SEEGER WEISS LLP
ATTORNEYS AT LAW
ONE WILLIAM STREET
NEW YORK, NEW YORK 10004-2502
(212) 584-0700
FAX (212) 584-0799
www.seegerweiss.com

CHRISTOPHER A. SEEGER*+
STEPHEN A. WEISS*
DAVID R. BUCHANAN*+
SETH A. KATZ*
DIOGENES P. KEKATOS*

MICHAEL L. ROSENBERG*+△
MARC S. ALBERT*△

AMY P. ALBERT*+~
ERIC T. CHAFFIN*‡
PATRICIA D. CODEY+
DONALD A. ECKLUND*+
MICHAEL S. FARKAS*+
JEFFREY S. GRAND*
ROOPAL P. LUHANA*+
LAURENCE V. NASSIF*+
JAMES A. O'BRIEN III*□
ELIZABETH A. WALL*+

ADMITTED IN
*NY, +NJ, ~CT
□MA, ‡PA
△COUNSEL

July 16, 2004

BY HAND
Honorable A. Simon Chrein
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: In re Zyprexa Products Liability Litig.; MDL No. 1596

Dear Magistrate Judge Chrein:

I write on behalf of the Plaintiffs' Steering Committee ("PSC") to oppose Eli Lilly and Company's ("Lilly") letter brief seeking the entry of an oppressive protective order that impinges on the attorney-client relationship, chills Plaintiffs' ability to retain experts, and requests that the PSC enter an agreement that violates its members' ethical obligations to their clients.

While counsel for Lilly and the PSC have, through a very successful meet-and-confer process, reached agreement on the vast majority of contested issues in connection with the protective order, the PSC vehemently opposes any order that prohibits them from sharing documents with the Plaintiffs on whose behalf the cases have been brought and requires the unnecessary identification of experts retained by the Plaintiffs. Additionally, Lilly's bad faith attempt to "sneak one past" the PSC by changing the definition of "competitor" that has been the subject of negotiations for weeks should not be indulged by this Court. Despite hours of negotiations, Lilly has modified the definition of "competitor" to add consultants and make it virtually impossible for Plaintiffs to retain experts. A copy of the protective order being discussed for weeks is attached as Exhibit A hereto so that the Court may compare the definition of "competitor" being negotiated with that submitted to this Court by Lilly without meeting-and-conferring with the PSC or even advising the PSC or the Court of this significant change in its letter brief. These types of "commando" litigation tactics have no place in our legal system.

Plaintiffs' Access to Discovery Materials

While the PSC does not take the position, that documents can never be designated as "Attorneys' Eyes Only," there simply is no justification for preventing our clients from reviewing documents in this litigation. Lilly's attempts to prevent the Plaintiffs themselves from seeing any documents in this litigation is absurd and not supported by governing law. In fact, even the cases Lilly cites in its letter brief do not support such a result.

In *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559 (1985), Judge Weinstein adopted then-Magistrate Scheindlin's decision that lifted the blanket protective order and required the defendants to bear the burden — through a motion on notice — of establishing why particular documents should be designated confidential. *Id.* at 574, 575. Thus, the Plaintiffs, absent class members, and the public were provided access to the documents unless and until the defendant established that limiting such access was warranted. If Lilly is permitted to prevent a limited subset of documents from being disclosed to the Plaintiffs, it only should be permitted to do so consistent with the *Agent Orange* decision, by bearing the burden — through a motion on notice — of establishing such need on a document-by-document basis, not as to all documents falling within the scope of this Protective Order. Thus, Plaintiffs should be included in Paragraph 6 of the protective order.

