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March 23, 2007

VIA FACSIMILE

Honorable Jack B. Weinstein
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: MDL No. 1596: TPP challenge to confidentiality of Lilly documents

Dear Judge Weinstein:

The purpose of this letter is to seek guidance from the Court as to how to move forward with a hearing in connection with the request by counsel in the Zyprexa purchase claim cases regarding the de-designation as "confidential" of the Eli Lilly documents cited in the *UFCW Local 1776 et al v. Eli Lilly & Company* complaint filed in November 2005. The proceedings related to this request span the last sixteen and a half months. I will not burden the Court with details here but have attached a short chronology of the proceedings to this letter if Your Honor is interested. I also would be happy to provide additional details at any point.

In brief, on November 7, 2005, concurrent with the filing of the first amended complaint in the above referenced case, Plaintiffs filed with this Court a *Notice of Plaintiffs' Action to Lift Confidentiality Designations Pursuant to Paragraph 9(b) of the Protective Order Dated October 3, 2004.* Over the next sixteen months, the parties corresponded with each other, engaged in briefing on the matter, and repeatedly consulted with Special Master Woodin. In early February 2007, in light of the matter then pending before the Court regarding the leak of selected documents to the New York Times and others ("Gottstein matter"), Special Master Woodin with the consent of the parties, wrote to Your Honor to determine whether the Court wished to consider the purchase claim cases' challenge along with the Gottstein challenge to the confidentiality of certain documents.

Every one of the millions of documents produced by Eli Lilly in this MDL has been marked "confidential" or "highly confidential," making each one subject to CMO-3. This included documents publicly available and material that in no way is properly protected under Federal Rule of Civil Procedure 26, including the Zyprexa label, newspaper articles, and much, much more. Only recently, in light of our challenge to the designations of the documents, did Eli Lilly acquiesce in the de-designation of a few of the documents cited in the first amended complaint. The company maintains that 90% of those cited documents, however, should remain confidential.

At every juncture, purchase claim plaintiffs (and their counsel) have abided by the provisions of CMO-3 and afforded Eli Lilly more than ample opportunity to respond. Although we believe Eli Lilly failed to comply with its obligations under the Order and therefore believe these documents are no longer "confidential," we have not released any documents.

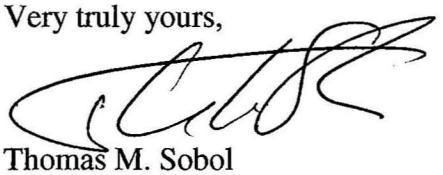
As this Court has noted time and again, "[a] presumption of public access applies to judicial proceedings and documents." Memorandum, Final Judgment, Order & Injunction, dated February 13, 2007, in *In re Injunction*, 07-cv-0504, related to MDL No. 1596. This is especially the case where, as here, documents for which the confidentiality designations are challenged are part of a public filing in litigation that is of crucial importance to the health care community and the public at large.

We are in receipt of this Court's Orders of February 12, 2007, directing the deferment of an argument on any motions to declassify challenged documents until the conclusion of the then-pending injunction proceedings and any contempt actions. The injunction proceedings have come to a conclusion and we are not aware of any contempt actions that have been filed. It was our understanding during the teleconference with Special Master Woodin that he did not believe our challenge, which has been pending since November 2005, would be placed on the back burner if it were coordinated with other pending challenges to the designations of the documents. Accordingly, we respectfully request a hearing on the purchase claim cases' challenge to the confidentiality designations of those Eli Lilly documents cited in the first amended complaint.

In summary, Plaintiffs' position is threefold. First, we have complied with the provisions of CMO-3 and will continue keep Lilly's "confidential" documents sealed even though there is a strong basis to conclude that the documents are no longer "confidential" by operation of CMO-3. Second, our understanding is that Lilly has not moved for contempt proceedings.[1] Regardless, our challenge is independent of the Gottstein matter. Finally, we have repeatedly extended courtesies to Eli Lilly and approached this issue in a manner designed to protect the alleged confidentiality of the documents. However, we should not be penalized for our good faith efforts by continued delay in a hearing and ruling on the matter.

