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Fred von Lohmann (FV 3955)
Appearing pro hac vice
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell St.
San Francisco, CA 94110
(415) 436-9333 x123
fax (415) 436-9993
fred@eff.org

Attorney for non-party John Doe

CV07-504 (JBW)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re: ZYPREXA PRODUCTS LIABILITY LITIGATION

No. 04-MDL-01596 (JBW)

SUPPLEMENTAL BRIEF FOR CLARIFICATION OF INJUNCTION

John Doe files this supplemental brief in support of his Notice of Motion and Motion for Reconsideration or in the Alternative for Stay Pending Appeal, filed January 8, 2007 ("Doe Br."), seeking clarification of this Court's January 4, 2007 Order for Temporary Mandatory Injunction ("January 4 Order"). If the Court intends to dissolve the January 4 Order and replace it with permanent injunctive relief, Doe respectfully asks that this brief be construed as a brief in opposition to such relief, incorporating by reference the arguments made in his January 8, 2007 submission.

I. The Lilly Documents Remain Available on the Internet.

During this Court's January 8, 2007 hearing, counsel for Eli Lilly represented that the Eli Lilly documents allegedly disseminated by Dr. Egilman ("Lilly Documents") were no longer available anywhere on the Internet. That representation appears to have been incorrect. The Lilly Documents were available for immediate download from at least two sources as of January 9, 2007, at least one of which appears to be located outside the United States. (Decl. of Laura R.

Mason, attached as Exhibit A). Moreover, a law professor at the Western New England School of Law reported on his weblog on January 8, 2007 that he was able to download the Lilly Documents within *19 minutes* of beginning a search for them online. (William G. Childs, "Protective Orders and the Internet," TortsProf Blog, Jan. 8, 2007, attached as Exhibit B). In short, it appears that the Lilly Documents remain readily available on the Internet. Meanwhile, public interest in the controversy surrounding the documents continues, and Eli Lilly has just itself established a new website devoted to disputing the analysis of Lilly Documents that recently appeared in *The New York Times*. *See* ZyprexaFacts.com, <http://zyprexafacts.com>.

II. The Relief Sought by Doe is Narrow, Seeking Only to Clarify the Scope of the Court's Injunction.

The relief sought by John Doe here is narrow and should be uncontroversial. He asks that the scope of Court's January 4 Order (as well as any subsequent order) be clarified in two ways.

First, he asks that the Court's orders be clarified as follows:

> "Notwithstanding the foregoing, this Order only binds nonparties who have notice of this Order and (a) are legally identified with a party or person directly bound by Case Management Order No. 3 ("CMO-3"); or (b) are in active concert with, participating with, or aiding and abetting a party or person directly bound by CMO-3. Nothing in this Order restrains independent actions taken by nonparties on their own behalf."

This clarification simply restates the outer limit of this Court's injunctive authority, whether under Federal Rule of Civil Procedure 65 or any other source of equitable power. *See* Doe Br. at 5-6 (citing cases). The clarification, however, is critical in light of the chilling effect on First Amendment interests created by ambiguity regarding the scope of the Court's injunction. *See* Doe Br. at 6-9. Counsel for Eli Lilly, for example, has already cited this Court's orders in "takedown" demands issued to independent third parties. *See* Doe Br. at 3 & n.4 (describing Dec.

29, 2006 cease-and-desist email sent by Sean Fahey to pbwiki.com).[1] Moreover, Doe himself continues to refrain from publishing information on the zyprexa.pbwiki.com website (the "Wiki") in light of this Court's January 4 Order. The clarification sought by Doe is therefore necessary to give him (and the public at large) a clear indication of who is and is not within the prohibitory circle of the Court's orders.

Second, Doe requests that reference to the Wiki be deleted from the January 4 Order and any subsequent orders. As explained in Doe's prior motion, wikis are websites that can be edited and revised by the public. *See* Doe Br. at 2-3. Because the password for the Wiki here has been publicly disclosed, an unlimited number of individuals are potentially able to post material to the Wiki. *Id.* Accordingly, by referencing the Wiki in its January 4 Order, rather than referencing specific parties and those who may have acted in concert with them, this Court effectively issued an impermissible prior restraint against the world. *See Alemite Mfring Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (opinion by L. Hand, J.) (a court "cannot lawfully enjoin the world at large.").

These two clarifications would work no prejudice on Eli Lilly. The company would remain free to seek contempt sanctions against those acting in concert with a party subject to CMO-3. Beyond that first degree of separation, Eli Lilly cannot call on the assistance of this Court. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969) ("[A] nonparty with notice cannot be held in contempt until shown to be in concert or participation" with a party); *Paramount Pictures Corp. v. Carol Publishing Group, Inc.*, 25 F.Supp.2d 372, 374 (S.D.N.Y. 1998) (in order for a nonparty to be bound by an injunction, "that entity must either aid and abet the defendant or be legally identified with it."). Accordingly, the relief sought by

[1] Doe also renews his request that the Court to enjoin Eli Lilly from misrepresenting the scope of the Court's orders to nonparties. *See* Doe Br. at 11.