Lilly also relies on *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, 1998 WL 186728 (E.D. LA), a case that is factually inapposite to the instant case. *Chrysler* involved two commercially sophisticated parties, who had a business relationship and a dispute arising out of that relationship. Additionally, in *Chrysler*, the plaintiff-dealership had already disseminated an exhibit that "contain[ed] sensitive and proprietary information." *Id.* at *1. Such facts simply do not exist here. Following this disclosure, Chrysler sought to have a certain "very limited number of documents" (*id.* at *2) designated as "For Attorney Eyes Only." The *Chrysler* court found that limiting disclosure of certain information to attorneys and experts is proper "when there is some risk that a party might use the information or disseminate it to others who might employ it to gain a competitive advantage over the producing party." *Id.* The Chrysler court also found that the previous disclosure by the plaintiff-dealership established just such a risk. *Id.* Lilly has not and cannot make such a showing that any plaintiffs have or will disseminate truly proprietary information. Accordingly, *Chrysler* does not support preventing the Plaintiffs from seeing any documents in the instant litigation. Each of these individual Plaintiffs has absolutely no interest in or motivation to disseminate confidential information in violation of a protective order.[1]

In the instant case, due to the fact that there has been no showing of prejudice or even risk of prejudice to Lilly, counsel would be violating their ethical obligations to their clients by denying them access to their own files. *See In re Ruden*, 265 A.D.2d 25, 26 (2d Dep't. 2000) (failure to turn file over to client found to be a violation of Code of Professional Responsibility). Additionally, the New York Court of Appeals has found — at least in arena of a terminated client — that the majority view that "courts and State legal ethics advisory bodies considering a client's access to the attorney's file in a represented matter ... presumptively accord the client full access to the entire attorney's file...with narrow exceptions" is the proper view. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 34 (1997). If this is true in a terminated attorney-client relationship, presumptively such a right is stronger in an existing attorney-client relationship.[2]

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[1] Lilly mischaracterizes certain negotiations of the preservation order in its letter brief. The PSC has never stated that plaintiffs cannot be expected to preserve the contents of their personal computers. Rather, the PSC refused to agree to a procedure that required all plaintiffs to set up a separate "mailbox" on their computer for the segregation of relevant materials stored on the pc. This is the same argument that Lilly has made in those negotiations, that the PSC cannot tell Lilly how to preserve. Lilly's implication that rather than preserve Zyprexa information, plaintiffs will either e-mail confidential information or post it somewhere in cyberspace is absurd and merely designed to gain shock value with this Court. Such shenanigans should not be countenanced.

[2] Lilly seeks to gain some traction from the fact that the Plaintiffs are being treated for mental illness to support the fact that these people should not be given access to information. Lilly has elected to profit handsomely from selling

Moreover, such a rule would prevent the proper preparation of the case for trial and deposition. Lilly will likely seek to depose each of the Plaintiffs in this MDL. Invariably, Lilly will ask the Plaintiffs for the basis for certain allegations in the complaint or why they believe Zyprexa caused their injuries. If their counsel cannot share documents with their clients, they will not be able to properly prepare for the deposition.[3] Accordingly, the PSC respectfully submits that Your Honor should add the Plaintiffs to Paragraph 6, which identifies to whom confidential information can properly be disclosed.

Disclosure to Competitors and Customers

Lilly simply misstates the PSC's objection to the last paragraph in Paragraph 6. The PSC does not object to giving Lilly three-days notice before disclosing confidential information to true competitors. What the PSC objects to is Lilly's wildly overbroad definition of the terms "competitor" and "customer." In fact, despite negotiating one definition of "competitor" with the PSC for several weeks, Lilly has submitted a wholly different definition to this Court — undoubtedly in the hope that the PSC will not notice their underhanded tactics.[4]

Lilly's definition of competitor, which the PSC learned of for the very first time in Lilly's July 15th letter brief, would effectively end this litigation.[5] If a competitor is defined to include any person who has been a consultant for any pharmaceutical manufacturer, it would include all possible experts — as all experts are consultants for one pharmaceutical manufacturer or another. The PSC respectfully urges the Court to limit the definition of "competitor" to mean "any manufacturer of a second generation antipsychotic" — the class of drug that Zyprexa is in.

Lilly's definition of "customer" is also oppressively broad. Under Lilly's current definition, Plaintiffs could not retain and show documents to a pharmacologist who works for or is affiliated with a pharmacy that purchases anything from Lilly. Lilly's motivation is clear — they do not want Plaintiffs to be able to retain experts, and they also want to keep the dangers of Zyprexa hidden from the medical community and the public at large — an effort they have successfully undertaken for many years. This Court should not permit Lilly to continue to hide the true dangers about Zyprexa any longer. Accordingly, "customers" should be removed from the Protective Order or, at a minimum, should be significantly narrowed.