This matter has been fully brief since April 10, 2006 and we request a hearing date, at the convenience of this Court, on the matter. If Your Honor would like to hear the issue at the Summary Judgment hearing currently set for March 30, we would be happy to oblige.

Very truly yours,



Thomas M. Sobol

cc: Counsel of record (via email)

[1] We have recently been informed that a contempt proceeding may have been filed but have been unable to confirm this report.

Exhibit A: Brief Procedural Chronology of Plaintiffs' Action to Lift Confidentiality Designations Pursuant to Paragraph 9(b) of the October 3, 2004 Protective Order

On November 7, 2005, concurrent with the filing of the first amended complaint in the above referenced case, we filed with this Court a *Notice of Plaintiffs' Action to Lift Confidentiality Designations Pursuant to Paragraph 9(b) of the Protective Order Dated October 3, 2004*. Therein, we indicated that we had contacted defense counsel, per the requirements of CMO-3, and made them aware of our challenge to the confidentiality designations on all of the documents produced by Eli Lilly that were cited in our first amended complaint.

Between November 7, 2005 and January 16, 2006, Plaintiffs provided defense counsel with lists and copies of the cited and challenged documents while extending the company's time to respond to our request to declassify the documents. Although our views as to whether the necessary events had occurred to trigger the time within which Eli Lilly had to respond to plaintiffs' challenge and seek protection of the Court – with plaintiffs' taking the position that Eli Lilly had failed to live up to the requirements of CMO-3 and thereby waived its right to the confidentiality status of the documents – we agreed, in good faith, not to take any steps toward disseminating documents prior to January 16, 2006.

On January 16, 2006, Eli Lilly sought relief from Special Master Woodin and moved for a protective order preventing the plaintiffs from disseminating any "confidential" documents.

Between January 16, 2006 and April 10, 2006, the parties engaged in briefing on the issue.

On June 2, 2006, Special Master Woodin held a teleconference hearing with the parties on the confidentiality challenge. At that hearing, Special Master Woodin directed Eli Lilly to do the following:

> What I would like to know is, of the 200 and X number, whatever, within the finite universe of documents, and it's a manageable number, I'm more inclined to deal on a document-by-document basis with a finite number of documents that form part of a class complaint.
>
> What I would like, Barry [Boise], what I would like Lilly to do is to give Tom [Sobol] a list of those documents that they object to de-designation and those documents that they acquiesce in de-designation for the documents referenced in this complaint, and let's see what we have left.
>
> …
>
> And I'm keeping an open mind in terms of what we then do, but my inclination is to go on a document-by-document basis and put

> Lilly to the test because I do think that to the extent documents can be de-designated, they should be de-designated.

June 2, 2006 Transcript, p. 63-64. Later during the call, he reiterated the plan:

> Now, so what I would like to know is, report back to me after, Lilly, you have reviewed the complaint, the first amended complaint, and where we are on what documents you acquiesced on and what documents you want to maintain confidentiality on.

Id. at 70. Eli Lilly never responded to this directive.

In January 2007, we renewed our efforts to lawfully disseminate the documents, in light of the great public interest in the case. At that time, we wrote to Eli Lilly outlining our view that the company had failed to comply with the provisions of CMO-3 and Special Master Woodin's June 2, 2006 directive and that, accordingly, the documents were not validly designated and could be disseminated. Again, however, plaintiffs indicated we would not take any steps until the conclusion of the hearing scheduled before this Court on January 16, 2007 on the matter of the leak of selected documents to the New York Times and others ("Gottstein matter").

On January 18, 2007, plaintiffs requested a teleconference with Special Master Woodin about the challenge to the documents, in light of our past efforts and this Court's proceedings regarding the Gottstein matter.

On February 7, 2007, following a teleconference with the parties and in recognition of the fact that the proceedings concerning the leaked documents involved a challenge to the confidentiality of those documents, Special Master Woodin, with the consent of the parties, wrote to Your Honor to determine whether the Court wished to consider both matters together.