Jon S. Dawson
Eric Jenkins
Davis Wright Tremaine LLP
701 W. 8th Avenue, Suite 800
Anchorage, Alaska 99501
(907) 257-5300

Attorneys for Bloomberg LLC
d/b/a Bloomberg News

FILED
STATE OF ALASKA
APPELLATE COURTS
2010 JUN 23 P 1:24
CLERK, APPELLATE COURTS
BY: _____ DEPUTY CLERK

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ELI LILLY AND COMPANY, Appellant. vs. BLOOMBERG LLC d/b/a BLOOMBERG NEWS and STATE OF ALASKA, Appellees.	Supreme Court No. S-13152 Trial Court No. 3AN-06-05630 Civ

OPPOSITION TO ELI LILLY'S EMERGENCY MOTION FOR STAY AND FOR ORDER PROHIBITING PUBLICATION OR DISSEMINATION OF DOCUMENTS PENDING APPEAL

I. INTRODUCTION

The case before this Court involves the attempt of a multi-national pharmaceutical manufacturer to keep from public view judicial documents that relate to past and potential harm arising from the use of its "Zyprexa" anti-depressant drug. Several states' Attorneys General, including in this matter Alaska, brought suit alleging that Eli Lilly

Davis Wright Tremaine LLP
LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

and Company ("Eli Lilly") did not properly disclose those harms to states that paid hundreds of millions of dollars in Medicaid for these prescriptions. The State of Alaska and Lilly settled for $15 million. Although the settlement may have addressed the State's financial interest, there has been no vindication of the public's need to know about this drug, the way it was tested, or what Lilly told or has not told the medical community. Those facts remain secret because of Lilly's insistence that its public relations interests outweigh the citizens' right to inspect public documents. This cannot be tolerated.

On June 18, 2008, after having twice permitted Eli Lilly to brief the merits of the public's right of access to the files of this case, Judge Rindner issued a carefully considered 26 page order unsealing a number of documents in the trial court file. Throughout his decision, Judge Rindner noted that Eli Lilly relied upon unsupported and conclusory statements of harm. Although Eli Lilly sought to stay that decision while it prepared a possible motion for reconsideration, that motion was denied. Bloomberg's counsel thereafter made copies of the subject documents and transmitted them by national courier service to Bloomberg. This Court's Order temporarily staying the trial court's decision came after close of business and was not seen by Bloomberg's counsel until after the documents were already en route to Bloomberg. However, Bloomberg was informed of this Court's Order before Bloomberg published any report based on the documents and has refrained from publishing any such report pending the Court's decision on Eli Lilly's motion.

Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

Having failed to make the requisite showing in the trial court, Eli Lilly now asks this Court to stay the trial court's decision in a matter that is of paramount concern to the public while Eli Lilly appeals the trial court's decision to this Court. Eli Lilly's motion must be denied for three independent reasons:

First, Eli Lilly does not meet – or even attempt to meet – the standard for obtaining a stay pending appeal. It makes no effort to show a likelihood of success on the merits, fails to discuss the harm to Bloomberg, and does not address the public interest in viewing the documents at issue;

Second, to the extent that Eli Lilly raises the brand-new argument that "comity" should prompt this Court to simply defer to a federal court in Brooklyn, New York, that argument was not raised below, is unsupported by citations to any authority, and is not a proper consideration in determining the public's right of access to the files of an Alaska court case; and

Third, while Bloomberg intends to await this Court's decision on this motion prior to publishing any articles based on documents it has obtained, the order Eli Lilly seeks prohibiting publication based on documents lawfully obtained from the trial court's files would constitute a prior restraint on free speech that is barred by the First Amendment.

There can be little doubt that Eli Lilly's motive in seeking a stay pending appeal is to delay the inevitable release of judicial documents in the hope that time will erode the news value and public importance of this information. This Court is not charged with the

Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

task of helping Eli Lilly deal with its public relations problems. Eli Lilly has not met its burden to obtain a stay pending appeal, and its motion should be denied.