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its products to this population and should not be able to now hide behind the very condition Zyprexa was designed to treat to resist providing people with the documents that establish their claims.

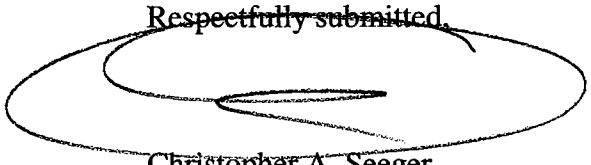
[3] Lilly's attempt to use what has been included in other protective orders — including those in two state court Zyprexa actions — is of no moment. As Your Honor aptly pointed out on July 2nd, "there are different dynamics in different cases and different products" (Trans. at 13, copy attached as Exhibit B) and we are now dealing with a PSC, not "150 individual plaintiffs." *Id.* at 17.

[4] While the PSC does not believe either definition is warranted, as discussed in detail herein, if the Court believes that it must choose one of these two definitions, the PSC respectfully submits that the one we had been negotiating for weeks is less oppressive and is the lesser of the two evils.

[5] It is often the case that experts will refuse to work on pharmaceutical litigation cases if their identity is shared with the drug manufacturer. This is because many experts are dependent on the manufacturers for a significant source of their income. Lilly is well aware of this dynamic and seeks to capitalize on it to defend this case on a basis other than the merits.

The PSC respectfully submits that Lilly's proposed Protective Order should not be entered for the reasons stated herein and that following Your Honor's ruling the PSC will submit a revised order reflecting those rulings.[6]

Respectfully submitted,



Christopher A. Seeger
Plaintiffs' Liaison Counsel

Enclosures

cc: Hon. Jack Weinstein, U.S.D.J. (By Hand, w/ encl.)
Nina Gussack, Esq. (by fax, w/ encl.)
Samuel Abate, Jr., Esq. (by fax, w/ encl.)
All Members of the PSC (by e-mail, w/ encl.)

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[6] While the issue was not raised in Lilly's letter, the PSC finds that the last sentence of paragraph immediately following Paragraph 6(m) is confusing and should be clarified before entry of the Protective Order. The PSC will agree to provide a copy of the Endorsement to the Protective Order for any ***testifying expert*** at the time the expert's designation is served. If, however, at the time the designation is served, no confidential documents have been shared with the testifying expert, then the Endorsement will not exist and cannot be served at that time. Another issue of ambiguity is that in the last sentence of Paragraph 14, the word "cooperation" is ambiguous as it is written. This issue has always been objected to by the PSC during the meet-and-confer process. The PSC respectfully submits that "cooperation" be limited to providing the 5 areas of information identified in that paragraph. Finally, with respect to Paragraph 10(a), throughout the negotiations, the PSC has insisted that this paragraph include language that in the event the parties cannot obtain a ruling before the deposition commences, the deposition shall be permitted to proceed, but the witness not be able to retain copies of any confidential documents shown to that witness and the transcript will be sealed until a ruling is obtained. Because this language has been omitted by Lilly — which is yet another area that Lilly has altered the language being negotiated without telling the PSC or identifying it as an area of dispute for the Court — the PSC objects to Paragraph 10 and requests that the Court order that it be re-written consistent with the PSC's position and to strike Lilly's language that "and no confidential documents shall be shown to the deponent until the Court has ruled."

TAB "A"

Michael A. London

From: "Fairweather, Aline" <fairweaa@pepperlaw.com>
To: "Christopher A. Seeger (E-mail)" <cseeger@seegerweiss.com>; "Michael A. London (E-mail)" <mlondon@dandl-law.com>
Cc: "Vale, Tony" <VALEA@pepperlaw.com>; "Hamilton, Matthew" <HAMILTOM@pepperlaw.com>
Sent: Thursday, July 01, 2004 12:43 PM
Attach: #1602804 v1 - Lilly Draft Protective Order.doc
Subject: Zyprexa MDL: Protective Order

<<#1602804 v1 - Lilly Draft Protective Order.doc>> Attached is a draft which captures Lilly's positions. We have bolded the sections we need to either agree on, or brief. Please note that we have taken out what was 4(c).

