents. Movants have petitioned for rehearing of the Court’s injunction covering the time period between now and the hearing on January 16. (*See* Movants’ Letter at 1.) The sole basis for that claim is an assertion that the Court did not give the parties an opportunity to discuss any changes to the injunction. (*Id.* at 2.) As discussed above, that due process claim is without merit.

To buttress the motion for rehearing, Movants and EFF make passing reference to their First Amendment arguments. But the merits of any alleged violation of Movants’ (or other

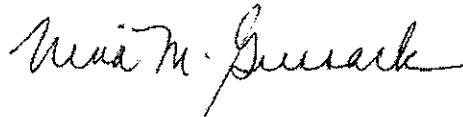
intervenor’) First Amendment rights have been properly scheduled for argument on January 16. Indeed, as Movants admit in their letter, the Court scheduled those arguments for January 16 at Movants’ request “in order to allow [Movants’ counsel] sufficient time to present arguments.” (*Id.* at 1.) Accordingly, it is to be expected that the parties are not fully prepared to argue Movants’ First Amendment allegations at the present time.

Nevertheless, because Movants attempt to brace their frail due process argument by insinuating a constitutional problem, it should be briefly noted that Movants’ First Amendment argument has been soundly and repeatedly rejected by the Supreme Court. *See, e.g., Seattle Times, Co. v. Rhinehart*, 467 U.S. 20, 31–37 (1984). Movants claim that they have a First Amendment right to obtain and distribute documents regardless of whether those actions are a knowing violation of this Court’s orders. In contrast, the Supreme Court has held that the First Amendment does not grant a license to violate legal restrictions in order to receive and publish information. Rather, “the truthful information sought to be published must have been lawfully acquired.” *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991); *see also Seattle Times, Co.*, 467 U.S. at 37. Just as “[t]he press may not with impunity break and enter an office or dwelling to gather news,” *id.*, Movants may not violate this Court’s carefully crafted protective orders to gather documents. In fact, the Supreme Court has specifically held that protective orders issued for good cause do not offend the First Amendment, even where a litigant seeks to publish fruits of discovery. *Seattle Times, Co.*, 467 U.S. at 31-37; *see also 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 holding is supported by several considerations, including the fact that there is no First Amendment right to access documents in discovery and the federal 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, Co.*, 467 U.S. at 31-37.

Movants acquired Lilly's confidential documents illegally as part of an intentional effort to evade this Court's requirements. Stated simply, Movants "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).

Respectfully submitted,



Nina M. Gussack
Sean 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 8, 2007

Counsel for Defendant, Eli Lilly and Company