II. BACKGROUND

On July 30, 2007, the trial court entered a blanket protective order under Alaska R. Civ. P. 26(c)(7), that permitted the parties to unilaterally designate various documents as confidential and file them with the Court under seal. As is typical of such orders, it did not require that the Court make any findings that good cause exists for preserving the confidentiality of individual documents filed under seal, but merely provided that such documents would be "kept under seal until further order of the Court." See Order Granting Bloomberg's Motion to Unseal records at p.2.

On March 7, 2008, Bloomberg moved to intervene in the case to assert the public's right of access to various documents that were filed under seal by the parties. Exhibit 1 hereto. Eli Lilly filed an opposition to that motion on March 20, 2008. Exhibit 2 hereto. Shortly thereafter, the underlying case settled. The Court subsequently permitted Eli Lilly to file a Supplemental Opposition to Bloomberg's motion to unseal documents in which Eli Lilly could further articulate why the Court should continue to deny the public access to the court's files.

Eli Lilly filed its Supplemental Opposition on April 25, 2008. Exhibit 3 hereto. In opposing Bloomberg's motion, Eli Lilly offered only conclusory assertions that it would be put at a "competitive disadvantage" by disclosure of the documents at issue. Those

Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

assertions were based in large part on an affidavit filed in another case that did not even relate to the particular documents at issue in Bloomberg's motion.

The trial court correctly found that Eli Lilly had failed to identify any specific harm that would result from disclosure. In his Order Granting Bloomberg's Motion to Unseal Records, Judge Rindner repeatedly noted that Eli Lilly rested its opposition upon conclusory statements of harm, or upon affidavits that failed to address the specific documents that Bloomberg sought to unseal. See Order Granting Bloomberg's Motion to Unseal Records attached hereto as Exhibit 4 at p.13 ("Lilly supports these claims through conclusory statements lacking factual support"); p. 14 ("the conclusory statement that . . . 'competitors could use this information to Lilly's competitive disadvantage' with no supporting facts or affidavits is inadequate to show good cause"); p.16 ("Lilly has failed to show how disclosure of Plaintiff's Ex. No. 10106 will harm Lilly"); p.18 ("[t]he Hoffman declaration does not discuss the Neosges deposition . . . [and] Lilly fails to illustrate, with any specificity, how Lilly competitors would use this information to harm Lilly"); p. 18 ("Lilly does not indicate the nature of alleged trade secrets or confidential business information and merely makes a conclusory statement that the information, if released, could be used by Lilly competitors to Lilly's disadvantage . . ."); p. 19 ("Lilly's reliance on general conclusory declarations which do not discuss the pleadings at issue is inadequate to show good cause"); p. 20 ("Lilly claims that the FDA must assert the documents confidentiality . . . [but] Lilly presents no law in support of this claim"); p. 25

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

("Lilly cites the Hoffman declaration's general discussion regarding competitive intelligence . . . [but] Lilly fails to present facts that support its contention that disclosure of these call notes will cause harm"); p. 26 ("Lilly offers no basis beyond general reference to the Franson declaration for why these communications must remain confidential").

Following issuance of Judge Rindner's Order, Eli Lilly moved for a stay of the trial court's decision in order to file a motion for reconsideration. See Exhibit 5 hereto. Bloomberg opposed Eli Lilly's motion for a stay, noting that Eli Lilly failed to properly support its arguments with admissible evidence, and that motions for reconsideration exist to remedy mistakes in judicial decision-making, not to permit parties to supplement prior deficient pleadings. Exhibit 6 hereto. Judge Rindner subsequently issued an order denying Eli Lilly's motion for a stay, and made the documents available to the public. See Exhibit 7 hereto.

After the trial court issued its order, counsel for Bloomberg inspected and copied the records at issue, and sent them via DHL to Bloomberg on the afternoon of June 18, 2008. As stated above, this Court's Order temporarily staying the trial court's decision came after close of business and was not seen by Bloomberg's counsel until after the documents were already en route to Bloomberg. Eli Lilly's motion to stay the trial court's order thus amounts to a request that Bloomberg be prohibited from publishing any news reports based upon records that were lawfully obtained from the Alaska courts.