When you've reviewed this, let's confirm where we stand on the Protective Order.

Aline.

DRAFT – FOR DISCUSSION AND NEGOTIATION PURPOSES ONLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

In re: ZYPREXA
PRODUCTS LIABILITY LITIGATION

MDL No. 1596

----------x

THIS DOCUMENT RELATES TO:
ALL ACTIONS

----------x

PRETRIAL ORDER NO. (PROTECTIVE ORDER)

The parties to the above-captioned litigation and this agreement recognize that in the course of prosecuting and defending this action, they may seek discovery of sensitive medical, mental health, and business information. The parties acknowledge each party's need to control the dissemination of sensitive medical, mental health, and business information and to keep such information confidential. To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, adequately protect confidential material, and ensure that protection is afforded only to material so entitled, the parties hereby agree to the following terms of this Stipulated Protective Order ("Order"), pursuant to Rule 26 of the Federal Rules of Civil Procedure.

1. **Discovery Materials**

This Order applies to all products of discovery and all information derived therefrom, including, but not limited to, all documents, objects or things, deposition testimony and interrogatory/request for admission responses, and any copies, excerpts or summaries thereof, obtained by any party pursuant to the requirements of any court order, requests for production of documents, requests for admissions, interrogatories, or subpoena ("discovery materials"). This Order is limited to the litigation or appeal of any action brought by or on behalf of Plaintiffs, alleging personal injuries or other damages arising from Plaintiffs' ingestion

of olanzapine, commonly known as Zyprexa® ("Litigation") and includes any State where counsel for the Plaintiff has agreed to be bound by this order.

2. Use of Discovery Materials

With the exception of documents or information that has become publicly available without a breach of the terms of this Order, all documents, information or other discovery materials produced or discovered in this Litigation shall be used by the receiving party solely for the prosecution or defense of this Litigation, and not for any other purpose, including any other litigation or judicial proceedings, or any business, competitive, governmental, commercial, or administrative purpose or function.

3. "Confidential Discovery Materials" Defined

For the purposes of this Order, "Confidential Discovery Materials" shall mean any information, or the contents of any document (including copies, transcripts, videos, and computer stored information),

a. which the designating party contends and in good faith believes is a trade secret or other confidential or proprietary research, development, trading, customer or commercial information, financial information, or information subject to a legally protected right of privacy (such as patient medical and mental health information or employee personnel records), and

b. which counsel for the designating party designates as "Confidential Discovery Materials" upon a good faith belief that there is cause therefore under applicable law. Confidential discovery materials shall not consist of information which at any time has been produced, disclosed or made available to the public or otherwise available for public access; provided, however, that confidential compilations of information shall not be deemed to have been so produced or disclosed merely because some or all of the component data have been so produced or disclosed other than in such compilation. Any information that has not been preserved or maintained in a manner calculated to preserve its confidentiality may not be designated as confidential.

The terms of this Order shall in no way affect the right of any person (a) to withhold information on alleged grounds of immunity from discovery such as, for example, attorney/client privilege, work product or privacy rights of such third parties as patients, physicians, clinical investigators, or reporters of claimed adverse reactions; **or (b) to withhold information on alleged grounds that such information is neither relevant to the subject matter involved in this action nor reasonably calculated to lead to the discovery of relevant and admissible evidence. Where the reason for a redaction of a particular document is unclear to the party receiving the document, such party may make a reasonable demand for an explanation of the redaction, to which the opposing party will respond in writing. Nothing herein prevents a party from moving to compel the withheld or redacted information.**

In addition, the parties recognize that when large volumes of discovery materials are provided to the requesting party's counsel for preliminary inspection and designation for production, these discovery materials may not have yet been reviewed for confidentiality purposes, and the producing party reserves the right to so designate and redact appropriate discovery materials after they are designated by the requesting party for production. During the preliminary inspection process, all discovery materials reviewed by the requesting party's counsel shall be treated as Confidential discovery material.