Doe does not deprive Eli Lilly of recourse against anyone that it properly would be able to reach via an order of this Court. Instead, it simply clarifies where the border lies, thereby preventing Eli Lilly from using this Court's orders to intimidate nonparties who are not subject to them.

Rather than recognizing the limits on this Court's equitable powers, Eli Lilly appears to suggest that this Court may reach any individual who contributes to the further dissemination of the Lilly Documents, no matter how many degrees of separation may lie between the individual and Dr. Egilman.[2] This view is plainly erroneous, as it would extend the reach of this Court's equitable powers to the whole world. The Court's equitable powers reach the parties before it and those who aid and abet them; they do not reach the Lilly Documents wherever they may roam. *See* Doe Br. at 5-6. As Judge Learned Hand explained in 1930, "the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, ...but what it has the power to forbid, the act of a party." *See Alemite Mfring*, 42 F.2d at 833.

III. Doe is Entitled to Proceed Anonymously in Seeking to Protect His First Amendment Rights.

In light of the arguments made by Eli Lilly during the January 8, 2007 hearing, Doe anticipates that Eli Lilly may challenge Doe's right to appear anonymously in this matter. On the facts of this dispute, the Court should permit him to do so.

The question of whether a nonparty may proceed anonymously in challenging a prior restraint on speech arising from enforcement of a protective order appears to be a question of first impression. In light of the fact that the Court has the discretion to permit plaintiffs to proceed anonymously, however, it is reasonable to assume that the Court also enjoys the

[2] It is uncontested that Dr. Egilman is the only party involved in the present controversy who is directly bound by CMO-3.

discretion to permit anonymous appearances by nonparties. *See EW v. New York Blood Ctr.*, 213 F.R.D. 108, 110 11 (E.D.N.Y. 2003) (canvassing the "assortment of tests involving a variety of factors" used by courts in exercising discretion to permit anonymous plaintiffs).

In the instant case, the Court should permit Doe to proceed anonymously for four reasons. First, Doe is a nonparty who has been drawn into this matter by Eli Lilly's *ex parte* (as to Doe) request to expand this Court's December 29, 2006, Temporary Mandatory Injunction to include the Wiki. Accordingly, his position is fundamentally different from that of an anonymous plaintiff seeking money damages from a private defendant. *See id.* at 110 (noting risk of unfairness to a defendant having to litigate against an anonymous plaintiff).

Second, Doe seeks to appear anonymously to vindicate his First Amendment right to speak anonymously. It would be perverse, indeed, if an anonymous speaker were forced to forgo his anonymity in order to vindicate his First Amendment rights. In fact, courts routinely permit those with anonymous free speech interests to appear anonymously to contest subpoenas aimed at revealing their identities. *See Sony Music Entertainment Inc. v. Does 1-40*, 326 F.Supp.2d 556 (S.D.N.Y. 2004); *Doe v. 2TheMart.Com, Inc.*, 140 F.Supp.2d 1088 (W.D.Wash.2001); *cf. City of San Diego v. Roe*, 543 U.S. 77 (2004) (discharged employee entitled to proceed anonymously to assert First Amendment violation); *Doe v. Supreme Ct. of Fla.*, 734 F. Supp. 981 (S.D. Fla. 1990) (anonymous plaintiff permitted to bring constitutional challenge against prior restraint on speech).

Third, Eli Lilly will suffer no prejudice if Doe proceeds anonymously. Doe here seeks solely a clarification regarding the scope of this Court's injunctions barring the dissemination of the Lilly Documents. Doe has not asked this Court to make any factual findings regarding his (or anyone else's) relationship to any individuals bound by CMO-3. Instead, the issues raised by

Doe here are chiefly legal in nature, seeking clarification of the scope of this Court's injunctive powers and challenging the January 4 Order as an unconstitutional prior restraint on pure speech.[3] Accordingly, if the Court grants Doe the relief he requests, it will have no prejudicial impact on Eli Lilly's ability to develop a factual record with respect to anyone against whom it may want to bring contempt proceedings.