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

("Lilly cites the Hoffman declaration's general discussion regarding competitive intelligence . . . [but] Lilly fails to present facts that support its contention that disclosure of these call notes will cause harm"); p. 26 ("Lilly offers no basis beyond general reference to the Franson declaration for why these communications must remain confidential").

Following issuance of Judge Rindner's Order, Eli Lilly moved for a stay of the trial court's decision in order to file a motion for reconsideration. See Exhibit 5 hereto. Bloomberg opposed Eli Lilly's motion for a stay, noting that Eli Lilly failed to properly support its arguments with admissible evidence, and that motions for reconsideration exist to remedy mistakes in judicial decision-making, not to permit parties to supplement prior deficient pleadings. Exhibit 6 hereto. Judge Rindner subsequently issued an order denying Eli Lilly's motion for a stay, and made the documents available to the public. See Exhibit 7 hereto.

After the trial court issued its order, counsel for Bloomberg inspected and copied the records at issue, and sent them via DHL to Bloomberg on the afternoon of June 18, 2008. As stated above, this Court's Order temporarily staying the trial court's decision came after close of business and was not seen by Bloomberg's counsel until after the documents were already en route to Bloomberg. Eli Lilly's motion to stay the trial court's order thus amounts to a request that Bloomberg be prohibited from publishing any news reports based upon records that were lawfully obtained from the Alaska courts.

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

III. ARGUMENT

A. Eli Lilly Fails to Address the Standard for Seeking a Stay Pending Appeal, and Has Not Made the Requisite Showing.

In Powell v. City of Anchorage, 536 P.2d 1228, 1229 n.2. (Alaska 1975), the Court adopted a four-part test for determining the propriety of a stay pending appeal in cases involving non-monetary relief. To obtain a stay pending appeal under Powell, the moving party must demonstrate:

(1) the likelihood that the petitioner will prevail on the merits of the appeal,

(2) irreparable injury to the petitioner unless the stay is granted.

(3) no substantial harm to other interested persons; and

(4) no harm to the public interest.

Id.[1]

Eli Lilly's motion for a stay discusses only the theoretical harm that it would allegedly suffer if a stay were to be denied – and then only in a conclusory fashion that is again devoid of supporting facts. Eli Lilly expressly declined to address the merits of its appeal, and did not discuss the harm to either Bloomberg or the public that would result from the continued suppression of important public documents during the pendency of an appeal. Inasmuch as Eli Lilly makes no argument with respect to three of the prerequisites for a stay pending appeal – and because each of the four factors identified in

[1] This is the same test that the U.S. Supreme Court adopted in Hilton v. Braunskill, 481 U.S. 770, 776 (1987), and which is applied in the federal courts. See also Golden Gate Restaurant v. City and County of S.F., 512 F.3d 1112, 1119 (9th Cir. 2008).

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

Powell weighs against the requested stay – Eli Lilly's motion for a stay pending appeal should be denied.

1. Eli Lilly Has Not – and Cannot – Demonstrate Likelihood of Success on the Merits of Its Appeal.

A motion for stay pending appeal requires the moving party to demonstrate a likelihood of success on the merits. Powell, 536 P.2d at 1229. Not only does Eli Lilly fail to make the requisite showing, but it expressly refuses to do so. See Motion for Stay at p.3 ("Lilly will not argue in this motion the substance of why it believes the Superior Court erred in unsealing the documents filed under seal by Lilly below"). Eli Lilly thus asks this Court to stay Judge Rindner's decision without any argument whatsoever as to why Eli Lilly believes that Judge Rindner's carefully crafted 26-page order is subject to reversal on appeal.