4. **Designation of Documents as "Confidential"**

a. For the purposes of this Order, the term "document" means all tangible items, whether written, recorded or graphic, whether produced or created by a party or another person, whether produced pursuant to subpoena, to discovery request, by agreement, or otherwise.

b. Any document which the producing party intends to designate as Confidential shall be stamped (or otherwise have the legend recorded upon it in a way that brings the legend to the attention of a reasonable examiner):

CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER
In re Zyprexa Products Liability Litigation
Eastern District of New York
MDL 1596

Such stamping or marking will take place prior to production by the producing person, or subsequent to selection by the receiving party for copying. The stamp shall be affixed in such a manner as not to obliterate or obscure any written material.

c. A party may preliminarily designate as "Confidential" all documents produced by a third party entity employed by the party for the purposes of document management, quality control, production, reproduction, storage, scanning, or other such purpose related to discovery, by notifying counsel for the other party that all documents being produced are to be accorded such protection. Once said documents are produced by such third party vendor, the designating party will then review the documents and, as appropriate, designate them as "Confidential" by stamping the document (or otherwise having the legend recorded upon it in a way that brings its attention to a reasonable examiner) as such.

5. Non-Disclosure of Confidential Discovery Materials

Except with the prior written consent of the party or other person originally producing Confidential discovery materials, or as hereinafter provided under this Order, no Confidential discovery materials, or any portion thereof, may be disclosed to any person.

6. Permissible Disclosures of Confidential Discovery Material

Notwithstanding paragraph 5, Confidential discovery materials may be disclosed to and used only by:

a. **counsel of record for the parties in this Litigation who are actively engaged in the conduct of this Litigation and to his/her partners, associates,**

secretaries, legal assistants, and employees to the extent considered reasonably necessary to render professional services in the Litigation;

b. inside counsel of the parties, to the extent reasonably necessary to render professional services in the Litigation;

c. court officials involved in this Litigation (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Court);

d. any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper;

e. where produced by Plaintiff, in addition to the persons described in subsections (a) and (b) of this section, Defendant's in-house paralegals and outside counsel, including any attorneys employed by or retained by Defendant's outside counsel who are assisting in connection within this Litigation, and the paralegal, clerical, secretarial, and other staff employed or retained by such outside counsel or retained by the attorneys employed by or retained by Defendant's outside counsel. To the extent a Defendant does not have in-house counsel, it may designate two individuals employed by such Defendant (in addition to outside counsel) to receive Confidential Discovery Materials produced by Plaintiff.

f. **where produced by Defendants, in addition to the persons described in subsections (a) and (b) of this section, Plaintiff's attorneys in other filed litigation alleging injuries or damages resulting from the use of Zyprexa® including their paralegal, clerical, secretarial and other staff employed or retained by such counsel, provided that such counsel have agreed to be governed by the terms of this Order and shall sign a copy of the order.**

g. where produced by any Defendant, outside counsel for any other Defendant, including any attorneys employed by or retained by any other Defendant's outside

counsel who are assisting in connection with this Litigation, and the paralegal, clerical, secretarial, and other staff employed or retained by such outside counsel.

h. **persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify;**

i. outside consultants or outside experts retained for the purpose of assisting counsel in the Litigation;

j. employees of counsel involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designating programs for handling data connected with this action, including the performance of such duties in relation to a computerized litigation support system;

k. employees of third-party contractors performing one or more of the functions set forth in (j) above;

l. any employee of a party or former employee of a party, but only to the extent considered necessary for the preparation and trial of this action; and

m. any other person, if consented to by the producing party.