Finally, requiring Doe to identify himself would threaten to reveal information regarding his personal medical history of psychiatric misdiagnosis. A person's mental health history is a deeply private matter, especially in light of the unfortunate and widespread social stigma still associated with mental illness. Accordingly, courts frequently permit litigants to proceed anonymously in cases involving mental health matters. *See Doe v. Harris*, 495 F. Supp. 1161 (S.D.N.Y. 1980); *Doe v. New York Univ.*, 442 F.Supp. 522 (S.D.N.Y. 1978). The privacy interest is even more pronounced where the litigant is a nonparty seeking to vindicate First Amendment interests jeopardized by a court order, rather than a plaintiff invoking a court's authority to recover damages from a civil defendant.

IV. The Publication of Primary Source Materials Here is Protected by the First Amendment.

For the reasons described in Doe's earlier brief, the Court's January 4 Order constitutes a prior restraint on pure speech as applied to Doe and any other nonparties who are not acting in concert with a party bound by CMO-3. *See* Doe Br. at 6-10. Eli Lilly has fallen far short of demonstrating "an interest more fundamental than the First Amendment itself" sufficient to

[3] Only two factual predicates are relevant to Doe's petition here, and neither is contested by Eli Lilly. In order to establish his standing to challenge the January 4 Order, Doe asserts that he is a contributor to the Wiki and that he has published, and would like to continue to publish, links to locations where the Lilly Documents may be found. In addition, in order to eliminate any question of mootness, Doe asserts that the Lilly Documents remain available on the Internet. (*See* Exh. A).

overcome the "heavy presumption" against such a prior restraint. *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224, 227 (6th Cir. 1996). Simply put, just as the First Amendment prohibited a prior restraint on the publication of The Pentagon Papers, *see New York Times v. U.S.*, 403 U.S. 713 (1971), so too does it prohibit a prior restraint on the publication of links to the Lilly Documents here.

As an initial matter, it is clear that the First Amendment protects the publication of primary source materials, just as it protects discussion about and reporting derived from those materials. *See id.* (newspapers printing large excerpts from The Pentagon Papers). As described in detail in Doe's January 8, 2007 brief, moreover, this case is properly governed by the Sixth Circuit's ruling in *Proctor & Gamble v. Bankers Trust*, 78 F.3d 219 (6th Cir. 1996), wherein the court found that the importance of enforcing a protective order could not justify a prior restraint on pure speech. *See* Doe Br. at 7-8.

Furthermore, contrary to Eli Lilly's arguments, the First Amendment protects the right of independent third parties to disseminate documents, even where those third parties are aware that the documents were originally unlawfully obtained or released in breach of a legal obligation. *See Bartnicki v. Vopper*, 532 U.S. 514 (2001); *New York Times v. U.S.*, 403 U.S. at 750 (Burger, C.J., dissenting) (referring to The Pentagon Papers as "illegally acquired by someone"); *Ford Motor Co. v. Lane*, 67 F.Supp.2d 745 (E.D. Mich. 1999) (prior restraint impermissible even where trade secrets are at risk of misappropriation).

Particularly instructive on this point is the Supreme Court's ruling in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), where the Court considered whether the state could punish the "repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue" by media outlets that had not been involved in the interception, but were aware that the

recordings were the product of unlawful interception. *Id.* at 517. In that case, the Court answered the following question in the negative:

> "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?"

Id. at 528 (quoting *Boehner v. McDermott*, 191 F.3d 463, 484-85 (D.C. Cir. 1999) (Sentelle, J., dissenting)). In reaching this conclusion in *Bartnicki*, the Court focused on three factual issues:

> First, respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else.... Third, the subject matter of the conversation was a matter of public concern.

Id. at 525.

Just as in *Bartnicki*, nonparties here who did not aid or abet the initial disclosure of the Lilly Documents by Dr. Egilman (1) played no part in the breach of CMO-3; (2) obtained the Lilly Documents lawfully; and (3) disseminated information on a matter of obvious public concern. The clarification proposed by Doe would thus bring the Court's orders into alignment with the holding of both *Proctor & Gamble* and *Bartnicki* by expressly excluding this constitutionally protected category of individuals from its reach.[4]

V. CONCLUSION

For the reasons above, Doe respectfully asks that the Court clarify its January 4 Order, as well as any future orders it may enter relating to the dissemination of the Lilly Documents by nonparties, in the manner proposed above.

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[4] If anything, the First Amendment interests Doe seeks to vindicate here are even more weighty than those at issue in *Bartnicki*, since the instant case involves a prior restraint, whereas *Bartnicki* involved a civil penalty after publication.

In addition, Doe respectfully requests, in the alternative, a stay of any order that may apply to his constitutionally protected speech activities pending appellate review.

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Respectfully submitted,

Fred von Lohmann, FV-3955
Appearing pro hac vice
Electronic Frontier Foundation
454 Shotwell St.
San Francisco, CA 94110
(415) 436-9333 x123
fax (415) 436-9993
fred@eff.org

Attorney for nonparty John Doe