Judge Rindner made clear in issuing his order unsealing the documents at issue that Eli Lilly had failed to show good cause for keeping these records from the public. To establish good cause for keeping documents under seal, a party must demonstrate "that (1) the material in question is a trade secret or other confidential information within the scope of Rule 26(c), and (2) disclosure would cause an identifiable, significant harm." Order Granting Bloomberg's Motion to Unseal Records (quoting Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1179 (9th Cir. 2003)). It must make this showing as to each particular document it seeks to keep under seal. Foltz, 331 F.3d at 1130-31.

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

Despite being given two opportunities to do so, Eli Lilly failed to make the requisite showing. As noted by Judge Rindner, Eli Lilly offered nothing more than conclusory statements devoid of factual support, and relied upon an affidavit from another case that did not even discuss the specific documents at issue. See citations to trial court order at page 4 above. Nor could Eli Lilly have used a motion for reconsideration in the trial court to remedy these defects. As Bloomberg pointed out in opposing Eli Lilly's motion for a stay in the trial court, motions for reconsideration cannot "be used as a means to seek an extension of time for the presentation of additional evidence on the merits of the claim." Neal & Co. v. Ass'n of Village Housing, 895 P.2d 497, 506 (Alaska 1995). Eli Lilly failed to establish good cause for keeping the documents at issue under seal, and it cannot establish a likelihood of success on the merits of its appeal.

2. Eli Lilly Fails to Show Irreparable Harm

Eli Lilly contends that a stay pending appeal is necessary because the documents that the Superior Court unsealed "contain proprietary and highly confidential trade secrets of Appellant." Motion for Stay at p.1. Once again Eli Lilly fails to support this conclusory statement with reference to any facts showing either that the documents do in fact qualify as trade secrets under Alaska law, or that their disclosure, particularly in light of the matters discussed at trial, would result in significant harm. Eli Lilly cannot meet is burden of showing irreparable harm simply by asking this Court and the public to trust its

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

assessment of these documents, and the sincerity of its motives.[2] Indeed, Eli Lilly admitted in the trial court that no more than a "discrete subset" of the documents at issue were of sufficient concern to Eli Lilly that it would seek reconsideration of their release to the public. Affidavit of Brewster H. Jamieson Re Expedited Consideration of Motion For Stay attached hereto as Exhibit 6 at para. 2. Eli Lilly has had months since this case settled to identify those few documents it contends are worthy of protection, but instead sought to keep everything off limits to the public by making vague and conclusory allegations of harm.[3] This alone should lead this Court to question the sincerity of Eli Lilly's representations. Eli Lilly has not demonstrated irreparable harm.

3. Continued Delay Destroys the News Value of the Documents.

Not only does Eli Lilly again fail to demonstrate that disclosure of the documents would result in irreparable harm to its interests, but it omits any mention of the impact of a stay on the public's right to know and the press' role in informing the public about public health issues and judicial proceedings. Courts have repeatedly recognized that news is a perishable commodity that declines in value with each passing day. See e.g.,

---

[2] It is worth noting that Lilly's efforts in this regard have also failed in the New York case that Lilly now argues will be corrupted by disclosure of documents here. In that case Lilly asked the court to conduct oral arguments in secret, claiming the same "trade secrets" and "competitive disadvantage" as here. The court denied that motion, and Lilly did not engage in emergency motion practice to reverse that decision. In re Zyprexa Products Liability Litigation, 2008 WL 939204 (E.D.N.Y.) (March 25, 2008).

[3] After a close in camera review, the trial court found that the materials in question did not warrant secrecy. Counsel for Bloomberg has had an opportunity to review the materials, and it is no surprise that these materials do not constitute bona fide trade secrets. In fact, some of the sealed materials include publicly-published trade journal articles from the American Diabetes Association and the American Psychiatric Association, as well as Powerpoint slides of "talking points" that Lilly representatives used to discuss Zyprexa with potential prescribing physicians. The sealed documents even include sections of Lilly's Annual Shareholder Reports – material required under federal law to be made public through the Securities and Exchange Commission. Clearly, Lilly has used oversealing to protect its public relations interests instead of bona fide trade secrets.