Any individual to whom disclosure is to be made under subparagraphs (d) through (m) above, shall sign, prior to such disclosure, a copy of the Endorsement of Stipulated Protective Order, attached as Exhibit A. Counsel providing access to Confidential discovery materials shall retain copies of the executed Endorsement(s) of Stipluated Protective Order. **Any party seeking a copy of an endorsement may make a reasonable demand to which the opposing party will respond in writing. If the dispute cannot be resolved the demanding party may move the Court for an order compelling production upon a showing of good cause.** For testifying experts, a copy of the Endorsement of Stipulated Protective Order executed by the testifying expert shall be furnished to counsel for the party who produced the Confidential discovery materials to which the expert has access, at the time the expert's designation is served, or at the time the Confidential discovery materials are provided to the testifying expert, whichever is later.

Before disclosing Confidential discovery materials to any person listed in subparagraphs (d) through (m) who is a Customer or Competitor (or an employee of either) of the party that so designated the discovery materials, but who is not an employee of a party, the party wishing to make such disclosure shall give at least three (3) business days advance notice in writing to the counsel who designated such discovery materials as Confidential, stating that such disclosure will be made, identifying by subject matter category the discovery material to be disclosed, and stating the purposes of such disclosure. If, within the three (3) business day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the Court has denied such motion. As used in this paragraph, (a) the term "Customer" means any direct purchaser of products from Lilly, or any regular indirect purchaser of products from Lilly (such as a pharmacy generally purchasing through wholesale houses), and does not include physicians; (b) the term "Competitor" means any manufacturer or seller of prescription medications.

7. **Production of Confidential Materials by Non-Parties**

Any non-party who is producing discovery materials in the Litigation may agree to and obtain the benefits of the terms and protections of this Order by designating as "Confidential" the discovery materials that the non-party is producing, as set forth in paragraph 4.

8. **Inadvertent Disclosures**

a. The parties agree that the inadvertent production of any discovery materials that would be protected from disclosure pursuant to the attorney-client privilege, the work product doctrine or any other relevant privilege or doctrine shall not constitute a waiver of the applicable privilege or doctrine. If any such discovery materials are inadvertently produced, the recipient of the discovery materials agrees that, upon request from the producing party, it will promptly return the discovery materials and all copies of the discovery materials in its

possession, delete any versions of the discovery materials on any database it maintains and make no use of the information contained in the discovery materials; provided, however, that the party returning such discovery materials shall have the right to apply to the Court for an order that such discovery materials are not protected from disclosure by any privilege. The person returning such material may not, however, assert as a ground for such motion the fact or circumstances of the inadvertent production.

b. The parties further agree that in the event that the producing party or other person inadvertently fails to designate discovery materials as Confidential in this or any other litigation, it may make such a designation subsequently by notifying all persons and parties to whom such discovery materials were produced, in writing, as soon as practicable. After receipt of such notification, the persons to whom production has been made shall prospectively treat the designated discovery materials as Confidential, subject to their right to dispute such designation in accordance with paragraph 9.

9. **Declassification**

a. Nothing shall prevent disclosure beyond that limited by this Order if the producing party consents in writing to such disclosure.

b. If at any time a party (or aggrieved entity permitted by the Court to intervene for such purpose) wishes for any reason to dispute a designation of discovery materials as Confidential made hereunder, such person shall notify the designating party of such dispute in writing, specifying by exact Bates number(s) the discovery materials in dispute. The designating party shall respond in writing within 20 days of receiving this notification.

c. If the parties are unable to amicably resolve the dispute, the proponent of confidentiality may apply by motion to the Court for a ruling that discovery materials stamped as Confidential are entitled to such status and protection under Rule 26 of the Federal Rules of Civil Procedure and this Order, provided that such motion is made within forty

five (45) days from the date the challenger of the confidential designation challenges the designation or such other time period as the parties may agree. The designating party shall have the burden of proof on such motion to establish the propriety of its Confidential designation.

d. If the time for filing a motion, as provided in paragraph 9.c, has expired without the filing of any such motion, or ten (10) business days (or such longer time as ordered by this Court) have elapsed after the appeal period for an order of this Court that the discovery material shall not be entitled to Confidential status, the Confidential discovery material shall lose its designation.

10. Confidential Discovery Materials in Depositions

a. Counsel for any party may show Confidential discovery materials to a deponent during deposition and examine the deponent about the materials so long as the deponent already knows the Confidential information contained therein or if the provisions of paragraph 6 are complied with. **If a deponent refuses to sign an endorsement of the protective order, the examining party shall continue the deposition and move the Court for an Order directing that deponent to abide by the terms of the protective order.** Deponents shall not retain or copy portions of the transcript of their depositions that contain Confidential information not provided by them or the entities they represent unless they sign the form described, and otherwise comply with the provisions in paragraph 6. A deponent who is not a party shall be furnished a copy of this Order before being examined about potentially Confidential discovery materials. While a deponent is being examined about any Confidential discovery materials or the Confidential information contained therein, persons to whom disclosure is not authorized under this Order shall be excluded from being present.

b. Parties (and deponents) may, within thirty (30) days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as Confidential. Until expiration of such thirty (30) day period, the entire transcript, including exhibits, will be treated as subject to Confidential protection under this Order. If no party or deponent timely designates

a transcript as Confidential, then none of the transcript or its exhibits will be treated as confidential.

11. Confidential Discovery Materials Offered as Evidence at Trial

Confidential discovery materials and the information therein may be offered in evidence at trial or any court hearing, provided that the proponent of the evidence gives notice to counsel for the party or other person that designated the discovery materials or information as Confidential in accordance with the Federal Rules of Evidence and any local rules, standing orders, or rulings in the Litigation governing identification and use of exhibits at trial. Any party may move the Court for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The Court will then determine whether the proffered evidence should continue to be treated as Confidential and, if so, what protection, if any, may be afforded to such discovery materials or information at trial.

12. Filing

Confidential discovery materials shall not be filed with the Clerk except when required in connection with matters pending before the Court. If filed, they shall be filed in a sealed envelope, clearly marked:

"THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION COVERED BY A PROTECTIVE ORDER OF THE COURT AND IS SUBMITTED UNDER SEAL PURSUANT TO THAT PROTECTIVE ORDER. THE CONFIDENTIAL CONTENTS OF THIS DOCUMENT MAY NOT BE DISCLOSED WITHOUT EXPRESS ORDER OF THE COURT"

and shall remain sealed while in the office of the Clerk so long as they retain their status as Confidential discovery materials. Said Confidential discovery materials shall be kept under seal until further order of the Court; however, said Confidential discovery materials and other papers filed under seal shall be available to the Court, to counsel of record, and to all other persons entitled to receive the confidential information contained therein under the terms of this Order.

13. Client Consultation

Nothing in this Order shall prevent or otherwise restrict counsel from rendering advice to their clients in this Litigation and, in the course thereof, relying generally on examination of Confidential discovery materials; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 6.

14. Subpoena by other Courts or Agencies

If another court or an administrative agency subpoenas or otherwise orders production of Confidential discovery materials which a person has obtained under the terms of this Order, the person to whom the subpoena or other process is directed shall not provide or otherwise disclose such discovery materials until ten (10) business days after notifying counsel for the designating party in writing of all of the following: (1) the discovery materials that are requested for production in the subpoena; (2) the date on which compliance with the subpoena is requested; (3) the location at which compliance with the subpoena is requested; (4) the identity of the party serving the subpoena; and (5) the case name, jurisdiction and index, docket, complaint, charge, civil action or other identification number or other designation identifying the

litigation, administrative proceeding or other proceeding in which the subpoena or other process has been issued. **Furthermore, the person receiving the subpoena or other process shall cooperate with the producing party in any proceeding related thereto.**

15. **Non-termination**

The provisions of this Order shall not terminate at the conclusion of this Litigation. Within ninety (90) days after final conclusion of all aspects of this Litigation, Confidential discovery materials and all copies of same (other than exhibits of record) shall be returned to the party or person which produced such documents or, at the option of such party or person (if it retains at least one copy of the same), destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the discovery materials not more than one hundred twenty (120) days after final termination of this Litigation. Outside counsel, however, shall not be required to return or destroy any pretrial or trial records as are regularly maintained by that counsel in the ordinary course of business; which records will continue to be maintained as confidential in conformity with this Order.