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

Nebraska Press Assn. Et. Al. v. Stuart, 427 U.S. 539, 609 (1976) (Brennan J., concurring) ("delay inherent in judicial proceedings could itself destroy the contemporary news value of the information the press seeks to disseminate"); In re Providence Journal, 820 F.2d 1342, 1352-53 (1st Cir. 1986) (noting that the delay inherent in appellate review may cause the restrained information to lose its value); U.S. v. Antar, 38 F.3d 1348, 1362 (3d Cir. 1994) ("the press had a right of access to the information, and as each day passed, the information denied to the press and the public grew increasingly stale").

Public interest in Zyprexa is currently at its height. News organizations continue to publish articles related not only to the issues raised in this litigation, but also to Eli Lilly's continued efforts to get Zyprexa approved for new uses and new classes of patients.[4] The State of Alaska's allegations regarding Eli Lilly's marketing practices, including withholding of information regarding Zyprexa's side effects, are of paramount public concern. In attempting to delay the release of this material to the media, Eli Lilly merely hopes to avoid bad publicity about its wrongdoing until it is no longer newsworthy. That is clearly not a legitimate basis for a stay. Eli Lilly's repeated failure to make a proper showing of harm indicates that it is seeking a delay for delay's sake, and not because there is any legal merit to its position.

---

[4] See "Antipsychotics and the Elderly, New York Timers, June 17, 2008, available at http://www.nytimes.com/2008/06/17/health/17brfs-ANTIPSYCHOTI_BRF.html?ref=usImportant; Lilly Seeks Approval Soon for Long-Acting Zyprexa, Reuters, May 29, 2008, available at http://www.reuters.com/article/rbssHealthcareNews/idUSN29393201200805 29; Lilly Nears Regulatory Decision on Key Cardio Drug, CNN Money, June 4, 2008, available at http://money.cnn.com/news/newsfeeds/articles/apwire/d938230117cfbfa2ae6d2a1893b7d947.htm; FDA Orders Warning Label on Older Antipsychotics, Washington Post, June 17, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/06/16/AR2008061602086.html.

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

4. A Stay Is Contrary to the Public Interest.

Courts have long recognized that "[a]n informed public depends on accurate and effective reporting by the news media [because] . . . [f]or most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic." Cable News Network v. American Broadcasting, 518 F.Supp. 1238, 1245 (N.D.Ga. 1981) (citations omitted).

This case concerns much more than simply the competing interests of Bloomberg and Eli Lilly. As patients continue to be prescribed Zyprexa by their doctors, and as Eli Lilly aggressively pursues approval of Zyprexa for new uses and new classes of patients, the public depends upon the news media for full and accurate reporting regarding this potent drug. Eli Lilly makes no attempt to argue that blocking public access to the documents at issue for the duration of an appeal would cause "no harm to the public interest," Powell, 536 P.2d at 1229, nor can it . A stay denying public access necessarily means that people who are presently taking Zyprexa, or who may be prescribed Zyprexa in the near future, may be denied crucial information from which to make an informed decision about the drug's risks and benefits. It is difficult to conceive of a more pressing, compelling need for this information.

To obtain a stay pending appeal, Eli Lilly was required to demonstrate: (1) likelihood of success on the merits; (2) irreparable harm if a stay is denied; (3) that Bloomberg would suffer no significant harm from a stay; and (4) that a stay would result

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

in no harm to the public interest. Id. Eli Lilly addressed only the harm it allegedly would suffer from denial of a stay, and then only with conclusory statements unsupported by facts or citations to the record. It is clear that the requirements for a stay are not met in this case, and the Court should decline to permit Eli Lilly to profit by further delaying the release of public records from the trial of this matter.

B. "Comity" Does Not Require that this Court Permit a Federal Court in Brooklyn to Regulate Access to Alaska Court Files.