16. **Modification Permitted**

Nothing in this Order shall prevent any party or other person from seeking modification of this Order or from objecting to discovery that it believes to be otherwise improper.

17. **Responsibility of Attorneys; Copies**

The attorneys of record are responsible for employing reasonable measures to control and record, consistent with this Order, duplication of, access to, and distribution of Confidential discovery materials, including abstracts and summaries thereof.

No duplications of Confidential discovery materials shall be made except for providing working copies and for filing in Court under seal; provided, however, that copies may be made only by those persons specified in sections (a), (b) and (c) of paragraph 6 above. Any copy provided to a person listed in paragraph 6 shall be returned to counsel of

record upon completion of the purpose for which such copy was provided. In the event of a change in counsel, retiring counsel shall fully instruct new counsel of their responsibilities under this Order and new counsel shall sign this Order.

18. **No Waiver of Rights or Implication of Discoverability**

a. No disclosure pursuant to any provision of this Order shall waive any rights or privileges of any party granted by this Order.

b. This Order shall not enlarge or affect the proper scope of discovery in this or any other litigation; nor shall this order imply that Confidential discovery materials are properly discoverable, relevant, or admissible in this or any other litigation. Each party reserves the right to object to any disclosure of information or production of any documents that the producing party designates as Confidential discovery materials on any other ground it may deem appropriate.

c. The entry of this Order shall be without prejudice to the rights of the parties, or any one of them, or of any non-party to assert or apply for additional or different protection. Nothing in this Order shall prevent any party from seeking an appropriate protective order to further govern the use of Confidential discovery materials at trial.

19. **Improper Disclosure of Confidential Discovery Material**

Disclosure of discovery materials designated Confidential other than in accordance with the terms of this Protective Order may subject the disclosing person to such sanctions and remedies as the Court may deem appropriate.

_____

Plaintiffs Lead Counsel

Dated:_____

_____

Nina M. Gussack
Anthony C.H. Vale
Aline Fairweather
Matthew J. Hamilton
PEPPER HAMILTON LLP
3000 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103
Attorneys for Defendant
Eli Lilly and Company

Dated: :_____

SO ORDERED

_____

Jack B. Weinstein
Senior District Judge

Dated: _____, ____, 2004
Brooklyn, New York

DRAFT – FOR DISCUSSION AND NEGOTIATION PURPOSES ONLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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In re: ZYPREXA PRODUCTS LIABILITY LITIGATION — MDL No. 1596

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THIS DOCUMENT RELATES TO:

ALL ACTIONS

----------x

ENDORSEMENT OF STIPULATED PROTECTIVE ORDER

I hereby attest to my understanding that information or documents designated Confidential are provided to me subject to the Stipulated Protective Order ("Order") dated _____ ___, 2004 (the "Protective Order"), in the above-captioned litigation ("**Litigation**"); that I have been given a copy of and have read the Order; and that I agree to be bound by its terms. I also understand that my execution of this Endorsement of Stipulated Protective Order, indicating my agreement to be bound by the Order, is a prerequisite to my review of any information or documents designated as Confidential pursuant to the Order.

I further agree that I shall not disclose to others, except in accord with the Order, any Confidential Discovery Materials, in any form whatsoever, and that such Confidential Discovery Materials and the information contained therein may be used only for the purposes authorized by the Order.

I further agree to return all copies of any Confidential Discovery Materials I have received to counsel who provided them to me upon completion of the purpose for which they were provided and no later than the conclusion of this Litigation.

I further agree and attest to my understanding that my obligation to honor the confidentiality of such discovery material will continue even after this Litigation concludes.

I further agree and attest to my understanding that, if I fail to abide by the terms of the Order, I may be subject to sanctions, including contempt of court, for such failure. I agree to be subject to the jurisdiction of the United Stated District Court, Eastern District of New York, for the purposes of any proceedings relating to enforcement of the Order.

I further agree to be bound by and to comply with the terms of the Order as soon as I sign this Agreement, regardless of whether the Order has been entered by the Court.

Date: _____

By: _____