Having apparently concluded that it cannot meet the good cause standard for keeping the trial court records under seal, Eli Lilly now takes a new approach in its motion for stay and argues that "comity" requires this Court to simply defer to proceedings in a federal district court in Brooklyn, New York. This new argument is waived: inasmuch as this argument was not raised below, and is unsupported by citation to any authority, it warrants no consideration by this Court. See Anchorage Nissan, Inc. v. State of Alaska, 941 P.2d 1229, 1238 n.16 (Alaska 1997) ("[w]e need not consider an argument not raised below, except where plain error has been committed"); Katmailand, Inc. v. Lake and Peninsula Borough, 904 P.2d 397, 402 n.7 (Alaska 1995) (arguments nor properly developed with citations to authority are deemed waived). Even if the Court were to nonetheless consider this argument, it fails for the obvious reason that public access to Alaska court files is a matter for the Alaska courts to determine, and is not the province of a judge in Brooklyn.

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

Eli Lilly chose to do business in the State of Alaska, chose to collect millions of dollars in Alaska's tax dollars under Medicaid, and was sued by the State based on allegations that its conduct resulted in substantial harm to the citizens of this state. The present appeal concerns the public's right of access to documents on file with the Alaska Court system.[5] While federal constitutional law prescribes minimum standards of public access to judicial documents, the public's right of access to Alaska court files is governed in the first instance by Alaska law. See Alaska R. Admin P. 37.5-37.7; AS 40.25.120(a); Johnson v. State, 50 P.3d 404 (Alaska.App. 2002). To the extent notions of comity have any applicability, comity would require that Alaska courts be permitted to decide this question under Alaska law. See Abreu v. Huffman, 82 F.Supp.2d 749, 754 (N.D.Ohio 2000) ("comity requires federal courts to defer to a state's judgment on issues of state law"). More importantly, Alaska courts are certainly as capable of deciding this issue as any other court.

C. Any Prohibition on Publication of Information Lawfully Obtained From Court Files Would Constitute an Unconstitutional Prior Restraint On Free Speech in Violation of the First Amendment.

Bloomberg reporters have already obtained access to the documents that were unsealed by Judge Rindner. While Bloomberg has no intention of publishing the

[5] More than 30 Alaska entities subscribe to Bloomberg News, including: Alaska Housing Finance Corp., Alaska Pacific University, Alaska USA Federal Credit Union, the City of Juneau, the Municipality of Anchorage, and the State of Alaska Department of Revenue. Newspapers in Alaska routinely carry stories from Bloomberg's wire service. Bloomberg's readers depend upon Bloomberg to report on issues of concern to Alaska residents, as well as to publish stores of national interest. Bloomberg's responsibilities to its Alaskan clients require that it diligently pursue and publish information that is of interest and concern to Alaskans.

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

unsealed documents or information contained therein pending a ruling by this Court, the prohibition Eli Lilly seeks on publication of information lawfully obtained from the trial court's files would constitute an unconstitutional prior restraint on free speech in violation of the First Amendment to the United States Constitution.

The First Amendment to the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom . . . of the press." The U.S. Supreme Court has "interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary – orders that impose a 'previous' or 'prior' restraint on speech." Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 556 (1976). Although the prohibition "against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in exceptional cases." Ford Motor Company v. Lane, 67 F.Supp.2d 745, 751 (E.D.Mich. 1999). Indeed, "[e]ven where questions of allegedly urgent national security or competing constitutional interests are concerned, [the U.S. Supreme Court] ha[s] imposed this most extraordinary remedy only where the evil that would result from the reportage is both great and certain . . ." Id. quoting CBS v. Davis, 510 U.S. 1315, 1317 (1994). Thus, "[t]o justify a prior restraint on pure speech, publication must threaten an interest more fundamental than the first amendment itself." Id. at 752.

Applying the doctrine of prior restraints, courts have refused to enjoin the publication of documents containing alleged trade secrets even where, unlike this case,

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

the court documents were allegedly obtained unlawfully. In Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996) (en banc), the Sixth Circuit considered whether a trial court erred in issuing an injunction preventing Business Week magazine from publishing a story that was based on sealed documents that the magazine allegedly obtained in violation of a court order. Business Week allegedly knew of the existence of the court's protective order making those documents confidential, but obtained copies through a reporter with a contact at a law firm representing one of the parties, neither of whom knew the documents were under seal. Id. at 223. Business Week then prepared an article based on those documents, which the trial court enjoined Business Week from publishing.

Reversing the trial court's decision enjoining publication, an en banc panel of the Sixth Circuit made clear that the case involved a prior restraint of speech:

> The critical starting point for our analysis, therefore, is that we face the classic case of a prior restraint. Indeed, prohibiting the publication of a news story is the essence of censorship and is allowed only under exceptional circumstances . . . *Seattle Times* holds that *parties* to civil litigation do not have a right to disseminate information they have gained through participation in the discovery process. That case, however, does not govern the situation where an independent new agency, having gained access to sealed documents, decides to publish them. In short, at no time – even to the point of entering a permanent injunction after two temporary restraining orders – did the District Court appear to realize that it was engaging in a practice that, under all but the most exceptional circumstances, violates the Constitution: preventing a news organization from publishing information in its possession on a matter of public concern.

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

Id. at 225 (emphasis in original). The court also laid out the extraordinarily high burden that must be met to restrain pure speech:

> The purpose of a TRO under Rule 65 is to preserve the status quo so that a reasoned resolution of a dispute may be had. Where the freedom of the press is concerned, however, the status quo is to "publish news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion." *Providence Journal*, 820 F.2d at 1351. Rather than have no effect, "a prior restraint, by . . . definition, has an immediate and irreversible sanction. . . . In issuing a TRO, a district court is to review factors such as the party's likelihood of success on the merits and the threat of irreparable injury. *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977). In the case of a prior restraint on pure speech, the hurdle is substantially higher: publication must threaten an interest more fundamental than the First Amendment itself. Indeed, the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial.

Id. at 227-28 (emphasis added).

The Sixth Circuit went on to hold that trade secrets allegedly contained in the sealed documents could not be used to justify a prior restraint on free speech: "[t]he private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint." Id. See also Lane, 67 F.Supp.2d at 753 ("[i]n the absence of a confidentiality agreement or fiduciary duty between the parties, Ford's commercial interest in its trade secrets and Lane's alleged improper conduct in obtaining the trade secrets are not grounds for issuing a prior restraint").

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

Bloomberg lawfully obtained copies of the documents following issuance of Judge Rindner's order making them available to the public, and prior to this Court's order staying Judge Rindner's decision. Bloomberg violated no law or court order in doing so. Inasmuch as Lane and Procter & Gamble make clear that prior restraints are unconstitutional even if documents may have been improperly obtained, the First Amendment clearly bars any order prohibiting Bloomberg from publishing documents or information from documents that were properly copied after being unsealed by the trial court in this case.

CONCLUSION

Eli Lilly does not even discuss three of the four factors that this Court has established as prerequisites to the granting or a stay. Eli Lilly makes no attempt to argue that there is a probability it will succeed on the merits, it fails to provide specific discussion of the harm to Bloomberg were a stay to be granted, and it ignores the substantial harm to the public interest were information regarding Zyprexa to continue to be suppressed. Instead, Eli Lilly asks this Court to stay disclosure of documents that are of vital interest to the public based on nothing more than conclusory allegations of harm

DAVIS WRIGHT TREMAINE LLP
LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399

that are again unsupported by any hard facts. For the foregoing reasons, Eli Lilly's motion for a stay pending appeal must be denied.

DATED this 23rd day of June, 2008.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Bloomberg LLC

By: _____
Jon S. Dawson, ABA #8406022

By: _____
Eric Jenkins, ABA #0011078

Certificate of Service:

I certify that on June 23, 2008, and a true and correct copy of the foregoing document was sent to the following attorneys or parties of record by:

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

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

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

Joyce Sheppard
Joyce Sheppard

LAW OFFICES
Suite 800 · 701 West 8th Avenue
Anchorage, Alaska 99501
(907) 257-5300 · Fax: (907) 257-5399